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Issue Date: 19 December 2011

CASE NO.: 2011-AIR-00005

In the Matter of:

MICHAEL HARDING,
Claimant,

v.

SO. CAL PRECISION AIRCRAFT;
NORTON AIRCRAFT MAINTENANCE
SERVICES, INC.
Respondents,

DECISION AND ORDER GRANTING RELIEF

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21" or "the Act"), as implemented by 29 C.F.R. Part 1979 (2002). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102.

Michael Harding ("Complainant") was employed as an inspector, lead inspector, data coordinator, assistant quality control manager, and senior audit inspector for So. Cal Precision Aircraft Inc. ("SCPA") until his employment was terminated on October 10, 2007. On November 9, 2007, Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor ("DOL") alleging that Respondent had terminated his employment due to activity that is protected under AIR 21. Complainant alleged the protected activity occurred on October 8, 2007 when he sent a formal complaint for witnessed wrongful, unsafe, and dangerous regulatory violations to the FAA.

On April 22, 2010, during the initial phase of an investigative report OSHA found the circumstances in the case sufficient to raise the inference that Complainant's protected activity was a contributing factor to the adverse actions taken against him. In addition, OSHA found that complainant had made a *prima facie* showing that protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint, and SCPA had failed to demonstrate

by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of the protected activity. On March 23, 2011, upon completion of the investigation, OSHA found that the preponderance of evidence did not demonstrate that Complainant's protected activity contributed to SCPA's decision to terminate him.

On April 8, 2011, Complainant requested a hearing by an administrative law judge pursuant to 29 C.F.R. § 1979.106(a). The case was assigned to the undersigned, who held a formal hearing in Long Beach, California on May 31, 2011. The parties were afforded a full and fair opportunity to present evidence and arguments. Claimant represented himself and Respondent, Norton Aircraft Maintenance Services, Inc. ("NAMS") was represented by counsel. Respondent SPCA did not appear in court.[1] Administrative Law Judge Exhibits ("AX") 1-3, Complainant's Exhibits ("CX") 1-5, and Respondent's Exhibits ("RX") 1-7 were admitted into the record.[2] The following witnesses testified at the hearing: Michael Harding, T. Milford Harrison, Dwight Leon Perryman, and Greg Johnson. The parties were provided the opportunity to present post trial briefs. On August 31, 2011, Respondent filed a post-trial brief. Complainant did not file a post trial brief.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent. Any evidence in this record that has not been discussed specifically has been determined to be either relevant but comprised in other evidence or insufficiently probative to affect the outcome directly.

ISSUES

1. Whether AIR 21 applies.

2. Whether Complainant engaged in protected activity and, if so, whether Respondent knew of the protected activity.

3. Whether Respondent engaged in an adverse employment action.

4. Whether the protected activity was a contributing factor in Respondent's decision to take adverse action.

5. Whether Respondent provides clear and convincing evidence of a non-discriminatory motive for the adverse action.

6. If Complainant prevails, what relief is appropriate.

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[1] Because NAMS is found to be the successor-in-interest to SCPA, this opinion uses Respondent to refer to NAMS and/or SCPA. However, when clarity between the two corporations is needed the name of the specific corporation is used.

[2] *See* Hearing Transcript ("TR") at 15, 16, 17, 18, 21, 22, 24, 31, 32. CX 1-5 were admitted over Respondent's objection and RX 2, RX 3 were admitted over Complainant's objections. TR at 20-21, 31-32; TR at 23-24.

FINDINGS OF FACT

This Air 21 claim was brought by Complainant concerning the termination of his employment by SCPA, where Complainant was an inspector, lead inspector, data coordinator, assistant quality control manager, and senior audit inspector for ten months.[3] Complainant alleges that Respondent violated the Act when it terminated his employment on October 10, 2007 because he filed a complaint with the FAA on or about October 8, 2007 discussing several aviation safety issues, which he claims constituted protected activity under AIR 21. Respondent replies that the termination was unrelated to the complaint filed with the FAA, claiming that Complainant was terminated for good cause because he could not fulfill his job duties. In addition, Respondent argues that complainant never worked for NAMS, and NAMS is not the successor-in-interest to SCPA.

Complainant served in the United States military for 31 years and retired as a Master Sergeant E-8. *See* Hearing Transcript (hereinafter, "TR") 37-38. After retiring from the military Complainant first started working on aircraft when he took a job with Lear-Siegler as a defense contractor. TR 39. In February 2000, Complainant went to work for Raytheon and earned his Airframe and Power Plant Mechanics License ("A&P license"). TR 40-41; CX 1:2. From 2000 to 2007, Complainant held various short-term contract jobs as an A&P mechanic. TR 41-42; CX 1:1-2.

In December 2006[4], Complainant started working for SPCA as an inspector. TR 55. SPCA was a Part 145 repair facility, operating under FAA certificate number (#S2BR556Y) at San Bernardino International Airport ("SBD"). TR 61; CX4:2; RX3. SCPA undertook to provide air transportation and performed safety-sensitive functions, including aircraft maintenance and airworthiness testing, by contract for various air carriers at SBD. RX4:1; CX4:2.

As an inspector Complainant reported to the inspection lead, who he called "Eng." TR 69. After, when Complainant was made parts expediter, he was on the same level as "Eng" and no longer reported to him. TR 69. As parts expediter, Complainant stated he would do occasional rack inspections although his primary job was finding the parts and making sure they were certified and that they went back on the aircraft when they were available. TR 70. When Complainant was promoted to data coordinator he was given lead status and was above "Eng." TR 70.

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[3] There is conflicting evidence regarding the length of time Complainant worked for SCPA. Complainant's resume states that he worked for SCPA from December 2006 to November 2007. CX 1. Complainant also agreed to these dates at the hearing. Hearing Transcript at 42. However, in complainant's pretrial statement of complaint he states that he worked for SCPA from December 2005, which was most likely a typographical error, to November 2007. AX at 1. In the first complaint to the FAA, Complainant states that he came to SCPA in January 2007. CX 2 at 1. In the first amended complaint to the FAA, Complainant states that he was terminated from SCPA on October 10, 2007. CX 3 at 1. The preliminary investigative report from OSHA declared that Complainant worked for SCPA from January 2007 to October 2007. CX 4 at 2. The final investigative report from OSHA stated that Complainant was terminated in October 2007.

[4] See Footnote 1 *Supra*.

Complainant was also part of Human Resources and had to review resumes. TR 59. Complainant testified that with his military background safety was paramount and he also became a trainer and safety officer at SCPA. TR 57-58. He was assigned the task of safety officer because of his years of experience as Instructor at the JFK Special Warfare Center, Ft. Bragg, NC. CX 2:1. In Complainant's trainer and safety officer roles he gave all of the SCPA safety briefings, production procedure outlines, and work scope orientations to all of the incoming personnel. CX 2:1.

Complainant stated that he eventually worked his way up to senior audit inspector based on his experience, exposure, training and background. TR 57. With this promotion, he was given mid-management status and Complainant's supervisor was Quality Control ("QC") Director William Hoppe. TR 70; CX 2:2. Eventually Complainant reported to Brian Randall, who became QC manager in May 2007 after William Hoppe hired him. TR 70. In his senior audit position, Complainant stated that he made daily complaints regarding safety issues. TR 71-72. He also had two or three meetings with William Hoppe. TR 80. Complainant testified that throughout his time at SCPA he witnessed many safety issues and would address them to management and note them down in his notebook. TR 65; AX 2:1.

In January 2007, Complainant witnessed Emilio Santos use an acetylene torch to burn the tops off a cradle. TR 62; CX 3:2. Mr. Santos had no training on the torch and was blowing slag towards and hitting an aircraft ten feet away. TR 62; CX 3:2. Complainant told Mr. Santos to stop but he did not follow Complainant's order. TR 62; CX 3:2. Complainant informed Greg Albert, SCPA President and CEO, of the safety violation but nothing followed. TR 62; CX 3:2.

In February 2007, while working on a 1500-pound cargo door, somebody "propped" the door "full open" with a wooden 2x4 instead of opening it hydraulically and locking it in place. TR 65-66; CX 3:2. Complainant pointed out the safety issue to Tobias Bonilla, a mechanic that should have been supervised by an A&P mechanic. TR 65-66; CX 3:2. Complainant told him not to do it again; however, Mr. Bonilla placed the same 2x4 back in position, only the next time, loosely "safety wired." TR 65-66; CX 3:2.

In April 2007, Complainant testified that Greg Albert violated rules by allowing SCPA to operate without a qualified Director of Maintenance. TR 68; CX 3:2. This occurred when Rodney Brown, Director of Maintenance quit and SCPA, in ten days, replaced him with Marvin Perry, who lacked the required experience, and living in Tucson, only appearing on site two to three days a week. TR 67; CX 3:2.

In May 2007, William Hoppe hired Brian Randall as the QC manager and Complainant began reporting to Brian Randall. CX2:2. Immediately, Brian Randall started removing Complainant from as many duties as possible, including training schedules, library activities, HAZMAT class assignments, and safety check. CX 2:2; CX 3:1. As the safety violations continued, Complainant stated that he made daily complaints to Brian Randall. TR 72, 86. Complainant testified that at least eight hours of training before new hires take the floor is required by FAA, but after SCPA hired the new QC manager, the QC manager decided that the company did not need any of that training. TR 59. As a result, SCPA did not have the required HAZMAT training or access to the training manual. TR 59. In addition, there was no training

on filling out the proper paper work, and when Complainant attempted to give five-minute safety briefings, Dwight Perryman would break them up and tell people to return to work. TR 59.

Complainant testified that he had also been directed to violate a safety rule or violation. TR 80. Around the end of September, 2007, Complainant was ordered to use his inspection stamp to confirm entries in a "tally book" where numerous incorrect entries were not in line with standing FAA regulations. AX 2:1. When Complainant refused to do so because his FAA license would be at risk, Brian Randall became angry and ordered him out of the office and demanded complainant relinquish his QC office key yelling "just get the fuck out, you're fired, go home." But Complainant refused to go home. AX 2:1; CX 2:1. Later Brian Randall realized that he could not demote Complainant because Complainant was the only inspector with the certification and experience to hold the position of Senior Audit Inspector. AX 2:1.

Complainant claimed that by late September it had become obvious that SCPA had been failing in many areas in meeting its contracted obligations for scheduled work or keeping regulatory guidelines. CX 2:1. These failings were common knowledge and had been repeatedly brought to the attention of QC manager Brian Randall. CX 2:1. Complainant claimed that during late September, Jesus Gonzales, the primary FAA maintenance inspector ("PMI"), held a special meeting for the QA director, QC manager and dock control personnel to point out that SCPA had a documentation problem and personnel certification challenge that needed to be corrected. CX 2:2. Complainant was present at the meeting and took notes. CX 2:2. Jesus Gonzales had been the PMI for several firms that Complainant worked for. TR 81-82.

Complainant testified that SCPA's QC manager, Brian Randall, revealed to Complainant that he would fire him if he could because Brian Randall knew that Complainant was keeping a list of all SCPA's accidents, broken rules and FAA violations. TR 87; AX 2;1. Subsequently, on October 08, 2011, Complainant took the notes from his notebook of safety violations and wrote a formal letter of complaint to the FAA office in Riverside, California. TR 87; AX 2:1. This letter detailed the above referenced safety violations. CX 2.

Complainant alleged that the following day Jesus Gonzales arrived at SCPA and had a brief meeting with the manager, Greg Albert. TR 87-88; AX 2:1. Complainant saw Jesus Gonzales show Greg Albert the complaints and then saw Jesus Gonzales point to Complainant. TR 87-88; AX 2:1. At the time, Complainant was not in his office but was speaking with Mr. Francis the intake inspector. TR 89. Mr. Francis told Complainant that Jesus Gonzales was in the hangar and at that moment Complainant saw Greg Albert exit his office and approach Jesus Gonzales. TR 89. Jesus Gonzales then showed Greg Albert some papers that Complainant assumed were his complaints and then Jesus Gonzales pointed to Complainant. TR 89. Jesus Gonzales never spoke to complainant that day. TR 89.

Complainant went on to testify that on October 10, 2007, Melvin Perry, the Director of Maintenance told Complainant that he was "invited" to a meeting in the HR office. TR 90; AX 2:1. Complainant asked another inspector, Victor Martinez, to accompany him as a witness. TR 91; AX 2:1. Melvin Perry did not like that and ordered Victor Martinez not to come, but allowed it once it was clear that Complainant would not attend the meeting without Victor Martinez. TR 91; AX 2:1. When Complainant and Victor Martinez arrived at the HR office, the HR secretary,

Melinda Hoya, demanded that Victor Martinez leave, but again Complainant told Victor Martinez to stay. TR 91; AX 2:1. Melinda Hoya gave Complainant a form to write down a reason he was being suspended. TR 91-92; AX 2:1-2. Complainant wrote that he was being suspended for contacting the FAA inspector, but Melinda Hoya stated that that would not do and demanded he sign a blank form for her to fill in later. TR 92; AX 2:2. Complainant perceived that everyone knew about the FAA complaint he had sent and someone may have mentioned it during the whole confusion of the unfolding scene. TR 105.

Complaint further testified that the room was filled with people including Victor Martinez, Melvin Perry, William Hoppe, Brian Randall, and Chris Willis, the floor supervisor. TR 94-95. Melvin Perry told Complainant that they were going to have to let him go meaning suspend Complainant. TR 95. However, Complainant knew that suspension without pay was the same as termination because they would not let him return. TR 99. There were also repeated comments by Greg Albert and Brian Randall to "get the fuck out and don't come back." TR 99. Complainant was terminated from SCPA on October 10, 2007. TR 87.

Greg Albert had entered the office upset and cursing, telling Complainant that that he had six attorneys who were going to "kick [Complainant's] ass." TR 92, 95; AX 2:2. When Complainant attempted to leave, Greg Albert spit in his face and blocked his way. TR 92; AX 2:2. Complainant called for security but when the officer arrived Greg Albert told the officer that Complainant had attacked him and was to leave immediately. TR 92-93; AX 2:2. Bruce Gilbert, the Avionics supervisor and marketing manager, pushed Greg Albert aside and Complainant was able to leave. TR 93; AX 2:2. Complainant returned later with Bruce Gilbert's help to retrieve complainant's personal effects. TR 93; AX 2:2.

During his time with SCPA, Complainant testified that he had never received a derogatory review; he had never received anything but promotions. TR 100.

Complainant claimed that on October 12, 2007 he sent an amended complaint to the FAA. CX 3. In this letter he referenced the previous letter of October 8, 2007 and provided an in depth report of the numerous violations, unsafe acts, and wrong activities done at SCPA. CX 3:1. On November 9, 2007, Complainant filed a complaint to the OSHA, attaching the referenced FAA complaints and seeking whistleblower protection.

Complainant had a hearing with the State Labor Commission to collect back wages from SCPA. SCPA was represented by Melinda Hoya. TR 101. Melinda Hoya signed an agreement that Complainant was owed the money and he would be paid it within 30 days or SCPA would suffer a $235 fine for each day after that up to a limit of 60 or 90 days. TR 101. SCPA did not pay anything and Complainant received an order. TR 101. At the time Complainant was terminated he was making $25 an hour 40 hours a week, but he also worked a lot of overtime hours. TR 102-103.

From December 2007 to February 2008, Complainant worked as an A&P mechanic on a short-term contract for Certified Aviation Services in Ontario, California. TR 44; CX 1:1. Complainant worked 40 hours a week and was paid $22 an hour at Certified Aviation Services. TR 54. In February 2008, Complainant worked under a state department contract with

Blackwater, USA until June 2008 as an A&P convoy escort. TR 45; CX 1:1. At Blackwater, Complainant made approximately $14,000 a month for three months. TR 54. Next, from June 2008 to November, 2008, Complainant worked under contract for Dassault Falcon Jet as a Contract Inspector. TR 47; CX 1:1. Dassault Jet paid Complainant $28 an hour for 40 hour weeks. TR 53. Following this job, Complainant worked for DynCorp in Mannheim, Germany from November 2008 to April 2009. TR 47; CX 1:1. At DynCorp Complainant made approximately $35 an hour and worked 40 hours a week. TR 52. From April 2009 to at least the time of the Hearing, Complainant worked at DATA-Works, Fowler as Senior Maintenance Coordinator and contract A&P. TR 49; CX 1:1. Complainant was making approximately $17,000 a year at Dataworks. TR 51. After Complainant's termination from SCPA he applied for unemployment but never received the award. TR 49; CX 1:1.

Norton Aircraft Maintenance Services, Inc.

On January 18, 2009, Norton Aircraft Maintenance Services, Inc. ("NAMS") was incorporated in Delaware. TR 120; RX 1:1. NAMS was qualified to do business in California on January 22, 2008. TR 120. On January 22, 2008 NAMS, agreed to purchase assets from SCPA. TR 120; RX 2. These purchases included parts, tooling, machinery, vehicles, some personal property, office furnishings, the lease, Part 145 certificate, accounts receivable, insurance policies and some books and papers. TR 121; RX 2:1-2. NAMS did not purchase all of SCPA's assets. TR 121; RX 2:2-3. For Consideration, NAMS assumed SCPA's liabilities but these liabilities did not include any claims of wrongful termination, violation of AIR 21 Act, or liability for Complainant's claims. TR 121; RX 2:3-4. NAMS did not exchange any of its stock for the purchased assets nor was SCPA merged into NAMS. TR 122.

NAMS took over doing the same type of repair work that SCPA had previously done, using the same facilities, the same workforce, the same supervisory personnel and the same machinery and equipment as had SCPA. TR 128; RX 2. At the time that NAMS conducted the asset agreement, SCPA had around 50 employees. TR 129. All except approximately 10 of SCPA's employees were offered a job at NAMS. TR 129-130. The employees taken up by NAMS were a mix of supervisory and managerial employees. TR 130. One of the liabilities that NAMS took over was the payment of back federal taxes, which included FICA and other federal income withholding taxes and also the payment of back wages owed by SCPA. TR 131; RX 2:3.

At the time of the hearing, NAMS had 25 employees and at one point reached a maximum of approximately 80 in the last three and a half years. TR 132. NAMS continued some of SCPA work orders and generated new work orders, and SCPA kept some of its own work orders. TR 132. Greg Albert is listed on the asset purchase agreement as an individual selling assets to NAMS. TR 132-133; RX 2:1. Greg Albert was also the principal responsible for the Part 145 FAA Certificate authorizing NAMS's repair facility. TR 133. He had been both a paid employee and contract employee for NAMS. TR 133-134. He also held the office of President of NAMS for a short time in the beginning but was never a shareholder. TR 134-135. He was expected to direct maintenance business to NAMS TR 136. All of Greg Albert's connection with NAMS ceased at some point. TR 135.

At the time of the hearing, NAMS was operating under its own Part 145 certificate and was changing its corporate structure by forming a new parent corporation and redoing the various six different companies at the airport. TR 123, 139.

OSHA Preliminary Investigative Report

On April 22, 2010, OSHA sent NAMS, as successor-in-interest to SCPA, its preliminary investigative report regarding Complainant's Air 21 case. CX 4:1. In this letter OSHA noted that SCPA was mailed notice of the complaint via certified mail on or about November 21, 2007. CX 4:1. After notification, SCPA was given an opportunity to defend its position, and on November 26, 2007, Greg Albert, representing SCPA, sent a letter in response. CX 4:1. Interviews were scheduled with OSHA, Greg Albert, and three SCPA employees on October 10, 2008 but were cancelled due to emergency. CX 4:1-2. Subsequently, Greg Albert refused to cooperate with OSHA and directed all further contact to his attorney. CX 4:2.

The report found NAMS successor-in-interest to SCPA and noted that SCPA ceased operating in or around December 2007. CX 4:2. The report stated:

> To keep the operation afloat, in late January 2008, SBD Aircraft Services LLC, the master lessee of Hanger Complex facility at San Bernardino International Airport, invested more than $1 million dollars in a joint venture merging SCPA and [NAMS] and shedding the name SCPA in favor of Norton Aircraft Maintenance Services. Scot Spencer, general manager of SBD Aircraft Services, indicated that his investment in SCPA was to ensure that it continued to operate to provide crucial repair and maintenance services for the San Bernardino International Airport. [NAMS] performs the exact same repair and maintenance services SCPA performed. [NAMS] and SCPA share the same business address. Greg Albert, CEO and President of SCPA, remained president and/ or general manager of [NAMS], although he is not currently working in that position. [NAMS] and SCPA share the same Federal Aviation Administration (FAA) certificate number (#S2BR556Y). [NAMS] operates as a Chapter 145 Repair Station, as did SCPA.

CX 4:2.

The report found that NAMS had been constructively notified of Complainant's complaint through Greg Albert, who was directly involved in the termination of Complainant and subsequently president and/ or general manager of NAMS for a time. CX 4:2. The report also found that Complainant was an employee within the meaning of 49 U.S.C. § 42121 and that SCPA was a contractor under the meaning of 49 U.S.C. § 42121(e). CX 4:2. In addition, the report noted that Complainant engaged in protected activity when he filed a complaint with the FAA on or about October 8, 2007 and, as a result, the FAA inspected SCPA's facility and recommended several improvements. CX 4:2.

The report noted that Greg Albert suspected Complainant of filing a complaint to the FAA and believed that Complainant passed copies of the complaint around SCPA before he was terminated despite Complainant's disputing that he did so. CX 4:2-3. The Complainant suffered adverse actions when he was suspended on October 10, 2007 and later terminated on the same day by Greg Albert. CX 4:3.

The report found that Complainant's protected activity was a contributing factor in the adverse action taken against him for two reasons: (1) Greg Albert exhibited animus toward Complaint's protected activity when he indicated to OSHA that Complainant caused turmoil on the hanger floor among the workers by passing out copies of his FAA complaint; and (2) Complainant was suspended and terminated two days after filing his complaint to FAA and allegedly passing out copies of the complaint, thus, temporal proximity existed. CX 4:3.

Although Greg Albert maintained that Complainant was originally suspended pending investigation for failure to complete records and was later terminated for confrontational behavior, Greg Albert provided no documentation or evidence. CX 4:3.

The report concluded by stating that Complainant succeeded in making a *prima facie* showing that protected activity was a contributing factor in his termination and that SCPA failed to demonstrate by clear and convincing evidence that they would have taken the same unfavorable personnel actions in the absence of protected activity. CX 4:3.

OSHA's Final Investigative Report

OSHA completed and sent to Complainant its final investigative report on March 23, 2011. OSHA found that there was no reasonable cause to believe that Respondents violated AIR 21. RX 4:1. OSHA found that Complainant worked as auditor for SCPA, and SCPA was a contractor of air carriers. RX 4:1. The report stated that SCPA ceased operation in December 2007 and its corporate charter had been suspended since January 2, 2009. RX 4:1. It found that SCPA filed for Chapter 7 bankruptcy protection on March 5, 2009, and on November 10, 2009, the bankruptcy proceedings were closed without discharge after the Trustee reported that there were no assets of the estate to distribute to creditors. RX 4:1. The report named NAMS as the successor-in-interest to SCPA. RX 4:1.

The report found that Complainant was terminated on or about October 10, 2007, and on November 9, 2007, Complainant filed a complaint with OSHA alleging that Respondents discriminated against him in violation of AIR 21. RX 4:1. On or about October 8, 2007, Complaint either filed or was about to file a complaint with the FAA regarding several aircraft safety-related allegations; however, since OSHA dismissed the case on other grounds, it assumed without deciding that Complainant engaged in protected activity. RX 4:2.

The report found that former SCPA and NAMS owner Greg Albert acknowledged that he was aware that Complainant passed around copies of an FAA complaint that Complainant had filed; therefore, SCPA had employer knowledge. RX 4:2. It found that Complainant suffered adverse employment actions when he was suspended and then terminated on or around October 10, 2007. RX 4:2.

The report concluded that a preponderance of the evidence did not establish nexus even though there was evidence of temporal proximity. RX 4:2. A preponderance of the evidence did not demonstrate that Complainant's protected activity contributed to SCPA's decision to suspend him because the evidence established that Complainant was suspended because a customer complained that Complainant incorrectly filed documents, costing SCPA hundred of labor hours to correct the mistake. RX 4:2.

The report concluded that a preponderance of the evidence did not demonstrate that Complainant's protected activity contributed to SCPA's decision to terminate him because the evidence established on the whole that Complainant was terminated because he had a physical and verbal altercation with a manager after learning he would be suspended, which required SCPA to call security to escort him off the premises. RX 4:2. Thus, the complaint was dismissed. RX 4:2.

Dwight Perryman

Dwight Perryman worked for SCPA from August 2005 until January 2008. TR 173. He started as a Supervisor of Planning and Production Control and then was promoted to Director of Planning and Production Control. TR 173. Dwight Perryman worked with Complainant and recognized that Complainant's first supervisor was William Hoppe and subsequently Brian Randall. TR 174. Dwight Perryman testified that Complainant was hired as an inspector to go out and perform general inspection on the aircraft per the work cards. TR 174. Dwight Perryman's understanding was that Complainant was not able to perform this job because he was told that Complainant could not get up and down the ladders to inspect the aircraft. TR 174.

According to Dwight Perryman, SCPA moved Complainant over to do rack inspections because he could not perform his inspector job. TR 175. In this capacity Complainant's duty was to inspect the parts on the rack to find out if they had defects. If they had defects, then Complainant's duty was to write up non-routines to cover those defects. TR 175 Dwight Perryman claimed that Complainant was not able to perform this job either as he confused mechanics with his overly long write-ups of the defects. TR 175-176. Dwight Perryman testified that Brian Randall had several conversations with him about how unsatisfied he was with Complainant's performance. TR 176.

Dwight Perryman stated that to try and find a place for Complainant, Brian Randall put Complainant in Dwight Perryman's office to be the paperwork auditor after the old auditor left. TR 176. This job did not require either the physical stamina of the inspector job or the type of writing as the rack inspector job. TR 176-177.

Dwight Perryman did not think that Complainant was an easy person to work with. When Dwight Perryman tried to explain to Complainant that Complainant's morning safety meetings had to be brief, Complaint responded that he would talk as long as necessary. TR 177. Consequently, Dwight Perryman broke up the meetings and Complainant was belligerent to Dwight Perryman after that. TR 177. Brian Randall did not like the morning safety meetings either and told Dwight Perryman that they needed to be brief because Greg Albert would

complain that the employees were standing around. TR 178. Dwight Perryman did not know whether Brian Randall ever warned Complainant about the morning meetings. TR 178.

Dwight Perryman thought Complainant's reputation was routinely belligerent, explaining that when Complainant discovered he would not have eight hours for new employee orientation he became really upset. TR 178. Dwight Perryman also witnessed Complainant come to his production control dock and telling one of the female employees to "get up and grab a broom" even though that was not Complainant's employee. TR 179. Later the female employee filed a sexual harassment complaint. TR 179.

As auditor, Complainant moved into the office of Dwight Perryman, who was the custodian of aircraft records at the time. TR 179. Dwight Perryman observed Complainant's performance and did not think that he did a good job. TR 179. Dwight Perryman observed Complainant audit paperwork for airplanes that were gone, which would cause a big record keeping problem and FAA violation because then SCPA's copy would be different than the client's copy. TR 180. Complainant continued to make these type of changes even after William Hoppe and Brian Randall warned him not to. TR 180.

Dwight Perryman was working on October 10, 2007 and heard Complainant, William Hoppe, and Brian Randall in a loud conversation about Complainant's job performance. TR 181. After the conversation got loud, Dwight Perryman left his office because he did not want to be involved. TR 182. Dwight Perryman did not remember whether the loud conversation mentioned the complaint letter to the FAA. TR 184.

Dwight Perryman heard rumors that they were going to suspend Complainant, and after Complainant did not want to go, Complainant was terminated. TR 182. Dwight Perryman's understanding is that Complainant was terminated because he was unable to perform any of the three jobs that he was assigned. TR 182. Dwight Perryman did not see a physical altercation between Complainant and William Hoppe or between Complainant and Brian Randall. TR 182.

Before Complainant was terminated, Dwight Perryman never saw or heard of a letter circulated that Complainant wrote to the FAA. TR 183. Dwight Perryman thinks that within a week after Complainant was terminated Jesus Gonzales from the FAA came to the hanger and informed the senior management that a complaint had been turned into him but would not say from whom due to confidentiality. TR 183.

Dwight Perryman was hired by NAMS through an offer letter of employment. TR 185. This letter gave Dwight Perryman's position as Director of Planning and Production Control and stated his salary. TR 186. Dwight Perryman's position was the same at NAMS as it was at SCPA but had a small reduction in salary. TR 189. Dwight Perryman was owed back wages from SCPA but had not received any money. TR 186. Dwight Perryman did not know anyone who was owed money from SCPA who had received any money. TR 186. Dwight Perryman had taken his last check to SCPA's bank and was told that there was insufficient funds in the account. TR 187. The check was dated December 28, 2007. TR 191.

Greg Johnson

Greg Johnson worked for SCPA from 2006 to 2008. TR 206. Greg Johnson was hired as the nighttime tool crib attendant. TR 206. His next position was in stores and then as shipping/receiving inspector. TR 207. Greg Johnson worked with Complainant and recognized Brian Randall as Complainant's supervisor and believed that Greg Albert was his supervisor before Brian Randall. TR 207.

Greg Johnson believed that Complainant's first job at SCPA was as inspector and in this capacity he was supposed to inspect the physical aircraft. TR 208. Greg Johnson stated that there were certain areas of the aircraft he could not get into, and with Complainant's age, he could not climb up and down the ladders. TR 208.

Greg Johnson was told that after Complainant was unable to perform his inspector job he was moved to inspect parts that were taken off the plane and put on the rack. TR 208. This responsibility did not require any climbing but only to look at the parts on the rack and note down what was wrong with the part. TR 209. Greg Johnson testified that Complainant did not perform this job very well. TR 209. He stated that the parts the Complainant had noted were good were not good, and that there were fabrications on the paperwork. TR 209-210. Although Greg Johnson was not in the office where Complainant was confronted about these fabrications, he testified that he knew Complainant was asked about it. TR 210.

Greg Johnson testified that Complainant complained a lot, was not a good inspector, and found ways to get out of doing things. TR 210. He further stated that supervisors found Complainant hard to believe and a difficult person to work with. TR 210.

Greg Johnson claimed that Complainant's third job was as auditor. TR 211. He testified that he came into daily contact with Complainant and his impression was that Complainant was not able to perform his auditor job. TR 211. Greg Johnson stated that Complainant could not perform his auditor job because Complainant was hiding non-routine cards that he was supposed to have audited that were not done. TR 212. He also stated that cards were found in Complainant's drawers instead of correctly in the file cabinet. TR 213. After Complainant was terminated, Greg Johnson claimed that many cards were found in Complainant's drawers. TR 214. Greg Johnson testified that supervisors confronted Complainant about these cards and Complainant became upset. TR 212-213. Greg Johnson testified that he heard William Hoppe or Brian Randall warn Complainant about his performance as auditor although he did not hear a word they said because they would take Complainant aside. TR 213. Greg Johnson claimed that Complainant always had a problem and got into disputes with William Hoppe and Brian Randall. TR 212.

Greg Johnson worked on the day Complainant was terminated, October 20, 2007. TR 214. He heard an argument between William Hoppe and Complainant that was loud enough that everyone could hear. TR 214. From where Greg Johnson was at, he could not understand every word but heard that Complainant was being asked to leave the building by Brian Randall. TR 214. Greg Johnson believed that airport security was called because Complainant did not want

to leave the premises. TR 215. He testified that Complainant was completely out of control and insubordinate and he refused to listen to William Hoppe and Brian Randall. TR 215.

Greg Johnson testified that there was an FAA complaint letter circulating at SCPA, but he did not see the letter before Complainant was terminated. TR 216. He only saw the letter a little after Complainant was terminated. TR 216. Greg Johnson also testified that he did not hear of the FAA complaint prior to Complainant's termination. TR 217. He is not sure whether Jesus Gonzales was on the premises October 10th, 9th, or 8th. TR 217. Greg Johnson's understanding was that Complainant was terminated because he was not able to do the job that he was hired to do and was insubordinate and had infractions for the other jobs he was assigned to. TR 217-218.

At the time of the Hearing, Greg Johnson was working for San Bernardino Airport Maintenance Techniques ("SBAM'). SBAM performs aircraft maintenance and works in the same facility as NAMS. TR 220. Greg Johnson reports to Dwight Perryman. TR 222. Greg Johnson testified that Dwight Perryman does not work for NAMS but for SBAM. TR 222.

Greg Johnson was still working with SCPA in January, 2008 when they disappeared from the airport. TR 231. He was offered a letter of employment by NAMS. TR 231. SCPA owed Greg Johnson back wages but he was never paid them. TR 232. He did not know of anyone who had collected back wages. TR 232.

CONCLUSIONS OF LAW

Air carriers are prohibited under AIR 21 from discharging or otherwise discriminating against any employee because the employee, inter alia, provided the employer or Federal Government with information "relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other provision of Federal law relating to air carrier safety…." 49 U.S.C.A. § 42121(a). To secure an OSHA investigation, a complainant needs only to raise an inference of unlawful discrimination (i.e., establish a prima facie case), while at the adjudicatory stage a complainant must prove unlawful discrimination by a preponderance of the evidence. *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-Air-8, slip op. at 13 (ARB Jan. 31, 2006). Thus, the prima facie structure serves a gate-keeping function by setting the minimal standard required to secure a foothold in the courtroom in cases where the complainant relies on circumstantial evidence of discrimination. 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.104(b); *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 8 (ARB January 30, 2004).

In contrast, once the hearing takes place, the complainant must prove by a preponderance of evidence all of the standard elements required in any whistleblower case: (1) status; (2) engaging in protected activity; (3) adverse action; (4) a causal connection. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11, slip op. at 9 (ARB June 29, 2007).

In *Brune*, *supra*, at 13-14, the ARB restated the procedures and burdens of proof applicable to an AIR 21 whistleblower complaint, which it had previously articulated in *Peck*, *Supra*, slip op. at 6-18. The ARB stated that to prevail at the hearing stage the complainant must do more than make a prima facie showing, that is, the complainant must demonstrate discrimination by a preponderance of evidence. *See Brune*, *supra*, at 13. However, the ARB went on to state:

> This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR 21 cases. The Title VII burden shifting pretext framework is warranted where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action.
>
> Thereafter, and only if the complainant has proven discrimination by a preponderance of evidence and not merely established a prima facie case, does the employer face a burden of proof. That is, the employer may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event.

Brune, *supra*, slip op. at 13-14 (footnotes omitted).

Thus an affirmative defense is available to the employer if it can produce clear and convincing evidence that it would have taken the same adverse employment action regardless of any protected activity. *See* 49 U.S.C.A. § 42121(b)(2)(B)(iv); *see also* 29 C.F.R. § 1979.109(a). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *See Brune*, *supra*, at 14, n.37, citing *Black's Law Dictionary* 577 (7th ed. 1999). However, the ultimate burden of persuasion that the respondent intentionally discriminated because of complainant's protected activity remains at all times with the complainant. *See Taylor v. Wells Fargo Bank*, ARB No. 05-062, ALJ No. 2004-SOX-43, slip op. at 5, n12 (ARB June 28, 2007).

Whether AIR 21 Applies

A complainant is an "employee" for the purposes of AIR 21 if the complainant is "an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier…," and a contractor means "a company that performs safety-sensitive functions by contract for an air carrier." 29 C.F.R. § 1979.101. Both the status that Complainant was an "employee" and that SCPA and NAMS are contractors within the meaning of 49 U.S.C. § 42121(3) are not contested. Both SCPA and NAMS performed safety-sensitive functions,

including aircraft maintenance and airworthiness testing, by contract for various air carriers at San Bernardino International Airport. Complainant was hired by SCPA in January 2007 and eventually became SCPA's lead auditor; therefore, Complainant is an employee within the meaning of 49 U.S.C. § 42121. In addition, Complainant learned of his termination on or about October 10, 2007 and filed his AIR 21 complaint with OSHA on November 9, 2007. As this complaint was filed within 90 days of that adverse action, it is deemed timely. 49 U.S.C. §42121(b)(1). The parties, nevertheless, dispute whether AIR 21 applies; specifically, they dispute whether NAMS is the successor in interest to SCPA.

Successor Liability

The development of successor liability theory in employment law began with a series of U.S. Supreme Court cases discussing successor liability in the context of labor disputes. In *Golden State Bottling Company, Inc. v. National Labor Relations Board*, the Supreme Court held that "a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65(d)." *Golden State Bottling Company, Inc. v. National Labor Relations Board*, 414 U.S. 168, 180 (1973).

Following the *Golden State* decision, the Sixth Circuit was the first to extend successor liability theory to a Title VII case. *See EEOC v. Macmillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974). In *Macmillan*, the court stated that "[w]e are of the view that the considerations set forth by the Supreme Court … as justifying a successor doctrine to remedy unfair labor practices are applicable equally to remedy unfair employment practices in violation of Title VII." *Id*. at 1090-91. Furthermore, the court found that failing to find successor interest could emasculate Title VII claims by leaving the victim uncompensated and would also encourage evasion under the pretense of transfers of ownership. *Id*. at 1091-92.

The same analysis to remedy unfair labor practices in Title VII also applies to employee protection from discrimination in AIR 21 cases. In addition, the same concerns of leaving the victim uncompensated and encouraged evasion would also threaten to emasculate AIR 21 claims. Thus, AIR 21 claims are subject to the same successor liability analysis as Title VII claims.

The *MacMillan* court indicated that an employer may be a successor for some interests but not in other interests; therefore, the court must look at the particular facts of the case and "balance the interests of the employee and employer with the particular legal obligation at issue before deciding whether a successor should inherit liability." *Id*. at 1091. The *Macmillan* court set forth a list of nine factors that courts should consider when addressing successor liability:

1. Whether the new employer had notice of the charge or claim before acquisition of the business;

2. The ability of the predecessor to provide relief;

3. Whether there has been substantial continuity of the same business operations;

4. Whether the new employer uses the same plant;

5. Whether the new employer uses substantially the same workforce;

6. Whether the new employer uses substantially the same supervisory personnel;

7. Whether the same jobs exist under substantially similar working conditions;

8. Whether the new employer uses substantially the same machinery, equipment, and production methods; and

9. Whether the new employer produces or offers substantially the same product or service.

Id. at 1094.

The nine factors that *Macmillan* applied to determine successor liability have been relied upon by many subsequent courts. *See EEOC v. Sage Reality Corp.*, 507 F. Supp 599 (SD NY 1981); *Escamilla v. Mosher Steel Co.*, 386 F. Supp. 101 (SD Tex 1975); *Brown v. Evening News Asso.*, 473 F. Supp. 1242 (ED Mich 1979); *Howard v. Penn Cent. Transp. Co.*, 87 FRD 342 (ND Ohio 1980); *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975); *Trujillo v. Longhorn Mfg. Co.*, 694 F.2d 221 (10th Cir. 1982).

In *Wiggins v. Spector Freight System, Inc.*, the Sixth Circuit found that because the claims of employment discrimination were not known to the potential successor entity at the time it acquired the predecessor, it removed the case from the rationale of *MacMillan*. *Wiggins v. Spector Freight System, Inc.*, 583 F.2d 882, 886 (6th Cir. 1978)

Eight years later, the Sixth Circuit reaffirmed the holding in *Wiggins*, which effectively removed the notice prong of the nine *MacMillan* factors from the balancing test and made it an initial hurdle that must be cleared before moving on to the balancing of the remaining factors. *Rabidue v. Osceola Refining Company, a Division of Texas-American Petrochemicals, Inc.*, 805 F.2d 611, 616 (6th Cir. 1986), overruled on other grounds, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

More recently the Sixth Circuit re-examined the group of U.S. Supreme Court labor cases that addressed successor liability and reviewed its own holding in *MacMillan*. *See Cobb v. Contract Transport, Inc.*, 452 F.3d 543 (6th Cir. 2006). The court in *Cobb* de-emphasized the familiar *MacMillan* nine-factor balancing test and instead declared that an overriding three-prong balancing test first discussed in *Macmillan* was the more appropriate analysis. *Id*. at 552, 554-555, *citing MacMillan*, 503 F.2d at 1091.

Specifically, the *Cobb* court stated that the question of whether the imposition of successor liability is equitable in a particular case requires courts to balance the interests of the defendant employer; interests of the plaintiff employee; and goals of federal policy in light of the

particular facts of a case and the particular legal obligation at issue. *Id*. The Cobb court continued by explaining:

> The nine factors [in *MacMillan*] . . . are not in themselves the test for successor liability. Instead, the nine factors are simply factors courts have considered when applying the three prong balancing approach, considering the defendant's interests, the plaintiff's interests, and federal policy . . . [A]ll nine factors will not be applicable to each case. Whether a particular factor is relevant depends upon the legal obligation at issue in the case. The ultimate inquiry always remains whether the imposition of the particular legal obligation at issue would be equitable and in keeping with federal policy.
>
> *Id*. at 554.

Thus, the Sixth Circuit indicated that in each case where the question of successor liability is in play, a court must divine the specific legal obligation or duty at issue, balance that duty with the other two primary analytic factors (the employer's and employee's interests), use the nine secondary factors of *Macmillan*, if appropriate, to help formulate the proper inquiry and then decide as a matter of equity whether successor liability should be imposed.

Furthermore, the court indicated that privity, defined as "a merger or transfer of assets" and necessary for the plaintiff to show in the 11th circuit, is not always a precondition to successor liability; however, the court acknowledged that under some circumstances it would be appropriate to consider that factor. *Id*. at 555-556. Such circumstances could arise when a court is addressing whether imposing successor liability is equitable in the context of liability for past discrimination. The successor, assuming it has notice of the past activity, would then be able to negotiate a lower purchase price or indemnity clause to protect itself from a potential plaintiff's future claim. *Id*.

In *Trujillo v. Longhorn Mf. Co.* the court found successor liability and that the successor of a fireworks factory originally owned by a Texas corporation was liable for the employee's back pay even when it incorporated and capitalized after the employee's dismissal. *Trujillo v. Longhorn Mf. Co.*, 694 F.2d 221 (10th Cir. 1982). The successor purchased substantially all the assets of the Texas Corporation including its name. *Id*. The court applied the *MacMillan* factors and found that the notice requirement was met through the predecessor's vice president, who was also general manager and stock holder of successor. *Id* The successor company used the same manufacturing plant to make fireworks and used substantially the same workforce and supervisory personnel. *Id*. At the successor company the same jobs and working conditions existed and they used the same machinery, equipment, and methods of production. *Id*. The court found no hardship for the successor company even though the predecessor was still doing business under a new name and was able to provide relief especially because there was notice of the violation and the successor could have negotiated it at the sale agreement. *Id*.

The evidence in the present case clearly indicates that NAMS is the successor-in-interest to SCPA. Every consideration from the nine factors in *Macmillan* is present.

(1) The new employer had at the least constructive knowledge of the charge or claim before NAMS acquired the assets of SCPA. This is through Greg Albert who had been President/ CEO of SCPA and was directly involved in Complainant's termination and also held the office of President of NAMS for a short time when NAMS was starting out. TR 133-134; CX 4:2. Greg Albert had been the person that responded to the OSHA letter mailed to SCPA on or about November 21, 2007. CX 4:1.

(2) There is no ability for the predecessor to provide relief. SCPA filed for Chapter 7 bankruptcy protection on March 5, 2009, and on November 10, 2009, the bankruptcy proceedings were closed without discharge after the Trustee reported that there were no assets of the estate to distribute to creditors. RX 4:1. Furthermore, its corporate charter had been suspended on January 2, 2009. RX 4:1. In addition, Complainant had been owed back pay and still has never been paid. TR 101. In fact neither of Respondent's witnesses nor anyone they knew who had worked for NAMS had received any back pay owed to them from SCPA. TR 186 Thus, SCPA has no ability to provide Complainant relief.

(3) There has been substantial continuity of business operations as NAMS performs the same safety sensitive maintenance functions as SCPA did. TR 128; RX 2. NAMS purchased and worked under the same Part 145 FAA certificate authorizing the repair facility managed under the same President, Greg Albert. TR 133-134. Also NAMS continued some of SCPA work orders. TR 132.

(4) NAMS used the exact same hangar and building that SCPA did. In 2007 the master leaseholder leasing the hangar space to SPCA, SBD Aircraft Services, in turn rented the same space and lease that NAMS acquired through the purchase agreement. TR 149.

(5) There was also substantially the same work force as all but 10 of SCPA's 50 employees came to work for NAMS. TR 129-130. Both of Respondents' witnesses had worked for SCPA and then for NAMS in January 2008. TR 173, 185, 206, 231.

(6) NAMS used substantially the same supervisory personnel. The approximately 40 employees that came to NAMS from SCPA were a mix of supervisory and managerial employees. TR 130. Most importantly the President/ CEO of SCPA became the President of NAMS. TR 133-134; CX 4:2.

(7) Of the 40 SCPA employees hired by NAMS there was a mix of supervisory and managerial employees who continued in their same job. TR 130. Both of Respondent's witnesses carried over their same jobs from SCPA to NAMS. Dwight Perryman continued as Director of Planning and Production control and Greg Johnson as shipping/receiving inspector. TR 189,. NAMS took over the same workforce and the same supervisory personnel as had SCPA. TR 128; RX 2.

(8) NAMS used exactly the same machinery, equipment, and production methods as it purchased all of SCPA's parts, tooling, machinery, vehicles, some personal property, and office furnishings. TR 121; RX 2:1-2.

(9) As mentioned *supra* NAMS offered the same exact service as SCPA when it took over doing the same type of repair work under the same Part 145 FAA repair certificate. TR 121, 128; RX 2:1-2.

The legal obligation under Air 21 is to provide for:

> employee protection from discrimination by air carriers or contractors or subcontractors of air carriers because the employee has engaged in protected activity pertaining to a 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.

29 C.F.R. 1979.100(a).

The employer interests are, like any businesses, to pay off their debts and maintain good standing in the community. NAMS had knowledge of the complaint and could have negotiated it in the asset purchase agreement. The employee's interest is to be protected from discrimination or a negative action by employer for providing information concerning safety concerns.

Balancing the legal obligation with the employee's and employer's interests in addition to considering the nine *MacMillan* factors, and considering NAMS purchase of SCPA assets, I conclude as a matter of equity that successor liability should be imposed. As successor-in-interest AIR 21 applies to NAMS.

Protected Activity

Next, Complainant must show by a preponderance of the evidence that the protected activity contributed to the termination of his employment. *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2005-AIR-11, slip op. at 9 (ARB June 29, 2007). Under AIR 21, an employee has engaged in protected activity when the employee has "provided, caused to be provided, or is about to provide (with any knowledge of the employers) 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." 49 U.S.C. § 42121(a)(1). Such protected activity requires (1) a genuine belief that there was or would be a violation or alleged violation of an FAA order, regulation or standard, or a federal law relating to air carrier safety;(2) this concern was objectively reasonable to the circumstances; and (3) that the complainant expressed the concern in a manner that was "specific" with respect to the "practice, condition, directive or event" that gave rise to the concern. *Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3, slip op. at 14 (ARB July 31, 2006); *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 03-AIR-35, slip op. at 18 (June 29, 2006); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004). The complainant's allegation must only be objectively reasonable in the belief that his or her safety complaint is valid, and need not be ultimately substantiated. *Rooks, supra*, slip op. at 18.

Complainant alleges that he engaged in protected activity when he filed a complaint with the FAA on or about October 8, 2007. Complainant stated that he took the notes of safety violations that he had collected in his notebook and wrote a formal letter of complaint to the FAA office in Riverside California. TR 87; AX 2:1. This letter discussed several aviation safety issues at SCPA, including that an aircraft fell off the jacks resulting in a hole in the wing; "air stairs" were ripped off when an aircraft was moving; there was an overall lack of training at the facility; and SCPA was not following quality control procedures and lacked a quality control system. CX 2. It also included safety-related allegations that SCPA asked Complainant and others to fix documents related to work orders they did not directly work on. CX2:1. The OSHA preliminary investigative report noted that as a result of Complainant's FAA complaint, the FAA inspected the facility after Complainant had been terminated and recommended several improvements, including better tracking and follow up of training records and an internal audit system. CX4:2.

Respondent argues that without evidence of a fax confirmation or certified mail receipt, there was no evidence that Complainant ever sent the complaint either by facsimile or by mail before his termination. TR 113. Respondent also suggests that it would be highly unlikely for the FAA PMI to arrive the very next day as a result of allegedly receiving Complainant's complaint. However, there is ample evidence to prove that Complainant sent the letters or was about to send the letters. Both the OSHA preliminary and final investigative reports reference a complaint letter to the FAA by Complainant. CX 4; RX 4. Both reports also state that Greg Albert had acknowledged that he was aware Complainant had passed around copies of an FAA complaint that Complainant had filed. CX 4; RX 4. Respondent's witness, Greg Johnson, testified that there was an FAA complaint letter circulating SCPA. TR 216. In addition, Complainant testified that on October 9, 2007 FAA PMI Jesus Gonzales came to SCPA in response to the complaint. TR 87-88. Respondent's witness Dwight Perryman also stated that Jesus Gonzales came to the hangar to report that a complaint to the FAA had been filed although Dwight Perryman felt the date was after Complainant had been terminated. TR 183. I find that the evidence shows that Complainant engaged in protected activity when he mailed or was about to mail his complaint to the FAA on October 8, 2007.

Complainant also engaged in protected activity when he repeatedly informed his supervisors of safety violations during his time at SCPA. In January 2007, Complainant witnessed Emilio Santos use an acetylene torch to burn the tops off a cradle. TR 62; CX 3:2. Mr. Santos had no training on the torch and was blowing slag towards and hitting an aircraft ten feet away. TR 62; CX 3:2. Complainant told Mr. Santos to stop, but he did not follow Complainant's order. TR 62; CX 3:2. Complainant informed Greg Albert, SCPA President and CEO, of this safety violation but nothing followed. TR 62; CX 3:2.

In May 2007, William Hoppe hired Brian Randall as the QC manager and Complainant began reporting to Brian Randall. CX2:2. Immediately Brian Randall started removing Complainant from as many duties as possible, including training schedules, library activities, HAZMAT class assignments, and safety checks. CX 2:2; CX 3:1. As the safety violations continued, Complainant testified that he made daily complaints to Brian Randall. TR 72, 86.

Complainant stated that SCPA's failings in meeting its contracted obligations for scheduled work or keeping regulatory guidelines were common knowledge and had been repeatedly brought to the attention of QC manager Brian Randall. CX 2:1. However, Brian Randall revealed to Complainant that he would fire him if he could because Brian Randall knew that Complainant was keeping a list of all SCPA's accidents, broken rules and FAA violations. TR 87; AX 2;1

Respondent does not dispute any communication that Complainant had with his supervisors. I find that Complainant was vigilant about safety and following proper procedures. He continually informed his employer of any issues that he genuinely believed would be a violation of an FAA order, regulation, or standard, which constituted protected activity

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I find that Complainant had a genuine belief that there had been numerous violations of federal law relating to air carrier safety, and that these concerns were objectively reasonable under the circumstances. The complaint to the FAA detailed specifically the events that gave rise to the concerns. Therefore, Complainant engaged in protected activity when he filed a formal letter of complaint to the FAA and when he provided information regarding safety and FAA violations to his employer.

Knowledge of Protected Activity

In a whistleblower case the employer's knowledge of the protected activity is also required, which may be shown by circumstantial evidence. *Rooks, supra*, slip op. at 5; *Kester v. Carolina Power and Light Co.*, slip. op at 9, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 20, 2003). A whistleblower must show that an employee with authority to take the adverse action, or an employee "with substantial input" in that decision, knew of the protected activity. *See id.*, slip op. at 5-6.

The evidence leaves no doubt that SCPA knew of the protected activity. First, Greg Albert knew of Complainant's concern with the safety violation involving Mr. Santos carelessly using a blowtorch as Complaint reported the incident to Greg Albert. TR 62; CX 3:2. Furthermore, both OSHA reports also state that Greg Albert had acknowledged that he was aware Complainant had passed around copies of an FAA complaint that Complainant had filed. CX 4; RX 4. Respondent's witness Greg Johnson testified that there was an FAA complaint letter circulating within SCPA. TR 216. In addition, Complainant testified that on October 9, 2007, FAA PMI Jesus Gonzales came to SCPA and spoke with Greg Albert in response to the complaint. TR 87-88. Respondent's witness Dwight Perryman also stated that Jesus Gonzales came to the hangar to report that a complaint to the FAA had been filed although Dwight Perryman felt the date was after Complainant had been terminated. TR 183. Complaints throughout Complainant's employment with SCPA were also known to Brian Randall, QC Manager, because Complainant complained to him daily. TR 72, 86. Brian Randall also knew that Complainant was keeping a list of all of the safety violations. TR 87; AX 2;1. Therefore, I find that employer had knowledge of the protected activity.

Adverse Employment Action

Not everything that makes an employee unhappy is an actionable adverse action; a complainant must show that something the employer did adversely affected his employment. *Trimmer v. US DOL*, 174 F.3d 1098, 1103 (10th Cir. 1999). The Secretary's regulations forbid air carriers to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any employee who has engaged in protected activity. *See* 29 C.F.R. § 1979.102(b) (AIR 21); *see also* 29 C.F.R. § 24.2(b)(2003) (adopting similar definitions under similar whistleblower protection statutes). Although AIR 21 protections are not reserved for especially detrimental employment actions, such as termination, suspension, demotion, or loss of status or pay, these are certainly the most obvious examples of an adverse employment action. *See Trimmer*, 174 F.3d at 1103.

The evidence leaves no doubt that Respondent engaged in an employment action that adversely affected Complainant's employment when it suspended and then terminated that employment on or about October 10, 2007. TR 99; RX 4:1; CX 4:2; AX 2:2. Respondent does not deny that Complainant was suspended and terminated but argues that he was terminated for good cause. AX 2:2.

Termination of employment clearly constitutes an adverse employment action. *Trimmer*, 174 F. 3d at 1103. I conclude that when Respondent terminated Complainant's employment on or about October 10, 2007, it engaged in adverse action against Complainant.

Whether the Protected Activity Contributed to the Adverse Employment Action

This element of an AIR 21 case requires Complainant to show by a preponderance of the evidence that the protected activity was contributing factor in Respondent's termination of Complainant's employment. *See* 49 U.S.C.A. § 42121(b)(2)(B)(i), (iii) (2003); 29 C.F.R. § 1979.104(b). A contributing factor is "any factor which, alone or in combination with other factors tends to affect in any way the outcome of the decision." *Heinrich v. Echolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51, slip op. at 10 (ARB June 29, 2006). The causal nexus between protected activity and adverse employment action may be established using circumstantial evidence. *See Frady v. Tennesse Valley Authority*, ALJ Nos. 1992-ERA-19 and 34, slip op. at 3 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984), *quoting Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981).

Temporal Proximity Between Protected Activity and Adverse Action

An unfavorable personnel action taken shortly after a protected disclosure may lead the fact finder to infer that the disclosure contributed to the employer's adverse employment action. 29 C.F.R. § 1980.104(b)(2); *Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006) (per curiam). Temporal evidence is but one factor to be considered in determining whether the evidence as a whole suffices to raise the inference that the adverse action was taken in retaliation for the protected activity. *See Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173, 177 (3d Cir. 1997). Although temporal proximity between the protected activity and the

adverse employment action circumstantially creates an inference of causation, it may not be sufficient to establish a violation of AIR 21. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 3, 2004).

Where the protected activity and the adverse action are separated by an intervening event that could have independently caused the adverse action, the inference of causation is compromised. *Tracanna v. Artic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1, slip op. at 8 (ARB July 31, 2001). However, the Board has indicated that even where an intervening event breaks the *temporal* link, other evidence may establish the causal link. *Id*., citing *Farrell v. Planters Lifesavers Co.*, 206 F. 3d 271, 279 (3d Cir. 2000) (emphasis added). Thus, where the temporal evidence is compromised, other evidence must be produced in order to show a causal nexus. *See Farrell*, 206 F.3d at 279-280.

The evidence establishes that there was temporal proximity between Complainant's protected activity and the adverse action. On October 8, 2007 Complainant stated that he wrote a formal complaint to the FAA indicating several safety violations and mailed it to Riverside, California. TR 87; AX 2:1. The following day the PMI for the FAA, Jesus Gonzales, arrived at SCPA and had a brief meeting with Greg Albert. TR 87-88; AX 2:1. Complainant saw Jesus Gonzales show Greg Albert the complaints and then saw Jesus Gonzales point to Complainant. TR 87-88, AX 2:1.

The following day Complainant was taken to the Human Resources office and was told he was being suspended. TR 91-92; AX 2:1. Melinda Hoya, the Human Resources assistant, requested that Complainant write down the reason he was being suspended, so Complainant wrote that he was being retaliated against for writing the compliant to the FAA. TR 92; AX 2:2. By this time the room was filled with people including Victor Martinez, Melvin Perry, William Hoppe, Brian Randall and Chris Willis. TR 94-95. Complainant perceived that everyone knew about the FAA complaint he had sent and someone may have mentioned it during the whole confusion of the unfolding scene. TR 105.

The preliminary OSHA investigative report found that the letter was mailed on or about October 8, 2007 while the final OSHA investigative report did not decide on that matter because OSHA dismissed the complaint on another issue. CX 4; RX 4.

Respondent argues that there could have been no temporal proximity with the FAA complaint letter because without evidence of a fax confirmation of certified mail receipt, there was no evidence that Complainant ever sent the complaint either by facsimile or by mail before his termination. TR 113. Respondent also suggests that it would be highly unlikely for the FAA PMI to arrive the very next day from allegedly receiving Complainant's complaint. Respondent's witness Dwight Perryman testified that he had never heard or saw of an FAA complaint letter circulated before Complainant was terminated, and that it was within a week after Complainant was terminated that Jesus Gonzales came to SCPA. TR 183. In addition, Greg Johnson testified that he did not see Complainant's FAA letter circulating until after Complainant was terminated. TR 216.

However, two employees not seeing Complainant's FAA complaint until after he was terminated is not conclusive that the complaint was not sent until after Complainant was terminated. OSHA's preliminary investigative report stated that Greg Albert acknowledged that he believed Complainant passed copies of his FAA complaint around the hangar floor prior to Complainant's suspension and termination and that Complainant's protected activity was a contributing factor in the adverse action taken against him. CX 4:3. First, the report found that Greg Albert exhibited animus toward Complainant's protected activity when Greg Albert indicated to OSHA that Complainant caused "turmoil" on the hangar floor by passing around copies of his FAA complaint. CX 4:3. Second, the report found that temporal proximity had been demonstrated because Complainant was suspended and then terminated two days after submitting his FAA complaint and shortly after Greg Albert perceived Complainant passing around his FAA compliant to coworkers. CX 4:3.

OSHA's final investigative report also stated that Greg Albert acknowledged that he was aware that the Complainant passed around copies of an FAA complaint Complainant had filed. RX 4:2. In addition, it also found evidence of temporal proximity between Complainant's alleged protected activity on or about October 8, 2007 and his suspension and termination on or about October 10, 2007. RX 4:2.

I find that the decision to terminate Complainant was at least in part motivated by animus concerning either Complainant's complaint to the FAA or knowledge that Complainant was about to send the complaint to the FAA. In addition, I find the decision in part due to the growing animus towards complainant's continual complaints to Brian Randall. Brian Randall revealed that he would try to fire Complainant if he could because he knew Complainant kept a list of all of SCPA's accidents, broken rules, and FAA violations. TR 87; AX 2:1. Also, at the end of September 2007, Complainant had refused to use his inspection stamp to confirm numerous incorrect entries that were not in line with standing FAA regulations. TR 80; AX2:1. Brian Randall had directed Complainant to do so and when Complainant refused and reported it to William Hoppe, Brian Randall became angry and yelled "just get the fuck out, your fired, go home." CX 2:1. Thus, Complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in Respondent's termination of Complainant's employment.

Respondent's Showing of a Non-Discriminatory Motive

If a complainant proves by the preponderance of the evidence that the Respondent violated AIR 21, the Complaint is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *Hirst v. Southeast Airlines, Inc.*, ARB Case No. 04-116, 04-160, ALJ Case No. 2003-AIR-47, slip op. at 7 (ARB January 31, 2007). "Clear and convincing" evidence is more than a preponderance of the evidence but less than proof "beyond a reasonable doubt." *Yule v. Burns Int'l Sec. Serv.*, 1993-ERA-12, slip op. at 4 (Sec'y May 24, 1995). An employer fails to meet this burden of proof if it is determined that the employer's stated basis for the adverse employment action is pretextual, that is, a false cover for the adverse action where the real basis is impermissible retaliation for protected activity. *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-

AIR-17, slip op. at 18 (ARB March 30, 2007). Where an employer offers shifting explanations for the adverse personnel action, this in itself may be sufficient to provide evidence of pretext. *Vieques Air Link, Inc v. U.S. Dept. of Labor*, 437 F.3d 102, 110 (1st Cir. 2006). Pretext does not automatically compel a finding of discrimination. *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2005-AIR-11, slip op. at 9 (ARB June 29, 2007). Where pretext is present, the administrative law judge must consider the evidence and determine whether a violation of AIR 21 occurred. *Id.*

Respondent claims that Complainant was terminated for good cause. AX 3:2. This good cause was an inability to perform any of the three jobs that he was assigned to do at SCPA. AX 3. Respondent's witness Dwight Perryman testified that Complainant was hired as an inspector to go out and perform general inspection on the aircraft per the work cards. TR 174. Dwight Perryman's understanding was that Complainant was not able to perform this job because he was told that Complainant could not get up and down the ladders to inspect the aircraft. TR 174.

According to Dwight Perryman, SCPA moved Complainant over to do rack inspections because he could not perform his inspector job. TR 175. In this capacity, Complainant's duty was to inspect the parts on the rack to find out if they had defects. If they had defects, then Complainant's duty was to write up non-routines to cover those defects. TR 175. Dwight Perryman claimed that Complainant was not able to perform this job either as he confused mechanics with his overly long write-ups of the defects. TR 175-176. Dwight Perryman testified that Brian Randall had several conversations with him about how unsatisfied he was with complainant's performance. TR 176.

Dwight Perryman stated that to try and find a place for Complainant, Brian Randall put Complainant in Dwight Perryman's office to be the paperwork auditor after the old auditor left. TR 176. This job did not require either the physical stamina of the inspector job or the type of writing as the rack inspector job. TR 176-177.

Dwight Perryman did not think that Complainant was an easy person to work with. When Dwight Perryman tried to explain to Complainant that Complainant's morning safety meetings had to be brief, Complaint responded that he would talk as long as necessary. TR 177. Consequently, Dwight Perryman broke up the meetings and Complainant was belligerent to Dwight Perryman after that. TR 177. Brian Randall did not like the morning safety meetings either and told Dwight Perryman that they needed to be brief because Greg Albert would complain that the employees were standing around. TR 178. Dwight Perryman did not know whether Brian Randall ever warned Complainant about the morning meetings. TR 178.

Dwight Perryman thought Complainant's reputation was routinely belligerent, explaining that when Complainant discovered he would not have eight hours for new employee orientation he became really upset. TR 178. Dwight Perryman also witnessed Complainant come to his production control dock and telling one of the female employees to "get up and grab a broom" even though that was not Complainant's employee. TR 179. Later the female employee allegedly filed a sexual harassment complaint. TR 179.

As auditor Complainant moved into the office of Dwight Perryman, who was the custodian of aircraft records at the time. TR 179. Dwight Perryman observed Complainant's performance and did not think that he did a good job. TR 179. Dwight Perryman observed Complainant audit paperwork for airplanes that were gone, which would cause a big record keeping problem and FAA violation because then SCPA's copy would be different than the client's copy. TR 180. Complainant continued to make these type of changes even after William Hoppe and Mr. Randal warned him not to. TR 180.

Dwight Perryman was working on October 10, 2007 and heard Complainant, William Hoppe, and Brian Randall in a loud conversation about Complainant's job performance. TR 181. After the conversation became heated, Dwight Perryman left his office because he did not want to be involved. TR 182. Dwight Perryman did not remember whether the loud conversation mentioned the complaint letter to the FAA. TR 184.

Dwight Perryman testified he heard "rumors" that they were going to suspend complainant and after Complainant did not want to go he was terminated. TR 182. Dwight Perryman's understanding is that Complainant was terminated because he was unable to perform any of the three jobs that he was assigned. TR 182. Dwight Perryman did not see a physical altercation between Complainant and William Hoppe or between Complainant and Brian Randall. TR 182.

Dwight Perryman's testimony does not demonstrate by clear and convincing evidence that Respondent would have taken the same unfavorable action in the absence of protected activity. First, it is unclear how Dwight Perryman would have any knowledge of Complainant's ability to perform his duties other than what was told to him. Dwight Perryman originally testified that Complainant was unable to perform his inspector job because he was told that Complainant could not get up and down the ladders to inspect the aircraft. TR 174. Dwight Perryman understood that SCPA moved Complainant over to do rack inspections from William Hoppe. TR 196. In addition, Dwight Perryman admitted that rack inspector is not a lesser job than inspector. TR 196. The example Dwight Perryman used to show Complainant was not an easy person to work with was when Complainant became upset after he could no longer hold morning safety meetings, and the example that Dwight Perryman used to show that Complainant had the reputation of being belligerent was when Complainant became upset when the hours for new employee training was reduced. Both examples point to Complainant's concern for safety and heighten the idea that he tried to follow safety rules and complained when they were not followed. TR 177-179. Dwight Perryman believed that Complainant was unable to perform any of the three jobs that he was assigned was based on "rumors" as he had never heard any of the words from the loud conversation that took place between Complainant and William Hoppe. TR 182. This type of evidence that relies completely on "rumors" and information from other people is not clear and convincing in any respect.

In addition, Respondent's witness Greg Johnson testified that Greg Johnson believed that Complainant's first job at SCPA was as inspector and in this capacity he was supposed to inspect the physical aircraft. TR 208. Greg Johnson stated that there were certain areas of the aircraft he could not get into and with Complainant's age he could not climb up and down the ladders. TR 208.

After Complainant was unable to perform his inspector job he was moved to inspect parts that were taken off the plane and put on the rack. TR 208. This responsibility did not require any climbing but only to look at the parts on the rack and note down what was wrong with the part. TR 209. Mr. Johnson testified that Complainant did not perform this job very well. TR 209. He stated that the parts the Complainant had noted were good were not good, that there were fabrications on the paperwork, going on about things that were not related with the party. TR 209-210. Although Greg Johnson was not in the office where Complainant was confronted about these fabrications, he knows that Complainant was asked about it. TR 210.

Greg Johnson testified that Complainant complained a lot, was not a good inspector, and found ways to get out of doing things. TR 210. Greg Johnson further stated that supervisors found Complainant hard to believe and a difficult person to work with. TR 210.

Greg Johnson claimed that Complainant's third job was as auditor. TR 211. He testified that he came into daily contact with Complainant and his impression was that Complainant was not able to perform his auditor job. TR 211. Greg Johnson stated that he could not perform his auditor job because Complainant was hiding non-routine cards that he was supposed to have audited that were not done. TR 212. He also stated that cards were found in Complainant's drawers instead of correctly in the file cabinet. TR 213. After Complainant was terminated, Greg Johnson claimed that many cards were found in Complainant's drawers. TR 214. Greg Johnson testified that supervisors confronted Complainant about these cards and Complainant made a fuss. TR 212-213. Greg Johnson testified that he heard William Hoppe or Brian Randall warn Complainant about his performance as auditor although Greg Johnson admitted he did not hear a word they said because they would take Complainant aside. TR 213.

Greg Johnson claimed that Complainant always had a problem and got into disputes with William Hoppe and Brian Randall. TR 212.

Greg Johnson worked on the day Complainant was terminated, October 20, 2007. TR 214. He heard an argument between William Hoppe and Complainant that was loud enough that everyone could hear. TR 214. From where Greg Johnson was located, he could not understand every word but heard that Complainant was being asked to leave the building by Brian Randall. TR 214. Greg Johnson believed that airport security was called because Complainant did not want to leave the premises. TR 215. Greg Johnson testified that Complainant was completely out of control and insubordinate and he refused to listen to William Hoppe and Brian Randall. TR 215.

Greg Johnson's understanding was the Complainant was terminated because he was not able to do the job that he was hired to do and was insubordinate and had infractions for the other jobs he was assigned to. TR 217-218.

Greg Johnson's testimony like Dwight Perryman's testimony is almost completely based upon information from other people rather than firsthand knowledge. Greg Johnson testified that he heard about Complainant changing positions to rack inspector from Brian Randall. TR 228. In addition, the information Greg Johnson had on Complainant's work as auditor was provided

to him by Brian Randall after Greg Johnson had asked Brian Randall why complainant was leaving so upset. TR 229. In regards to the auditing cards, Greg Johnson claims these were controlled items and Greg Johnson only saw them after the fact. TR 250. He came to see the cards through Brian Randall .TR. 251. After Greg Johnson had asked what happened why was Complainant fussing and crying Brian Randall allegedly showed him the cards and said this is what Complainant had been doing. TR 252. Although Greg Johnson claims that he saw Complainant unable to physically inspect aircraft it is hard to believe that Greg Johnson knew so much about Complainant's business. Complainant testified that he had never seen Greg Johnson before and that fact did not surprise Greg Johnson.

In short, the hearsay testimony offered by Respondent consists of explanations offered by the very same management officials who terminated Complainant. Obviously, these managers could not be expected to tell Complainant's co-workers that Complainant had been terminated for expressing safety concerns. Thus, the secondhand versions of the reason for termination pale in comparison to the facts offered by Complainant in his very credible testimony. As for the alleged insubordination related to the heated discussion on the date of Complainant's termination, the law is well settled that the right to engage in statutorily protected activity permits some leeway for impulsive behavior. *Kenneway v. Matlack, Inc.*, Case No. 88-STA20, 1989 Department of Labor Sec. Labor LEXIS 47, D&O of SOL (Sec'y June 15, 1989); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114 (ARB June 29, 2011). Accordingly, I find that Complainant's behavior in this heated discussion was acceptable given his treatment by his managers due to his protected activity in making complaints relating to commercial aircraft safety.

I conclude that Respondent did not provide clear and convincing evidence that Complainant was terminated for poor work performance or insubordination.

Relief

Complainant seeks various forms of relief to remedy Respondent's violations of the Act. These are the Secretary's regulations on fashioning a remedy:

> If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages, At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

29C.F.R. § 1979.109(b).

Back Pay and Restoration of Employment

Health, pension and other related benefits are terms, conditions and privileges of employment to which a successful complainant is entitled from the date of a discriminatory

layoff until reinstatement or declination, and these compensable damages include medical expenses incurred because of termination of medical benefits, such as insurance premiums. *Creekmore v. ABB Power Sys. Energy Serv., Inc.*, 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996).

Complainant is awarded back pay and restoration of the terms, conditions, and privileges associated with his employment, including all privileges associated with seniority. *See id.; see also* 29 C.F.R. § 1979.109(b). Restoration of employment is effective immediately. *See* 29 C.F.R. § 1979.109(c). Respondent shall reimburse Complainant for all medical expenses incurred because of termination of medical benefits, including but not limited to health care premiums.

Costs and Expenses Reasonably Incurred

Respondent is liable for reimbursement of any other expense reasonably incurred by Complainant because of termination of Complainant's employment. 29 C.F.R. § 1979.109(b). Complainant does not request or provide details as to any such expenses but if Complainant has reasonably incurred any such expense, a record of the expense may be submitted, served and responded to in the same manner as provided for attorney's fees and costs.

ORDER

NAMS, as successor-in-interest to SCPA, shall compensate Michael Harding for all back pay, less earnings from post SCPA employment, and shall restore the terms, conditions, and privileges associated with his employment, including seniority, effective immediately.

NAMS, as successor-in-interest to SCPA, shall reimburse Michael Harding for all medical expenses incurred because of termination of medical benefits, including but not limited to health care premiums. NAMS shall also reimburse Michael Harding for all expenses reasonably incurred by Complainant because of termination of employment.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within (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, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other

means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). 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 no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed , the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b). The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1979.109(c). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. 29 C.F.R. § 1979.110(b).