

U.S. Department of Labor

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Issue Date: 14 January 2019

CASE NO.: 2017-SPA-00002

In the Matter of:

MICHAEL BIRD,
Complainant,

vs.

**FUGRO MARITIME SERVICES/
C-MAR AMERICA,**
Respondents.

APPEARANCES:

MICHAEL BIRD
For the Complainant

JOHN UNGER, Esq.
For Respondent Fugro

MICHAEL J. THOMPSON, Esq.
For Respondent C-Mar

Before Christopher Larsen
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim under the employee-protection provisions of the Seaman's Protection Act ("SPA"), 46 U.S.C. § 2114, as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281, and associated regulations at 29 C.F.R. Part 1986, filed by Complainant Michael Bird ("Complainant") against Respondents Fugro Marine Services ("Fugro") and C-Mar America, Inc. ("C-Mar").

I. Procedural History

I held a telephonic hearing in this case on August 22, 2018. Complainant,¹ Fugro's counsel John Unger, and C-Mar's counsel Michael Thompson all appeared and were given a full and fair opportunity to present evidence and argument. I admitted Claimant's exhibits ("CX") 1-51,² Fugro's exhibits ("FX") 1-25, and C-Mar exhibits ("CRX") 1-5.³ (HT, pp. 9-10). Before the hearing the parties submitted pre-hearing statements.⁴ Additionally, the parties have submitted post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, I carefully considered each in arriving at this decision.

II. Issues

Complainant served as a mate aboard the Fugro Americas vessel, a vessel owned by Respondent Fugro. He was assigned to the vessel through C-Mar, a crewing agency. Complainant argues that both Fugro and C-Mar violated the SPA by retaliating against him for reporting to the Coast Guard that the vessel was overloaded.⁵

¹ Complainant represented himself.

² Before the hearing, by written motion, Respondent Fugro objected to a number of Complainant's exhibits on the grounds of relevancy, hearsay, and quality/legibility. (FX I.) At the hearing I acknowledged the objections but admitted all of the exhibits into evidence. In reaching my findings I reviewed all exhibits, but I gave less evidentiary weight, if any, to Complainant's exhibits which were irrelevant, of poor quality, or illegible.

³ The hearing transcript shows I admitted C-Mar Exhibits 1-25. (HT, p. 10.) Yet C-Mar only submitted five exhibits distinct from Fugro's exhibits. These five exhibits were provided in C-Mar's Pre-Hearing Statement and Exhibits received on August 3, 2018. I therefore, *nunc pro tunc*, admit only these five exhibits.

⁴ Instead of a prehearing statement, Complainant filed a "First Complaint" outlining his arguments and evidence ("1st Complaint"). Respondent Fugro objected to the submission of the Complaint, but I received it into evidence as a form of prehearing statement. (HT, p. 9.)

⁵ In his 1st Complaint, Complainant asserts the principal dispute is his reports to the Coast Guard and subsequent termination. (1st Complaint, p. 2.) As separate allegations, he asserts Respondents provided false stability reports to the Coast Guard after his alleged termination, and that an incident and safety report regarding the vessel overloading were inconsistent. (*Id.*) As I remarked at the hearing, Fugro gave the stability reports to the Coast Guard after Complainant was already terminated, and thus they did not factor into the alleged adverse action against him. (HT, p. 50.) The Fugro incident report of January 8 details potential explanations for why the vessel came into port overloaded, and the report from the safety meeting on January 9 lists an incident as "Troubled Crew Member Had Concerns About Vessel Stability or Load Line Depths/Heights." (CX 33);(CX 34.) Complainant argues the two reports are inconsistent because the incident report admits the vessel came into port overloaded, while the safety report suggests the incident was caused by a troubled crew

Complainant left the vessel, and the vessel departed without him. He alleges both Fugro and C-Mar retaliated against him by not allowing him to continue working aboard the vessel when it later returned to port. C-Mar argues they cannot be held liable under the SPA because they were not Complainant's employer, or in alternative that they took no adverse action against Complainant. Fugro asserts they took no adverse action against Complainant, and that even if the court finds they took an adverse action there is no evidence to suggest it was based on Complainant's protected activity of reporting to the Coast Guard.

The issues to be considered include:

1. Whether C-Mar is a potentially liable entity for purposes of the Seaman's Protection Act;
2. Whether Complainant engaged in protected activity;
3. Whether Fugro and/or C-Mar had knowledge of the protected activity;
4. Whether Fugro and/or C-Mar took an adverse action against Complainant;
5. Whether Complainant demonstrates his protected activity was a contributing factor in the adverse action against him;
6. Whether Fugro and/or C-Mar establish by clear and convincing evidence that it would have taken the same adverse personnel action in the absence of any protected activity; and
7. The damages, if any, to which Complainant is entitled.

III. Summary of the Evidence

A. Complainant's Employment History

Complainant graduated from Great Lakes Maritime Academy in 1997 with a third mate standing. (FX H, p. 4.) He began his career sailing on the Great Lakes for three seasons, and then upgraded to working on ocean cargo ships. (*Id.* at 6.) He initially sailed with the American Maritime Officers Union, and then with the Marine Engineers Beneficial Association. With the Marine Engineers he served as a second or third mate aboard U.S. naval ships supporting Operation Iraqi Freedom and Operation Enduring Freedom in Afghanistan and Iraq. (*Id.* at 17.) He then served as second-mate for Premier Pacific Seafoods in Alaska. (*Id.*) From 2006 to 2016 Complainant continued to work as a crew member on numerous vessels. (*Id.*);(CRX 3.) His licenses include second mate for unlimited ocean, masters ocean 1,600/3,000 international, domestic 1,600, and master towing. (CRX 3.)

member, *i.e.* Complainant. (HT, p. 55-56.). Complainant asserts the two reports offer "two differing explanations for the vessel overloading," and show Respondents got rid of him so that he would not be able to contribute to the drafting of the reports. (1st Complaint, p. 2); (HT, p. 55). Outside of any clarification they offer as to the overloading incident, I find these reports, and specifically the alleged inconsistencies, of little evidentiary value.

Upon learning of an open vacancy on the Fugro Americas, a research vessel engaged in mapping the ocean floor, Complainant contacted Stephen Murray, a logistics coordinator for C-Mar, in June, 2016. Through C-Mar Complainant became employed aboard the Fugro Americas vessel. (HT, pp.71-72);(1st Complaint, p. 2.) Complainant described C-Mar's role as a "crewing agency," that provided "all of the maritime crew." (HT, p. 72.) C-Mar collected and kept several employee records on file for Complainant.⁶ C-Mar was not involved in the day-to-day operations aboard Fugro. (HT, p. 72.) At his deposition Complainant asserted he was a direct employee of C-Mar and received his paychecks from C-Mar, but that C-Mar had "no management or oversight of the vessel." (FX H, p. 37.) He stated that based on his best recollection there was no set contract period for employment with either Fugro or C-Mar. (*Id.* at 39.)

From June 6, 2016, to January 8, 2017, Complainant worked as a mate aboard the Fugro Americas, with its base port of operations in Port Fourchon, Louisiana. (HT, p 72);(1st Complaint, p. 2.) The Fugro Americas vessel had two sets of officers and crew assigned to the ship, with a typical rotation of six weeks. (*Id.* at 3.) Complainant was assigned as Third Mate to Captain Waller's crew. (*Id.*) In December, 2016, Complainant's crew, the "Waller crew," consisted of twelve men. (FX 9.) Complainant, and other members of the crew aboard Fugro Americas, were at-will employees without any employment contract. (HT, p. 135.) Complainant departed the Fugro Americas vessel on January 8, 2017, and since then has not been employed on any Fugro ships or in any position acquired through the C-Mar crewing agency. (*Id.* at 90.)

Immediately after he left the Fugro Americas vessel, Complainant collected around \$8,000 in unemployment insurance. (*Id.* at 81.) Starting in April, 2017, Complainant worked three days a week at a water taxi company in San Francisco. (*Id.* at 80.) He also worked intermittently, two to four times a month, as a deck engineer for a company called Seaway. (FX H, p. 14.) From May 29, 2017, to July 23, 2017, Complainant worked for Signet Marine. (HT, p. 81.) He served as chief mate on a University of Miami research vessel from March, 2018 to April, 2018. (FX H, p. 11.) He also testified to intermittently driving for Uber and Lyft. (*Id.* at 15.)

⁶ On June 15, 2016, Complainant completed an "Employee Information" form with C-Mar, including his personal contact information, emergency contact details, and his direct deposit details. (CRX 1.) He also completed a verification of previous employment form. (CRX 2.) He provided C-Mar with his Merchant Mariner Credential, a seafarer identity document, a Falck emergency service card, transportation worker identification credential, SafeGull card, a Dynamic Positioning Operator Certificate, and his passport (CRX 4). C-Mar also kept a record containing Complainant's international and domestic capacities, and the regulations governing his work. (CRX 5.)

B. Alleged Protected Activity

a. Overloading Incident and Report to Coast Guard

A ship is assigned a series of draft lines for various conditions, such as winter and summer, which are visible indicators used to indicate whether a ship is overloaded. (1st Complaint, p. 3.) Compliance with draft lines reduces the risk of a vessel capsizing at sea, ensuring there is enough distance from the waterline to the deck. (*Id.*) The draft line is determined by measuring the distance from the bottom of the ship to the water line. (*Id.* at 4.) On large vessels, over 100 meters in length, the maximum summer draft line is 10 feet, 6 inches, and the maximum winter draft line is 10 feet, 3 inches and 3/8 of an inch. (*Id.*) Since the Fugro Americas vessel was under 100 meters in length, and thus under the Coast Guard Load Line Zones, it could operate year-round at the more generous summer draft line of 10 feet six inches. (FX 10); (CX 8, p. 2);(1st Complaint, p. 4.)

Complainant stated in his deposition that the chief mate of the Fugros America put too much water on the vessel before it departed Port Fourchon on December 30, 2017. (FX H, p. 40.) Complainant pointed out the overloaded condition to the chief mate and the captain, and the crew pumped some of the water off before departure. (*Id.*) But the vessel still left the dock overloaded at a mean draft of 10 feet, 8 inches. (*Id.*); (CX 9.) The “Rough Log” for December 30, 2016, confirms Complainant’s assertion, with an entry at 3:40 p.m. listing the bow draft line at 10 feet 10 inches, and the stern at 10 feet 6 inches, for a mean draft of 10 feet, 8 inches. (CX 9.) The vessel departed at 5:30 p.m. (*Id.*) Complainant was off-duty and asleep when they left the docks, and only found out the vessel was still overloaded at midnight when he took over watch for another crew member. (FX H, p. 44.) Complainant did not further discuss the overloading with the captain or report it to anyone else. (*Id.* at 51.) The vessel was at sea until January 7, 2017.

On January 7, 2017, the vessel docked at Port Fourchon, Louisiana, and Complainant noticed the waterline was still over the summer draft marks. (HT, p. 17.) Complainant documented the ship was at either 10 feet, 6 inches and 3/4 of an inch, or 10 feet, 7 inches and 1/4 inch. (CX 11.) He documented the measurements and took pictures of the sides of the ship, showing them to Captain Waller who “shrugged [him] off.” (FX H, p. 55.) Complainant then contacted by telephone Erik Leutscher, the area supervisor for Fugro, explaining the vessel was overloaded and expressing concern that the vessel would be returning to sea again in the same overloaded capacity. (HT, p. 17.) Mr. Leutscher told complainant he would have Mr. Herbert, the vessel superintendent for Fugro, contact him. (*Id.*) At the hearing Mr. Leutscher testified that he told Complainant he had the full right to contact the Coast Guard. (*Id.* at 123.) Mr. Leutscher then contacted Mr. Herbert, informing him about the call from Complainant, and asking him to address the situation. (*Id.* at 123.) When Complainant got in touch with Mr. Herbert he told him that the vessel was overloaded, and that if “[he] felt [he] was being harassed or retaliated against,

that [he] would inform the client and the Coast Guard.” (*Id.* at 18.) Mr. Herbert informed him he would have to talk to staffing about the safety concern. (*Id.*)

After these phone calls Complainant went to Sean Barret, the Fugro party-chief on board, and spoke with him about the overloading concerns. (*Id.*) Complainant and Mr. Barret then went to the onboard client representative, Philip Halick, and Complainant again expressed his concerns about the vessel being overloaded. (*Id.* at 19.) Mr. Halick sought documentation, and Complainant sent him pictures allegedly showing the vessel overloaded. (*Id.*);(CX 2.) Complainant, Mr. Barret, and Mr. Halick all then met with the vessel’s captain, Clayton Waller, and debated the issue for about forty-five minutes around midnight. (HT, p. 19). In addition to the vessel being overloaded Complainant also raised other prior safety issues with the captain. (*Id.* at 20.) At his deposition Complainant stated that Captain Waller responded that he had “no right to call all these people and raise the issue.” (FX H, p. 66.) On January 8, 2017 at around two in the morning, Mr. Barret told Complainant that the client, Anadarko Petroleum, viewed the issue as an internal Fugro matter and would not get involved. (HT, p. 20.)

Complainant then called the Coast Guard “800” number at 2 a.m. on January 8, 2017, and got in contact with a lieutenant j.g., the duty officer for the marine safety unity out of Homar, Louisiana. (*Id.*) They had several calls back and forth. (*Id.*) Complainant remarked that the vessel was overloaded because of a ballast error before the departure on December 30, 2018. (*Id.* at 28.) He asserted he was concerned about the captain being a physical threat to him, that he wanted an escort off the ship, and that he wanted to make it clear he was not abandoning the ship. (*Id.* at 30.) Complainant asked the Coast Guard if they could send someone to escort him off, but the Lieutenant told him no one was available. (*Id.* at 25.) The Lieutenant also responded that they could not send someone to inspect the vessel on a Sunday. (*Id.* at 24.) He told Complainant that if he thought it was unsafe he could contact Harbor Patrol. (*Id.* at 31.) Complainant stated that before he got off the vessel on January 8, 2017, he came to the conclusion that “likely, nobody from the Coast Guard would be there that day.” (*Id.* at 33.)

Fugro has a policy of assigning a designated person ashore (“DPA”) to a vessel. (*Id.* at 65.) A DPA is a person, not located on the vessel, who registers complaints and investigates them. (*Id.*) The DPA for the Fugro Americas vessel, who was also a marine assurance officer, was Bruce Grimball. (*Id.*) Mr. Grimball testified that his job is “to give guidance, write policy procedure, and verify compliance.” (*Id.* at 132);(FX 18.) He stated that as a DPA he is independent of operations and can make safety decisions without bias. (HT, p. 132.) Complainant never contacted Mr. Grimball, or any other DPA, to make a complaint about his safety concerns. (*Id.* at 66.) Complainant stated that he did not contact the DPA because in his experience “when you speak up and report issues, that you end up making yourself a target.” (*Id.*)

On the morning of January 8, 2017, the crew pumped water off the vessel. (FX H, p. 70.) While on duty, at 8 a.m. Complainant checked the draft marks again and measured them at 10 feet 3 and 1/2 inches, well-below the summer marks, but still above the winter draft line by 1/8 of an inch (CX 12);(HT, p. 21.) Complainant mistakenly believed the winter draft line of 10 feet 3 inches and 3/8 of an inch applied, instead of the more generous summer draft marks, because he was “accustomed to sailing of large vessels” that adhered to different draft lines. (1st Complaint, p. 4.) At 8:13 a.m. he sent Mr. Herbert a text stating the vessel was still overloaded by 1/8th of an inch, and falsely, that the Coast Guard had instructed him to depart the vessel and wait on the dock so he could speak to an inspector.⁷ (CX 4.) He further stated in the text message that he was not resigning his job, and would be available to Fugro after the Coast Guard questioned him. (*Id.*) Complainant told Captain Waller he was leaving the ship to talk to the Coast Guard, and according to Complainant the captain reacted by saying he “thought that was the best option for all parties.” (FX H, p. 76.) Complainant asked whether he should take all of his items, or just some of them, and the Captain directed him to take all of his things. (*Id.* at 77.) Complainant stated at his deposition that to him the instruction to take all of his items meant they did not want him to come back. (*Id.*)

At 8:36 a.m. Captain Waller sent an email to Mr. Herbert stating:

I instructed mike [*sic*] to call you, he received a reply from the coast guard, saying that he should get off vessel, harbor patrol will pick him up and will notify mike [*sic*] when coast guard will be available. (FX 7.)

Mr. Herbert responded to the email directing Captain Waller to “[g]et the name and number for the Harbor Patrol Officer [Complainant] spoke to,” to which Captain Waller responded “[r]eceived and understood.” (*Id.*)

Complainant left the vessel at 9:30 a.m. on January 8, 2017. (1st Complaint p. 14)(FX 5.) Complainant testified he got off the vessel because he felt unsafe working with the captain, the boat was overloaded, and the crew was not following the certificate of inspection with respect to manning in the engine room and the automation. (HT, p. 34.) He also stated he got off because he was “fearful of getting [his] own self prosecuted,” because he believed the vessel was unseaworthy, and it was a felony to send an unseaworthy ship to sea. (*Id.* at 35.) The Daily Report for the Fugro Americas on January 8, 2017, shows Complainant left the ship at 9:30 a.m., and a “Client Rep/Project meeting” occurred at 10:00 a.m. (FX 5.) The Official Log for the vessel contains a handwritten entry stating “3rd mate Michael Bird continued with accusations,” against the Captain including “barricading room with furni-

⁷ At the hearing Complainant admitted his assertion that the Coast Guard instructed him to get off the vessel was false. (HT, pp. 63-64.) He stated he was “concerned about being accused of abandoning the vessel,” and that “if [he] had it to do over, [he] would have reworded the text a little better.” (HT, p. 63.) He stated he had discussed getting off the vessel with the Coast Guard, but not that they had instructed him to do so. (HT, p. 63.)

ture, fearing for his life, [and] instructed ‘supposedly’ by C.G. to get off vessel” (FX 19.) The log also states Complainant got off vessel at 9:30 a.m. (*Id.*) Once he was off the vessel Complainant witnessed the crew pumping more water off the ship, bringing the level to below even the winter marks. (HT, p.59.) Complainant testified that “they ordered more water be brought off the vessel,” even though it was already in compliance with the applicable summer draft marks, because “they believed [him] due to all the chaos.” (*Id.* at 21.) Complainant agreed that when the vessel left he was aware the crew had pumped off the additional water, and that he waited about 100 feet away on the dock, but did not attempt to return to the vessel because he “didn’t want to create any more conflict or drama with the Captain.” (*Id.* at 60.) The vessel left port without Complainant around noon on January 8, 2017. (*Id.*)

b. Alleged Termination

On January 8, 2017, Mr. Herbert, the Fugro vessel superintendent, called Stephen Murray, the C-Mar logistics coordinator, and informed him that Complainant had brought an up an issue with the ballast and was considering departing the vessel, and that if he did he would be taking his belongings. (*Id.* at 84-85.) Mr. Murray testified that Mr. Herbert told him Complainant was going to call the Coast Guard. (*Id.* at 156.) On January 9, 2017, Captain Waller sent Mr. Murray, with Mr. Herbert copied, an email stating:

...as you already know Mike Bird decided to depart the vessel yesterday and if *[sic]* doing so instructed to take belongings. Off vessel @ 09:30 yesterday.
(FX 8.)

At 9:54 a.m. Mr. Murray responded:

Thank you for the update and confirmation. I will begin sourcing a new mate immediately. (FX 8.)

On January 10, 2017, Mr. Murray sent an email to Faron Oliver and Mr. Herbert stating, *inter alia*, that “Michael Bird (Waller Crew) has decided that his future lies elsewhere so a long term replacement is currently being sought for him.” (FX 3.) At the hearing Mr. Murray testified that he stated in the email that Complainant’s “future lies elsewhere,” because when an individual packs up his belongings and departs the vessel it usually means they are quitting and do not intend to return to the vessel. (HT, p. 86.)

Complainant testified that neither Mr. Leutscher, Mr. Herbert, nor Mr. Barrett told him he would be terminated if he contacted the Coast Guard. (*Id.* at 67.) But he asserted Captain Waller said Complainant “had no right to inform his bosses, Fugro, the client, the Coast Guard, [and that] he meant that [Complainant] had no right to raise this issue at all.” (*Id.* at 68.) Complainant acknowledged that no one made any attempt to stop him from contacting the Coast Guard, but asserted “they retaliated by not having [him] come back to work.” (*Id.* at 71.) Mr. Grimball,

the DPA and marine assurance officer for Fugro, testified there was no obligation for Complainant to return to the vessel, and that the position is at-will employment. (*Id.* at 135.)

Complainant stated that while Fugro may not admit they would not hire him again because he left to report to the Coast Guard, they knew he was going to speak with the Coast Guard and they did not hire him to return to the ship because of his reporting. (*Id.* at 70). He testified that “you can leave the ship all the time,” that “people leave the vessel,” and offered general examples such as if a wife or child gets sick. (*Id.*)

At the hearing when Mr. Grimball, the DPA and marine assurance officer for Fugro, was asked “what [he] know[s] about the circumstances of Mr. Bird’s departure,” he testified that based on his conversations with other people

Mr. Bird made some loud accusations—you know, against the Captain and a few other things and escalated what should have been a minor misunderstanding...into something much major very quickly, and then decided to leave the vessel, and distort his reasons for leaving the vessel. (HT, p. 144.)

He further testified that he would not likely recommend that Fugro hire Complainant back, “especially after he walked off and we assumed he was done anyway.” (HT, p. 145.) When asked by Fugro’s counsel, he agreed that he had “no inkling” that the complaints to the Coast Guard had anything to do with Complainant not making the additional two hitches with his crew. (HT, p. 147.)

From when he left the ship on January 8, 2017, to January 18, 2017, neither Fugro nor C-Mar contacted Complainant. (*Id.* at 41.) The Fugro Americas vessel returned to port on January 17, 2017, and on January 18, 2017, Complainant called Mr. Murray of C-Mar. (*Id.* at 36-37.) Complainant testified Mr. Murray said “Captain Waller stated he did not want [Mr. Bird] to return to the vessel,” and that “Mr. Herbert did not—had instructed him for [Complainant] to not return to the vessel.” (*Id.* at 37.) Complainant stated Mr. Murray never directly used the words “you’re fired.” (*Id.*) Complainant noted Mr. Murray “was just relaying that they told me not to come back to work.” (*Id.* at 78.) In conflict with Complainant’s testimony, Mr. Murray testified he did not say that the captain or Mr. Hebert told him they did not want Complainant to return, but rather told Mr. Murray that Complainant decided to leave the vessel and took his belongings with him. (*Id.* at 89.) Yet Mr. Murray testified he only remembered the telephone call with Complainant “vaguely,” so I give more weight to Complainant’s version. (*Id.* at 87.) Mr. Murray testified he told Complainant he would consider him again for a position if one was available. (*Id.* at 89.) He testified he would have considered sending Complainant’s resume to Fugro for another job opportunity. (*Id.* at 90.) When asked whether Mr. Bird was not employed on future Fugro ships because he had departed the vessel and took his belongings he answered “yes.” (*Id.* at 90-91.) Complainant stated that in telephone

calls after January, 2017, Mr. Murray of C-Mar told him he was “in good standing with C-Mar,” and that “if a job would come up that he’d be more than happy to place me—place me in a job.” (*Id.* at 77.) Neither C-Mar nor Fugro ever made another offer of employment to Complainant. (*Id.* at 78.) After he spoke with Mr. Murray Complainant began searching for a new job. (*Id.* at 42.)

The Captain Waller crew Complainant worked with continued to complete rotations aboard Fugro Americas. (FX 20-25.) They worked a rotation beginning on February 25, 2017, and ending on April 10, 2017, for a total of forty-five days. (HT, p. 135.) The crew began another rotation on May 24, 2017, which ended on June 20, 2017, for a total of twenty-eight days. (*Id.*) After June 20, 2017, there were no more rotations for the Waller crew, because in August, 2017, management moved the vessel to a foreign region and hired foreign crew. (HT, p. 136-137);(FX 25.)

c. Coast Guard Investigation

After departing the vessel on January 8, 2017, Complainant set up an appointment to meet with the Coast Guard. (HT, p. 36.) Complainant spoke with Lieutenant O’Hearn on January 11, 2017. (*Id.* at 43.) He met with her at the Federal Building in Homer, Louisiana, to discuss the overloading issue aboard the Fugro Americas vessel. (*Id.* at 44.) Complainant provided his records and evidence, and the Lieutenant told Complainant she would keep in touch. (*Id.* at 45.) Complainant later emailed the Lieutenant the pictures he took of the vessel draft lines. (CX 16-25, 35.) On January 17, 2017, Complainant emailed Lieutenant O’Hearn to notify her the Fugro Americas had arrived in Port Fourchon. (CX 13.) On January 19, 2017, the Coast Guard inspected the Fugro Americas vessel. Mr. Grimball was onboard the vessel when the Coast Guard inspected it, and testified

Ms. O’Hearn and her team came aboard the vessel and began—started doing their investigation, interviews, and reviewing incident reports and log book entries, et cetera. (HT, p. 93.)

The Coast Guard officer requested the approval letter from the vessel’s stability program, DEFTload, a software program that provides stability calculations. (*Id.* at 140);(FX 2.) Mr. Grimball testified the approval letter showed that the vessel draft was within the allowance. (*Id.* at 142.) On January 23, 2017, Mr. Grimball sent Coast Guard Lieutenant Amy O’Hearn an email regarding the “Deflt Load [*sic*] Approval Letter,” to which she replied she had already closed the case and he did not need to send the letter, as “the stability program report of acceptance with the mean listed will suffice.” (FX 1.) The Coast Guard record of the investigation lists the incident date as January 9, 2017, and states the Marine Safety Unit was notified of an alleged violation of law/regulation. (FX 14.) The investigation was listed as “Closed” on January 19, 2017, and the Coast Guard took no action. (*Id.*)

IV. CONCLUSIONS OF LAW

A. Liability of C-Mar

Respondent C-Mar asserts it is not Complainant's employer under the SPA, and therefore cannot be liable. (C-Mar Closing Brief, p. 1). Citing to "general maritime law," C-Mar argues it is not Complainant's employer because it was not involved in the day-to-day operations aboard the vessel and did not have the right to direct, hire, or fire him. (*Id.* at 2.)

While C-Mar's argument that it does not qualify as Complainant's employer under general maritime law may be valid,⁸ it is misdirected. The SPA does not require that C-Mar be Complainant's employer to be held liable. The SPA only requires C-Mar be "a person" who "discharge[d] or in any manner discriminate[d] against a seaman." *See* 46 U.S.C Section 2114(a)(1). The regulations define "a person" as "one or more individuals or other entities, including but not limited to *corporations*, companies, associations, firms, partnerships, societies, and joint stock companies." 29 CFR § 1986.101(j)(emphasis added.) C-Mar America Inc., is a corporation, and thus under the SPA it is a person who can be held liable for discharging or in any manner discriminating against a seaman.

B. Burdens of Proof

The SPA provides, in part:

A person may not discharge or in any manner discriminate against a seaman because—

(A) the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred;

46 U.S.C. § 2114(a).

Retaliation means any discrimination against a seaman including, but not limited to, discharging, demoting, suspending, harassing, intimidating, threatening, restraining, coercing, blacklisting, or disciplining a seaman. 29 C.F.R. 1986.102(b).

⁸ The evidence suggests C-Mar acted as more of a staffing agency than a direct employer. Complainant learned of an available position aboard the Fugro Americas, and obtained that position, by contacting Stephen Murray, a logistics coordinator for C-Mar. (HT, pp.71-72);(1st Complaint, p. 2.) C-Mar kept several employee records on file for Complainant such as identification documents, an employee identification form, and his bank information for direct deposits. (CRX 1, 4.) Complainant described C-Mar's role as a "crewing agency," that provided "all of the maritime crew." (HT, p. 72.) Complainant stated C-Mar was not involved in the day-to-day operations aboard Fugro. (HT, p. 72.) Yet Complainant asserted he was a direct employee of C-Mar and received his paychecks from C-Mar. (FX H, p. 37.) He acknowledged he had no set contract period for employment with C-Mar. (FX H, p. 39.)

The SPA “incorporates the procedures, requirements, and rights described in the whistleblower provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105.” 29 C.F.R. § 1986.100(a). Under Section (b)(1) of STAA, STAA whistleblower complaints are governed by the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), 49 U.S.C. 42121(b). Thus, whistleblower complaints under the SPA are governed by the legal burdens of proof established in AIR21.

Under AIR 21, a two-pronged burden-shifting framework applies in whistleblower cases. 42 U.S.C § 42121(b). The complainant has the initial burden of satisfying prong one of the two-part test. *See* 42 U.S.C § 42121(b). To satisfy prong one he must demonstrate, by a preponderance of the evidence, that: (1) he engaged in protected activity under the SPA; (2) the employer knew he engaged in protected activity; (3) he suffered an adverse personnel action; and (4) his protected activity was a contributing factor in the adverse action. *See* 42 U.S.C § 42121(b).

If the complainant demonstrates all four elements, then the burden shifts to the employer to show, by clear and convincing evidence, that it would have taken the same adverse personnel action notwithstanding the protected activity. *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157-158 (3d Cir. 2013); *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 3 (ARB Sep. 18, 2014). The second prong of the burden-shifting framework does not ask whether the employer had nonretaliatory reasons for the adverse action; it asks instead whether those nonretaliatory reasons, by themselves, would have been enough that the employer would have taken the same adverse action in the absence of the protected activity. *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-036, ALJ No. 2014-FRS-00154, 2016 DOL Ad. Rev. Bd. LEXIS 60 at *33 (ARB Sept. 30, 2016; re-issued Jan. 4, 2017) (en banc). For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity. *Palmer*, at *92.

One of the primary goals of the SPA is to facilitate the Coast Guard’s enforcement of maritime safety laws and regulations. *Gaffney v. Riverboat Services of Indiana*, 451 F.3d 424, 444 (7th Cir. 2006), *cert. denied* 549 U.S. 1111 (2007). Whistleblower standards are meant to be interpreted expansively, as they have “consistently been recognized as remedial statutes warranting broad interpretation and application.” *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 15 (ARB Sept. 13, 2011).

a. *The First Prong: Complainant’s Case*

1. Protected Activity

The first element Complainant must prove to establish his case is that he engaged in protected activity. Under the SPA, a seaman engages in protected activity when he "in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred" 46 U.S.C. § 2114(a)(1)(A). The parties do not dispute that Complainant reported the overloaded violation to the Coast Guard. At issue is whether Complainant's report to the Coast Guard of the overloaded condition of the vessel was in good faith.

Respondent C-Mar argues Complainant's "mistaken belief the M/V FURGRO AMERICAS was overloaded was not reasonable for an experienced seaman." (C-Mar Closing Brief, p. 4.) Complaint admits he "made a mistake" as to what draft lines applied to the vessel. (HT, p. 21.)

On January 7, 2017, when Complainant first began reporting internally and to the Coast Guard that the vessel was overloaded, he measured the waterline at either 10 feet 6 inches and 3/4 of an inch, or 10 feet 7 inches and 1/4 inch, both over the applicable summer draft marks, and thus in fact overloaded. (CX 11.) On January 8, when Complainant departed the vessel, he measured the draft marks at significantly below the applicable summer marks, but above the inapplicable winter-draft marks by 1/8 of an inch. (HT, p. 21.) Complainant mistakenly believed the winter draft marks applied, and that the vessel was thus still overloaded. He asserts he was "accustomed to sailing of large vessels" that adhered to different draft lines, and that his mistake was in good faith. (1st Complaint, p. 4.) Respondent Fugro points out that 1/8 of an inch is approximately equivalent to the line of type on a page, implying that Complainant's allegation that the draft mark was above even the inapplicable winter lines was not in good faith. (Fugro Closing Brief, p. 3.) I find that the vessel was in fact overloaded when Complainant first measured it on January 7, and although he mistakenly believed the lower winter marks applied when he left the vessel on January 8, he offered a plausible justification for the mistake. Moreover, the crew pumped off additional water, suggesting they also were uncertain as to which marks applied. (HT, p. 21.) Therefore, I find Complainant honestly and in good faith believed that the vessel was overloaded in violation of maritime safety law, and that his safety reports were protected activity.

2. Knowledge

The second element requires Complainant demonstrate that Respondent knew he engaged in protected activity. It is undisputed that Complainant notified both Fugro and C-Mar of the safety violation and his reports to the Coast Guard. Thus, Complainant has demonstrated that both Respondents had knowledge of his protected activity.

3. Adverse Action

Complainant must next demonstrate factor three, that he suffered an adverse action, by a preponderance of the evidence. For this factor, I will address each Respondent separately.

Fugro argues it did not take an adverse action against Complainant because he voluntarily left the vessel. (Fugro Closing Brief, p. 10). This argument fails because it misconstrues the issue. The alleged adverse action was not Complainant leaving the ship, an act which he took voluntarily, but rather Fugro's decision not to allow him to return to the crew once the vessel made port again a few weeks later, or, as Complainant put it, "they never had [him] come back to work." (HT, p. 71.) Fugro's stronger argument is that Complainant quit his position aboard the vessel by departing it on January 8, 2017. But this argument is undermined by the text message Complainant sent to Fugro's vessel superintendent, Mr. Herbert, before getting off the vessel, stating "I am not resigning my job and will be available to Fugro after the Coast Guard questions me." (CX 4, p. 5.) Complainant took all of his items with him when he departed, a fact which Fugro argues demonstrates he quit; but the evidence in the record shows he did so because the Captain told him to.⁹

In fact, the only evidence Complainant intended to quit was his act of leaving the vessel. No witness testified to hearing Complainant say "I quit," or anything remotely like it. There is no written evidence to show Complainant intended to quit. Yet Captain Waller – who knew Complainant left the vessel intending to make a report to the Coast Guard – e-mailed Messrs. Murray and Herbert to say Mr. Bird had "decided to leave the vessel," and Mr. Murray replied he would "begin sourcing a new mate immediately," while Mr. Herbert – whom Complainant had texted just a day earlier to say he was leaving the vessel to make a safety report to the Coast Guard, and did not intend to resign by so doing – apparently remained silent.

Fugro's final argument, that Complainant's position was "by hitch," and that it did not take an adverse personnel action by not hiring him for future hitches, also fails. As part of Fugro's management, Mr. Grimball testified there was no obligation for Complainant to return to the vessel, that the position was at-will, and that Fugro had no obligation to hire Complainant "beyond his hitch". (HT, p. 135.) But simply because an employee's position is "at-will" does not mean Respondent cannot take an adverse action against him. Where the regular pattern of business is to keep the same crew for rotations aboard a vessel, the crew members have a reason-

⁹ At his deposition Complainant testified the Captain instructed him to take all of his items off the ship with him, an instruction which he interpreted to mean the Captain did not want him to return. (FX H, p. 77.) Moreover, the email Captain Waller sent to Mr. Murray on January 9, 2017, stated the Complainant was "instructed" to take his belongings, bolstering Complainant's version of the events. (FX 8.)

able expectation of returning to work on the next hitch. Mr. Grimball admitted that other members of the Waller crew returned to work on future rotations with the Fugro Americas after January 16, 2017. (*Id.*) Moreover, the record shows Complainant worked aboard the same vessel, Fugro Americas, from June 6, 2016, until January 8, 2017. (*Id.* at 72.) Where Complainant was continually hired for rotations aboard the vessel, suddenly not being allowed to return to work the next rotation, under the particular circumstances of this case, sufficiently demonstrates an adverse action for purposes of shifting the burden to Respondents.

Perhaps Fugro's assertion that Complainant quit would be more feasible if Complainant had never inquired with Respondents as to his position after he departed the vessel. But Complainant testified he called Mr. Murray, the logistics coordinator who staffed the Fugros vessel, when the vessel returned to port on January 18. In that conversation, according to Complainant, Mr. Murray said "Captain Waller stated he did not want [him] to return to the vessel," and that "Mr. Herbert did not—had instructed him for me [sic] to not return to the vessel." (*Id.* at 37.) He acknowledged Mr. Murray never directly used the words "you're fired," but understandably Complainant inferred as much. (*Id.*) Mr. Murray contradicted Complainant, testifying he never said Mr. Herbert and Captain Waller would not allow Complainant to return, but rather had told him Complainant decided to leave the vessel and took his belongings with him. (*Id.* at 89.) Yet, as noted above, he took his belongings with him because he was instructed to do so, and once he left the vessel C-Mar began "sourcing a new mate immediately" as a "long term replacement." (FX 8);(FX 3.)

I find a preponderance of the evidence shows Complainant did not voluntarily quit, and that Fugro took an adverse personnel action by not hiring him back for future rotations aboard the vessel.

C-Mar argues it did not take any adverse personnel action against Complainant because it "only relayed that Fugro instructed Bird not to return to work aboard the FUGRO AMERICAS." (C-Mar Closing Brief, p. 3.) Complainant himself testified Mr. Murray was relaying the message for Fugro, and does not assert C-Mar had any role in the decision-making regarding his termination. On January 9, 2017, Mr. Murray of C-Mar responded to Captain Waller's email informing him Complainant had left the vessel by stating he would "begin sourcing a new mate immediately." (FX 8.) C-Mar seeking a replacement worker is a reaction to an adverse personnel action taken by Fugro, but is not itself an adverse personnel action. Even if C-Mar had refused to source a new worker, Fugro would have likely engaged another crewing agency to replace Complainant. While Mr. Murray's statement to Complainant that C-Mar would be happy to place him in future a job if one came up may have been disingenuous, and Complainant was never placed in another position, the records does not show C-Mar had a regular business pattern of placing Complainant in positions, and thus had no obligation to do so.

I find C-Mar took no adverse personnel action against Complainant. Therefore, I deny the complaint against C-Mar.

4. Contribution

Next, Complainant must demonstrate his protected activity was a contributing factor in Fugro's adverse action against him. A "contributing factor" means any factor which alone, or in combination with other factors, tends to affect in any way the outcome of the decision. *Bechtel v. Administrative Review Bd., U.S. Department of Labor*, 710 F.3d 443, 447 (2nd Cir. 2013). In the recent *Palmer* decision, the ARB clarified the contributing factor inquiry for whistleblower complaints. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-036, ALJ No. 2014-FRS-00154, 2016 DOL Ad. Rev. Bd. LEXIS 60 at *26 (ARB Sept. 30, 2016; reissued Jan. 4, 2017) (en banc). The court noted that under the AIR21 standard a complainant must demonstrate his protected activity was a contributing factor, and that the term "demonstrate" means "to prove by a preponderance of the evidence." *Palmer*, ARB No. 16-036 at *26. The court further stated that although the statute contains no definition of "demonstrate," dictionary definitions of the term use phrases like "show that something is true" or "establish the truth of . . . by providing practical proof or evidence" or synonyms like "prove." *Id.* The complainant must not simply show a prima facie case or meet a burden of production, but rather must persuade the court that his protected activity contributed to the adverse action against him. (*Id.* at *30.) The AIR 21 burden of proof framework is much more protective of complainant employees and much easier for a complainant to satisfy than Title VII's *McDonnell Douglas* standard. *White v. Action Expediting, Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011, slip op. at 5, (June 6, 2014), citing to *Marano v. Dept. of Justice*, 2 F.3d 1137 (1993).

I must determine, then, whether the protected activity played some role in the adverse action. In so doing, I may consider any relevant evidence, including respondent's proffered nonretaliatory basis for the action. *Palmer*, ARB No. 16-036 at *27. Yet even if the respondent's nonretaliatory reason is true, a complainant will still prevail by proving the respondent's reason is only *one* of the reasons for its conduct, and that his protected activity was a contributing factor. *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18-19 (ARB May 31, 2006). The complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). Circumstantial evidence may include a wide variety of evidence, such as temporal proximity. *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1 (ARB Nov. 5, 2013) In addition to temporal proximity, circumstantial evidence includes evidence that discredits the respondent's proffered reason for the adverse action, demonstrating instead that it was pretext for retaliation. See *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018 (ARB June 29, 2011); see also *Bechtel v. Competitive Techs.*,

Inc., ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011). A respondent does not need to have any reason to fire an employee, let alone a legitimate business reason. *Powers v. Pacific Union Railroad Co.*, ARB No. 13-034, ALJ 2010-FRS-030 (Jan. 6, 2017)(slip op, p. 17.) But unless the Respondent posits a non-retaliatory reason, a factfinder is very likely to conclude that retaliation was the real reason for, or at least a contributing factor in, the discharge. (*Id.*)

Complainant alleges Fugro did not hire him back aboard the Fugros America vessel because of his protected activity of reporting to the Coast Guard. To support his argument Complainant offers generalized comparator evidence, testifying that crew members who left vessels, for reasons unrelated to safety complaints, did not suffer adverse personnel actions. At the hearing Complainant testified that “you can leave the ship all the time,” that “people leave the vessel,” and offered reasons such as “your wives get sick, your kids get sick and you have to take family leave.” (*Id.*) These examples do not serve as proper comparator evidence because Complainant offered no evidence showing the supposed workers were similarly situated to him, but there is no other comparator evidence in the record to refute Complainant’s generalized assertion that workers leave vessels “all the time” without consequence.

In a personnel email to Mr. Faron and Mr. Herbert on January 10, 2017, C-Mar’s Mr. Murray states he is seeking a replacement for Complainant, but also lists several other personnel actions. Of interest are the statements

Erick Long (Bloom crew) is back after missing the last hitch. Kenneth Geter no longer need as cover. (FX 3.)

Rodolfo Adviento (Bloom crew) has an approved leave of absence. John Hunter is his replacement. (*Id.*)

These statements, coincidentally in an email concerning Complainant, provide a glimpse into Fugro’s personnel practices. The first statement supports Complainant’s argument because it indicates a worker can “miss” the departure of a vessel, and still return to work upon that vessel once it returns. What is unknown, and what Mr. Murray did not clarify on direct or cross examination, is why Mr. Long “missed” the last hitch, and whether he provided Respondents with notice before doing so. The second statement regarding Rodolfo Adviento neither supports nor undermines Complainant’s argument, simply revealing that workers can request leave in advance, and that Fugro will approve that leave without the worker suffering an adverse action. At a minimum the comparator evidence in the record supports Complainant’s argument because it shows Fugro allows workers who leave vessels to return, and has a policy of using temporary replacement workers in the interim.

The temporal proximity between Complainant’s reports to the Coast Guard and Fugro’s adverse action also supports Complainant’s argument that his protect-

ed activity contributed to the adverse action. Complainant testified the Captain told him in the early morning on January 8, 2017, that he “had no right to inform his bosses, Fugro, the client, the Coast Guard, [and that] he meant that [Complainant] had no right to raise this issue at all.” (*Id.* at 68.) Further, Complainant’s uncontradicted testimony is that when he told the Captain he planned on leaving the ship to talk to the Coast Guard, the captain stated he “thought that was the best option for all parties.” (FX H, p. 76.) Complainant then left the vessel later that morning. A day after Complainant left the vessel allegedly to report to the Coast Guard, Fugro personnel, including the Captain, had already informed C-Mar’s Mr. Murray that Complainant left the vessel, and tasked him with seeking a long-term replacement. These comments by the Captain and temporal proximity with Complainant being replaced alone would strongly support causation, but the issue is confounded by the fact that there is also temporal proximity between Complainant abandoning the vessel without giving proper notice and Fugro’s adverse action. Where the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action. *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Here, the timing of Complainant’s reports to the Coast Guard is also the timing at which he abandoned the vessel, and thus the link between his safety reports and Fugro’s decision not to hire him back could be attenuated. But Complainant’s protected activity, reporting to the Coast Guard, cannot be separated from his abandoning the vessel because he told Fugro he was leaving to make the reports. Fugro cannot explain its adverse action solely as a response to Complainant abandoning the vessel independent of Complainant’s reason for getting off the vessel—protected activity. Accordingly, I find temporal proximity between the protected activity and adverse action is circumstantial evidence in support of contribution.

The inference of contribution created by temporal proximity is further bolstered by Fugro’s inability plausibly to explain the basis for its adverse action. Fugro is in the best position to offer evidence as to its basis for not hiring Complainant back for future rotations, and its failure to offer a plausible reason suggests that retaliation was the real reason for, or at least a contributing factor in, the adverse action. Fugro argues Complainant voluntarily left the vessel, and management merely assumed he quit. But Captain Waller and Mr. Herbert, at a minimum, knew Complainant was leaving to make a report to the Coast Guard. Complainant made calls and sent texts to Fugro management about his concern the vessel was overloaded and his intention to tell the Coast Guard. The record demonstrates escalating friction between the Captain and Complainant. The captain, and vessel management, might have been happy to rid themselves of a “troublesome” crew member, whose safety reports they found trivial, by allowing him to leave the vessel, treating it as a resignation, and then not allowing him to return. But condoning such a passive-aggressive response without consequence would undermine the

SPA's goal of facilitating the Coast Guard's enforcement of maritime safety laws and regulations. *Gaffney*, 451 F.3d at 444 (7th Cir. 2006).

Considering all evidence in the record, I find Complainant has prevailed in demonstrating his reports to the Coast Guard contributed to Fugro's decision to not hire him back. The contributing factor test requiring the protected activity *tend* to affect in *any way* the outcome of the decision places a significantly lower burden on Complainant than a motivating or substantial factor test. Even if the Captain and Fugro management were motivated to not hire Complainant for the future hitches for other reasons, such as his poor relationship with the Captain or that he was difficult to work with, the safety reports being only a relatively minor motive is sufficient for a finding of contribution. I find the comparator evidence, temporal proximity, and Fugro's failure to proffer a plausible basis for its decision collectively demonstrate that Complainant's reports to the Coast Guard were a contributing factor in the adverse action against him.

b. The Second Prong: Same Adverse Action Absent Protected Activity

Complainant demonstrated all four elements against Respondent Fugro required in prong one, and thus the burden shifts to Fugro to show, by clear and convincing evidence, that it would have taken the same adverse personnel action notwithstanding the protected activity. *See Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 3 (ARB Sep. 18, 2014). Convincing evidence denotes a conclusive demonstration, *i.e.*, that the thing to be proved is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Company*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012); *Palmer*, ARB No. 16-035 at 52. Clear and convincing evidence that the Respondent "could" have fired the Complainant for an incident fails because the Respondent's burden is to show that it "would have" terminated the Complainant for the incident." *Douglas v. Skywest Airlines*, ARB Nos. 08-070, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009.) Whistleblowers should be no less accountable than others for their infractions or oversights. *Daniel v. Timco Aviation Svcs., Inc.*, ALJ No. 2002-AIR-026, slip op. at 25 (June 11, 2003). But they should be held to no greater accountability and disciplined evenhandedly. *Id.*

Fugro's only stated reason for not hiring Complainant for future hitches is that he voluntarily quit. As noted above, there is considerable evidence to show he had no such intention. The evidence shows Complainant directly communicated he was not resigning. Fugro introduced no comparator evidence, which would support its argument it discharged Complainant because he left the vessel, showing a policy of not allowing workers who leave vessels without notice, or miss departures, to return. Fugro is in the best position to offer evidence as to its basis for not hiring Complainant for future hitches, and its failure to do so is telling. I could speculate that Fugro does not let workers return when they leave the vessel without giving notice, and that Complainant would have been treated the same if he had not made

the safety report, but there is nothing in the record to demonstrate this—and speculation does not suffice. Fugro fails to prove by any standard, let alone a clear and convincing evidence standard, that it would have taken the same action absent the protected activity.

VI. REMEDIES

A successful complainant is entitled to the statutorily-provided remedies. The SPA incorporates the procedures, requirements, and rights described in the Surface Transportation Assistance Act (“STAA”). *See* 29 C.F.R § 1986.100(a). Under the STAA a successful whistleblower complainant is entitled to reinstatement to the former position and compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination. *See* 49 U.S.C § 31105(b)(3)(A)(iii.) Relief may also include punitive damages not to exceed \$250,000. 49 U.S.C § 31105(b)(3)(C). If the complainant requests I may also order payment of “the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint.” 49 U.S.C § 31105(b)(3)(B).

In his post-hearing brief Mr. Bird requested:

1. His daily pay rate of \$650 dollars for half of the days from January 8, 2017 to October 31, 2018 based on “even time schedule—about half the total days between.”
2. Legal expenses of a few thousand dollars and travel/lodging costs to meet with Coast Guard.
3. Punitive damages of \$250,000.

Complainant did not request reinstatement, but it is an automatic remedy which must be ordered unless it is impossible or impractical. *Dickey v. West Side Transport, Inc.*, ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26 and 27 (ARB May 29, 2008). An ALJ properly denies reinstatement and a front pay award where the Respondent's dissolution is a "superseding intervening event that has foreclosed any possibility of [the Respondent] reinstating [the Complainant] and blocked any enforcement of a front-pay award." *Smith v. Lake City Enterprises, Inc.*, ARB No. 11-087, ALJ No. 2006-STA-32 (ARB Nov. 20, 2012) Here, I find reinstatement is not possible because the vessel upon which Complainant worked, the Fugro Americas, was moved to a foreign region in August, 2017, and a new foreign crew was assigned.

Complainant requests punitive damages up to the statutory cap of \$250,000. I find that evidence in the record does not support an award of punitive damages. Punitive damages are warranted where there has been “reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.” *Smith v. Wade*, 461 U.S. 30, 51 (1983); *see Youngermann v. United Parcel Serv., Inc.*, ARB

No. 11-056, ALJ No. 2010-STA-047, slip op. at 6 (ARB Feb. 27, 2013). The court's evaluation is based on three guideposts widely recognized as determinative: (1) the degree of reprehensibility of the respondent's misconduct; (2) the relationship between the harm to the complainant and the size of the punitive award, and (3) punitive damage awards in comparable cases. *See Raye*, ARB No. 14-074, slip op. at 6. While I find Fugro took an adverse action against Complainant, and that Complainant's protected activity of reporting to the Coast Guard contributed in some way to the decision to take that action, the violation was more careless than malicious. The record suggests the Captain and Fugro management considered Complainant a difficult crew member, and were happy to treat his leaving the ship as a resignation without contemplating how such an act would be perceived by other crew members who may want to make safety reports in the future. While this treatment of Complainant was imprudent, and actionable under the SPA, it does not amount to a reckless disregard for Complainant's rights.

I find Complainant has introduced sufficient evidence to establish he is entitled to compensatory damages consisting of backpay with interest. A wrongfully terminated employee is entitled to back pay. 49 U.S.C. § 31105(b)(3). An award of back pay is not a matter of discretion but is mandated once it is determined an employer has violated the statute. 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. Awards are calculated in accordance with the make-whole remedial scheme, and runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. *Ass't Sec'y & Bryant v Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005). Employment compensation is not deductible from the amount due for back pay. *Hadley v. Southeast Coop. Serv. Co.*, 86-STA-24 (Sec'y June 28, 1991).

Evidence in the record establishes that but-for his discriminatory discharge, Complainant would have performed two additional rotations aboard the Fugro Americas. The "Waller crew" completed a rotation beginning on February 25, 2017 and ending on April 10, 2017, for a total of forty-five days. (HT, p. 135.) The crew began another rotation on May 24, 2017 which ended on June 20, 2017, for a total of twenty-eight days. The June 20, 2017, departure was the last rotation Mr. Bird would have worked on the Fugro Americas vessel, because in August, 2017, management moved the vessel to a foreign region and reassigned a foreign crew. (HT, p. 136-137);(FX 25.) Complainant asserts in his post-hearing brief that his daily rate for his work aboard the Fugro Americas was \$650, but offers no supporting evidence such as his pay stubs, wage statement, or IRS Form W-2 for 2016. In order to return Complainant to his rightful position Fugro must pay him backpay for 73 days at his usual daily rate, in addition to interest.

Backpay awards can be offset by a complainant's interim earnings in positions he or she could not have held had his or her employment with Respondent continued. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995). The employer,

and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. *Hadley v. Southeast Coop. Serv. Co.*, 86-STA-24 (Sec'y June 28, 1991). Fugro provided affirmative evidence that Complainant was employed by a water taxi company in San Francisco in April and May, 2017, for \$160 a day, three days a week. What Fugro did not provide is the exact dates Complainant worked in April and May, and whether they coincide with the dates he would have been on rotation with the Fugro vessel. Fugro's evidence that Complainant worked for Signet Marine at a rate of \$525 per day from May 29, 2017 to July 23, 2017 will also offset the backpay amount that Fugro must pay to Complainant. The evidence that Complainant obtained \$8,000 in unemployment compensation does not affect the amount owed because unemployment compensation is not deductible from the amount due for back pay. *See Hadley v. Southeast Coop. Serv. Co.*, 1986-STA-00024 (Sec'y June 28, 1991).

Complainant does not request, and has introduced no evidence to support, special damages.

Finally, as a pro se litigant Complainant is not entitled to an attorney fee award. *See Dutkiewicz v. Clean Harbors Environmental Services*, ARB No. 97-090, ALJ No. 54-STA-34. His request for costs is valid, but they must be documented. The costs must also have been incurred in bringing the complaint. *See* 49 USC 31105(b)(3)(B). Thus, his request for travel and lodging incurred in meeting with the Coast Guard, even if documented, is not compensable because he did not incur those expenses in bringing the complaint before this court.

VII. CONCLUSION

Having closely reviewed the testimony and exhibits, I find:

1. Respondent C-Mar qualifies as a “person” who can be held liable under the SPA.
2. Complainant engaged in protected activity by reporting his safety concerns to the Coast Guard.
3. Both Respondents, C-Mar and Fugro, had knowledge of Complainant’s protected activity.
4. Respondent Fugro took an adverse personnel action against Complainant by finding a permanent replacement and not hiring him back for the crew’s future rotations aboard the Fugro Americas vessel.
5. Respondent C-Mar took no adverse action against Complainant.
6. Complainant demonstrated that his protected activity was a contributing factor in Fugro’s adverse personnel action against him.
7. Fugro failed to provide clear and convincing evidence that it would have taken the same adverse action absent the protected activity.
8. Complainant is entitled to backpay with interest, with the total amount owed being reduced by Complainant’s interim earnings.

VIII. ORDER

The complaint against Respondent C-Mar is DENIED.

The complaint against Respondent Fugro is GRANTED

The record is reopened for the sole purpose of calculating backpay, interim earnings, and interest owed. The formula for calculating the amount owed is:

Complainant’s daily rate (times) 73 (minus) Interim Earnings (plus) Interest.

Within forty-five days of issuance of this initial decision and order, Complainant and Fugro may provide the court with either 1) a stipulation to the dollar amount of the Complainant’s daily rate, interim earnings, and accrued interest; or 2) if the parties cannot stipulate, written evidence only the issues of Complainant’s daily rate, interim earnings, and interest owed. Complainant may also provide evidence of any costs he claims. The court will then close the record, take the matters

under submission, and provide the figure to be paid by Fugro in a supplemental order.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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. § 1986.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may

be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1986.110(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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1986.110(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. §§ 1986.109(e) and 1986.110(b). 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. § 1986.110(b).