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Issue Date: 16 November 2004

CASE NUMBER 2003-AIR-0017

In the Matter of

H. PAUL WALKER,
Complainant,

v.

AMERICAN AIRLINES,
Respondent.

Appearances

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For the Respondent

Before: Paul A. Mapes
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The above-captioned matter arises from a complaint by H. Paul Walker (hereinafter "Walker" or "the Complainant") against American Airlines, Inc. (hereinafter "American" or "the Respondent") under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act, 49 U.S.C. § 42121 ("AIR21" or "the Act"). A trial on the merits of the complaint was held in Long Beach, California, on October 8-10, 14-17, and 20-21, 2003, and on December 15-17 and 30, 2003. The following exhibits were admitted into evidence: Complainant's Exhibits (CX) 1, 2, 4-6, 9, 18 (in part), 20 (in part), 22 (in part), 24 (in part), 26 (in part), 27, 32, 34-36, 39-42, 45 (in part), 46, 27 (in part), 48 (in part), and 50; Respondent's Exhibits (RX) 1, 3-28, 29 (in part), 30, 31, 36-44, 46, 48, 49, 53-64, and 65 (for a limited purpose). Both parties submitted post-trial briefs. After all post-trial briefs had been submitted, the Complainant filed a request to re-open the record to allow receipt of recently obtained information concerning two of the Respondent's trial witnesses. That request was granted in an order issued on April 12, 2004, which required

the Respondent to submit certain information for *in camera* inspection. In an order dated May 6, 2004, redacted copies of seven of the *in camera* documents were provided to the Complainant's counsel (subject to a protective order) and designated as proposed Administrative Law Judge Exhibits (ALJX) 1 to 7. Following the submission of briefs and reply briefs by the parties, it was determined that only two of these documents, ALJX 3 and 4, would be admitted into evidence.

BACKGROUND

A. The Parties

The Complainant, H. Paul Walker, was first employed by American Airlines as a junior mechanic in May of 1986. Tr. at 50. Approximately one year later, he became an instructor at American's central maintenance facility in Tulsa, Oklahoma, and worked in that capacity for approximately 12 years. Tr. at 51-52. In 1999, he became a production supervisor at the Tulsa facility, doing "C-checks," major mechanical overhauls lasting three to five weeks. Tr. at 532-35. Walker has an airframe and power plant certificate from the Sparks School of Aeronautics and has also obtained various other licenses and certifications required to work on all of American's aircraft. Tr. at 51-53. While at Tulsa, Walker received above-average performance reviews and was not the subject of any disciplinary actions. Tr. at 55-66. In August 2000, Walker transferred to the maintenance division at Los Angeles International Airport (hereinafter "LAX"), where he was assigned to work as a production supervisor. Tr. at 54, 536. Carl Anderson, an existing production supervisor, was assigned to act as Walker's mentor for several weeks to orient him to the LAX facility and its work routines. Tr. at 71. Walker initially testified that he transferred to LAX because he had family members in the Los Angeles area and because of the good reputation of the LAX maintenance operation. Tr. at 53-54. On cross-examination, however, Walker confirmed that his transfer to LAX was also motivated by harassment, intimidation, and stress he claims to have experienced while at Tulsa. Tr. at 544. Walker also claimed that his wife had been sexually harassed while an employee at American's Tulsa facility in 1997. Tr. at 545.

The Respondent, American Airlines, is a large interstate and international air carrier headquartered in Fort Worth, Texas. At LAX the Respondent operates a maintenance facility which is responsible for inspecting, maintaining, and repairing many of the planes that pass through the airport. Tr. at 1895. This maintenance and repair function employs approximately 25 managers and over 300 mechanics. Tr. at 1895. In addition to working on aircraft that are in active passenger service, the Respondent's LAX maintenance department is also responsible for conducting "B-checks," overnight heavy-maintenance routines that take about 12 hours to complete. Tr. at 76.

During all periods relevant to this case, the LAX maintenance department was under the general supervision of Anthony Evans, the Managing Director of Aircraft Maintenance and Engineering for American Airlines' Western Division. Tr. at 3064. Evans' immediate subordinate was Jimenez Bailey, the Regional Manager of Aircraft Maintenance for Southern California. Tr. at 1892. In March of 2004, both Evans and Bailey were terminated from their jobs based on an auditor's report indicating that they had been embezzling company property.

ALJX 3, 4. Between roughly March 2001 and August 2001, Evans was on medical leave due to heart problems, so Bailey assumed Evans' duties as Managing Director and Nasdeo discharged Bailey's duties. Tr. at 2385, 3067, 3164. During the time period relevant to this case, the senior or "Level 5" managers who reported directly to Bailey included Carl Anderson, Anthony Nasdeo, Mel Rogers, Mo Sharifi, and Ron Merrill. Tr. at 71, 114, 2112, 2384, 2633. Reporting to the foregoing senior managers were "Level 4" supervisors, who are the lowest-level management employees. Tr. at 1896. Prior to September 2001, there were about 24 Level 4 supervisors working for the Respondent at LAX. Tr. at 1991. The supervisors working at LAX during the time period relevant to this case included Larry Pope, Chris Rushing, Joseph Anthony Cardenas, and the Complainant. Tr. at 54, 2557-59, 2611-12, 2744. At LAX, supervisors work staggered shifts and directly supervise crew chiefs, who in turn oversee crews of working mechanics. Tr. at 73, 1897-98, 2638, 2762. The crew chiefs who reported to the Complainant include Bobby Dean Canada and Albert Leigh. Tr. at 173, 1179.

In some circumstances, the work of the maintenance department was reviewed by personnel in the Respondent's Quality Assurance (hereinafter "QA") department. Tr. at 85-86. At the times pertinent to this proceeding, the QA department at LAX was directed by Charles Slezak, a manager who reported to another manager in Tulsa. Tr. at 2318-21. During the time period relevant to this case, Dave Starbuck was a QA supervisor who reported to Slezak, and Warren Moore was a QA inspector who reported to Starbuck. Tr. at 1481, 1501, 1551-52. During the period the Complainant was employed at LAX, the human resources staff member who advised managers in the Maintenance and Engineering department at LAX was Susie Kimball. Tr. at 1253-54.

B. Allegations of Pressures to "Pencil Whip"

The employees in American's LAX maintenance department are expected to have aircraft inspected and repaired in time to meet the scheduled departure times for numerous flights each day. Tr. at 1915, 2635-36. As a result, the LAX maintenance facility operates 24 hours per day every day of the week and its workers are under nearly continuous pressure to meet recurring deadlines. Tr. at 1896, 1915. In order to ensure that these deadlines are met, a planning department tracks aircraft that will be undergoing repair work at LAX and prepares work packages for each aircraft. Tr. at 74. The work packages contain a number of work cards identifying specific repair tasks to be performed on a given aircraft on a particular night. Tr. at 75, 1909. In the maintenance area, production supervisors assign work cards to individual mechanics, who then perform the repairs and sign the cards when the work is completed. Tr. at 72, 1909. In addition, any non-routine maintenance items that may be discovered while physically inspecting the aircraft are written up on "E-58" forms by quality assurance inspectors, who turn the forms over to production supervisors who then assign mechanics to perform the repairs. Tr. at 77-78, 680, 1560. Work cards, E-58s, and any other documentation relating to completed repair work are then reassembled in the work package, which is then signed by a crew chief or production supervisor. Tr. 195-97, 1909. QA department employees sign to release aircraft that have undergone B-check maintenance work and also perform random audits of completed work packages. Tr. at 1482-83, 1912-14. In addition, FAA inspectors have free access to the LAX maintenance area and physically visit the Respondent's maintenance facility on a daily basis. Tr. at 1903, 1910. The FAA inspectors may request and review any work

package at any time. Tr. at 1908-10. Because American's aircraft are serviced, repaired, or inspected at many different maintenance sites, aircraft repaired at the LAX facility often undergo repairs or inspections at different maintenance stations elsewhere in the American system. Tr. at 1917-18.

According to the Complainant, during the period he worked at LAX there were not enough mechanics assigned to the B-check crews to perform all the required work. Tr. at 109-13, 1556-58. In fact, he asserted, "every single night" he was "12 men short as well as crew chiefs short right from the start." Tr. at 112. He supported this contention by citing the annual manpower budgets for each shift and by referring to handwritten notations on a daily labor schedule showing the actual number of mechanics available for work on August 19, 2001. CX 25 at 361, Tr. at 112, 282-94. As a result of such inadequate staffing, he claims, there was pressure on the supervisors, crew chiefs, and mechanics to falsify work sheets to indicate that they had performed inspections or completed work that had not in fact been done. Tr. at 89-90, 97, 114, 130-31. According to various witnesses, this practice of signing off work assignments that were not in fact completed or simply not performed at all is known as "pencil whipping." Tr. at 86 (Complainant's testimony), Tr. at 173 (testimony of Bobby Dean Canada), Tr. at 1200 (testimony of Albert Leigh). Walker testified that he first observed "pencil whipping" while Carl Anderson, one of the production supervisors on the midnight shift with Walker, was showing him around the facility. Tr. at 71. Walker said that Anderson would "sign everything off and clean it up and basically sign the aircraft off" even though "some of the paperwork wasn't done and some of the packages weren't signed off, things weren't completed." Tr. at 71. Walker admitted, however, that he did not report these occurrences to anyone. Tr. at 558, 770.

Various aspects of Walker's testimony regarding pressure to engage in "pencil whipping" are supported by the testimony of other witnesses. For example, Bruno Rosenthal, a former mechanic at LAX, testified that when planes didn't make their gates on time managers would start yelling, act disgruntled, throw their pencils down on the desk, and exclaim "Oh, great!" Tr. at 1649-50. Rosenthal's testimony was corroborated by Susan Trechak, who worked as a production control coordinator in the LAX maintenance department from August 2000 to April 2001. According to Trechak, when an airplane undergoing repairs was delayed and not likely to make its scheduled departure time, the people in "the control room" would become so tense they would begin running around and yelling. Tr. at 1720-22, 1725-26. She testified that on such occasions managers would summon supervisors, including Walker, into an adjoining supervisor's room and yell at them. Tr. at 1727.

The Complainant's allegations regarding the general pressure to "pencil whip" are also partially supported by the testimony of Bobby Dean Canada, who is currently an avionics technician with American in Fort Worth, Texas. Tr. at 172. Previously, Canada had been a mechanic and crew chief at LAX, but did not normally work under the supervision of Walker. Tr. at 173. Canada testified that in November of 2000 Walker directed him to take a plane out of service due to excessive engine vibration that had been reported in a PIREP (a pilot's logbook report of a mechanical or safety problem). Although Canada and Walker called American Production Control to take the plane out of service to check the engine vibration, this did not happen. Tr. at 176-77. Instead, the PIREP was signed off, apparently by Carl Anderson, and the plane departed with no maintenance checks being performed. Tr. at 180-82. Walker provided a

similar account of this incident in his testimony. Tr. at 260-62, 409-10. Like Rosenthal and Trechak, Canada also testified that managers did not want any delays or cancellations due to maintenance work problems. Tr. at 206. Canada stated “they didn’t want any, no matter what it took to get the planes to the gate, get them done, get them out on time.” Tr. at 207.

Likewise, Albert Leigh, a crew chief who worked for Walker, testified that “a few” mechanics or supervisors would engage in “pencil whipping.” Tr. at 1200. As well, he testified, sometimes mechanics were offered “an extra overtime hour” just for signing off the paperwork. Tr. at 1217. Leigh felt that management pressure to sign off work was “a chronic problem.” Tr. at 1182. Leigh testified that he communicated his frustration about this kind of pressure to Walker, but that he could not recall whether Walker expressed any concern about being pressured to “pencil whip” himself. Tr. at 1189, 1199. Although Leigh objected to this pressure, he testified that he avoided putting any allegations about it in writing and even avoided using the term “pencil whipping,” because he felt that employees who made such complaints might be subject to retaliation. Tr. at 1205-06. He also testified that he asked permission to step down from his position as a crew chief because of “mounting pressures from supervision” to sign off paperwork “when work hadn’t been completed” or correctly performed. Tr. at 1181.

In contrast to the claims of the Complainant and his witnesses, a series of LAX managers called by the Respondent testified that although there is often pressure to get planes to the gates on time, employees are not urged to falsely sign off on repairs or inspections that have not been completed. These witnesses included a retired director of maintenance for all of American’s fleet of airplanes, as well as various senior and line managers at the LAX facility.

For example, William Fey, a retired managing director of maintenance operations for all of American, testified that he considered signing off on incomplete work to be a “dischargeable offense” and that in the instances where such conduct was discovered it was “dealt with harshly.” Tr. at 2243-44. Fey testified that he had received no communication of any kind from Walker or anyone else indicating any pressure from managers at LAX to release unsafe planes or to sign off maintenance work that had not been completed. Tr. at 2241-42, 2252. When asked about the meaning of the phrase “move the metal,” Fey said it means that “the employee or group of employees get their ass in gear and get the airplane on the gate so it can be dispatched and make money,” but that it did not mean releasing unsafe planes or signing for uncompleted work, which would result in discharge if discovered. Tr. at 2251.

Like Fey, Anthony Evans testified that neither Walker nor anyone else had ever directed any complaint to him about Walker being pressured to sign off paperwork for incomplete repairs or unsafe aircraft. Tr. at 3086-87. Similarly, Jimenez Bailey testified that while “making schedule [is] important” to both American and its customers, he would “never” release unsafe planes for service and that he would “absolutely” expect any plane presenting a safety risk to be taken out of service. Tr. at 1915-16. Bailey felt that “pressure to get an airplane out to meet schedule is always safety driven,” and he rejected the idea that there is pressure on anyone to sign off unsafe planes just to meet the schedule. Tr. at 1924-25. He specifically denied ever asking Walker or any mechanic to release an unsafe plane. Tr. at 1925.

Likewise, lower level LAX managers to whom Walker reported gave similar testimony. Mo Sharifi denied ever pressuring Walker to sign off work that had not been completed or directing him to place scheduling ahead of the safety of the aircraft. Tr. at 2134, 2148. He added that he has no reservations about taking planes out of service if they are unsafe and that as a manager he does so “all the time.” Tr. at 2126. Tony Nasdeo testified that he had little direct contact with Walker, but that Walker had never communicated anything to him about pressure of any kind to commit safety violations. Tr. at 2387-88. When Mel Rogers was asked whether he harassed Walker to release planes that were unsafe or to sign for repairs that had not been completed, he replied, “[a]bsolutely not.” Tr. at 2644.

Finally, it is noted that during cross-examination many of the witnesses called by the Complainant, including the Complainant himself, denied that they had in fact ever signed off work that had not been done. Walker testified that he had never “pencil whipped” or requested any of the mechanics he supervised to do so. Tr. at 619-20. In addition, Bobby Canada testified that he never “pencil whipped” any of the work cards he signed as a mechanic. Tr. at 237. Similarly, Leigh agreed that he was at times directed by managers to just take care of the paperwork, but stated that he did not sign off incomplete or unsafe work as a result—instead, he often wound up turning those tasks “over to day shift and they’d still be sitting there not completed.” Tr. at 1125-26.

C. NBIs and NBOs

When an LAX mechanic works more hours than are shown on the mechanic’s timecard, a supervisor must sign an “exception sheet” in order for the mechanic to be paid for the additional hours. Tr. at 513-14. For example, a supervisor might sign a mechanic’s exception sheet when the mechanic has worked during a lunch period, is legitimately entitled to a “bonus” or “penalty” hour in accordance with the terms of a collective bargaining agreement, or when a defect in an identification badge has prevented a mechanic from properly “badging out.” Tr. at 514, 1956, 2903. When an employee has failed to badge out, an approved exception sheet change is termed a “no badge out” or an “NBO.” Conversely, an approved change for an employee who has failed to badge in is termed a “no badge in” or “NBI.” Tr. at 514.

In this case, all parties are apparently in agreement that, on at least some occasions, mechanics at LAX are unable to complete all of their assigned tasks during their regular shifts. Tr. at 114-16. During the early part of 2001, the evidence indicates, there were several options that supervisors used to get the mechanics to work beyond their regular quitting times. One option, if managers approved the payment of overtime, was to have mechanics volunteer to work a paid lunch or additional hours for overtime pay. Tr. at 110-11, 129, 2035. Alternatively, managers could require mechanics to work paid overtime by issuing “white slips” to the mechanics. Tr. at 2584-85. Finally, supervisors or crew chiefs could make informal arrangements under which mechanics would work past their regular quitting times, but not “badge out” on the time clock when they left for home. Later, a supervisor would sign exception sheets showing departure times that allowed the mechanics to be paid for more overtime than they had actually worked. Tr. at 130, 1956, 2906. This practice appeared on payroll records as an exception sheet NBO, and both employees and managers at LAX referred to this practice somewhat loosely as “NBOs” or as “NBO deals.” Tr. at 569, 1956, 2959. The parties have

explicitly stipulated that prior to July of 2001, it was a commonly accepted practice at LAX for maintenance supervisors to use “NBO deals” to induce mechanics to work beyond their normal quitting times. Tr. at 1061-63, 1202, 1937, 1959-60.

Around the beginning of July 2001, senior managers at LAX decided that the use of NBOs to compensate mechanics for overtime work at LAX would have to stop. Tr. at 515. Bailey testified that the decision was not targeting NBOs in general, which are legitimate under appropriate circumstances, but “NBO deals,” which he described succinctly as “when you’re paying an employee for overtime for time that he’s not actually working on the clock at American Airlines.” Tr. at 1956. To ensure that the new policy would be implemented, supervisors were required to read and sign individual copies of a July 30, 2001 memo from Bailey confirming that the practice of using NBOs as a substitute for overtime pay would no longer be allowed at LAX. RX 28. The memo stated that mechanics who badge out before accepting an overtime assignment must “badge back in, and out again at the end of their overtime” or else be in violation of Rule 5 of American’s Rules of Conduct, which requires checking in or out of work “in the prescribed manner and for yourself only.” RX 28.

During the trial, the Complainant described in detail the informal arrangements by which mechanics agreed to overtime and were compensated using NBO entries, but denied approving such arrangements himself for the mechanics he supervised. Tr. at 570-72, 2903-07. Walker also acknowledged that the practice was widespread at LAX. Tr. at 571-72.

ALLEGED PROTECTED ACTIVITIES AND RETALIATORY ACTIONS

A. Alleged Protected Activities and Work Disputes Prior to July 16, 2001

During the trial and in his Pre-Trial Statement, the Complainant alleged that during his employment at the Respondent’s LAX maintenance facility he engaged in a variety of different activities that are protected under the whistleblower provisions of AIR21. The evidence concerning these alleged activities is set forth below.

1. First ASAP on Wing Flap Damage in May 2001

In January of 2001, American Airlines aircraft 358 was undergoing a B-check at LAX. Tr. at 100. According to Walker’s testimony, he observed dents on one wing flap that exceeded allowable limits for such flap damage. Tr. at 101. Walker further testified that Starbuck and Moore also observed the dents and agreed that the flap needed to be replaced, which meant that the plane would miss its gate assignment the next morning. Tr. at 101-02. When this information was relayed to Rogers, Walker testified, Rogers “blew up at me,” and said “it’s not going to come out of service, it’s going to make the gate.” Tr. at 102, 107. According to Walker, sometime later a Technical Services (“Tech Services”) representative contacted by Rogers appeared at the hangar and said that he had a letter authorizing approval of the flap in its damaged condition.¹ Tr. at 102-03. Walker testified that he did not see the letter and did not

¹ Tech Services, which is based in Tulsa, is composed of engineers and technicians, and, according to Walker, is the entity that LAX mechanics “go to when we have serious problems or serious questions” about an aircraft. Tr. at 103.

think the plane was safe to fly, but signed off the aircraft because Tech Services “took the responsibility, and they said release the airplane.” Tr. at 104-5. In May of 2001, the Complainant testified, he learned that the FAA had inspected the flap on aircraft 358, determined the damage was out of acceptable limits, and ordered the aircraft to be ferried to American’s Fort Worth maintenance facility for a flap change. Tr. at 98. Consequently, on May 23, 2001, Walker filed an Aviation Safety Action Partnership (ASAP) report² with the FAA, disclosing that he had misinterpreted dent limit specifications when inspecting a trailing edge flap on a Boeing 767 in January 2001. Tr. at 98-100, RX 6. The ASAP filed by Walker, however, contains no reference to Walker being pressured to sign off the flap by Rogers or any other manager, or to having received any misleading directive from a Tech Services representative. RX 6. Walker admitted that he wrote no internal complaints to anyone at American about being pressured to sign off what he felt to be an unsafe aircraft in this instance, but still insisted that he and Starbuck “signed it off because we were threatened to do so.” Tr. at 794, 799, 801.

Starbuck testified that the Tech Services representative in question was a Tech Services crew chief from Tulsa who just happened to be at LAX at that time. Tr. at 1484. According to Starbuck, the crew chief said “that Engineering had approved that particular damage to the aircraft,” and thereby convinced Starbuck to release the aircraft. Tr. at 1484. Starbuck confirmed that neither he nor Walker saw a copy of the letter referred to by the Tech Services crew chief in January 2001, but added that around June 2001 he did view a copy of the letter and realized that it had expired prior to January 2001. Tr. at 1494-98. Starbuck testified that the FAA discovered the out-of-limits flap damage while doing a “ramp check” of aircraft 358 on May 24, 2001, following additional maintenance on the aircraft at LAX on the night of May 23, 2001. Tr. at 1497. Starbuck noted that he and Walker then filed their ASAPs on May 24, 2001. Tr. at 1497-98.

Rogers disputes the assertion that he pressured Walker to sign off aircraft 358. Tr. at 2641. According to Rogers, when he learned of the flap damage, he recalled that a large number of planes had been involved in a hail storm at Dallas and directed Walker to call Tech Services to learn whether aircraft 358 was one of those planes. Tr. at 2642. Later, according to Rogers, there was a conference call including himself, Walker, and Starbuck in which Tech Services “informed us that the aircraft had in fact been in the hail storm and there had been some dispensation for that flap due to the damage from the hail storm.” Tr. at 2642-43. Rogers stated that without that guidance from Tech Services, he would not have wanted aircraft 358 to be released if the flap damage was beyond the limits specified in the maintenance manual. Tr. at 2643.

² “An ASAP” is airline industry jargon for a disclosure form mechanics or managers fill out and submit under the ASAP program. This process was established by an agreement between American, the FAA, the pilots’ union, and the mechanics’ union. ASAPs permit mechanics or other personnel to make voluntary disclosures to the FAA in cases where they discover that they have previously made some kind of mistake in performing aircraft maintenance or when an improper maintenance procedure may have been performed. Submitted ASAPs are reviewed by a panel whose members are drawn from the FAA, the mechanics’ union, and the pilots’ union. An ASAP must be submitted within 48 hours of learning of a mistake or problem, with the understanding being that a timely ASAP submission greatly reduces the potential for fines or other disciplinary action. Tr. at 99, 809-10, 1926-27, 2245-46, CX 48 at 739.

2. Complaints About Manpower and Equipment

According to Walker's testimony, at various times in 2001 he raised his concerns about on-going manpower shortages at LAX with his senior managers, including Rogers, Sharifi, Merrill, Nasdeo, Bailey, and Evans, but that they generally replied that there was sufficient manpower to perform the required maintenance and get planes to their assigned gates on schedule. Tr. at 114. Walker further testified that he also brought up the subject of manpower shortages at various management meetings attended by Bailey and Evans. Tr. at 268-69. Bailey denied that Walker ever complained to him about manpower shortages. Tr. at 2032, 2037. However, on cross-examination Bailey agreed that an e-mail from Walker's crew chiefs in July 2001 affirmed differences in opinion between Walker and senior managers concerning manpower assigned to the B-check line. Tr. at 2038-39, CX 26 at 462. In addition, on cross-examination Nasdeo confirmed that Walker had complained of manpower shortages to Rogers in July 2001. Tr. at 2508-09.

The Complainant also testified that he complained to Nasdeo and Bailey about shortages of computers, parts, tools, and equipment. Tr. at 116. For example, he testified, he directed an e-mail requesting a crane, some computers and various supplies to Willie Ayala, an American employee Walker believed to be based in Tulsa. Tr. at 119-20. Walker also testified concerning an e-mail with equipment requests that he sent to Nasdeo on June 19, 2001. Tr. at 404-05, CX 32 at 553. In the e-mail, which concerned a variety of different subjects, Walker listed parts and tools that were needed by mechanics and complained about training not being scheduled at a time when night-shift mechanics could attend. CX 32. Near the end of the memo the Complainant made the following observation: "Lets work smarter not harder and if we treat people the way we want to be treated (and I don't mean roll over and die) we still expect 8 hours of work for 8 hours of pay, but we don't have to beat anybody to get there. Please Help we need it." Following that statement is the handwritten word, "Agree." CX 32. Similar positive responses were written on the sheet after other requests made earlier in the e-mail. CX 32. Walker testified that Nasdeo came to see him about the memo, talked about some of the items, and gave Walker a copy of the memo with his handwritten notations on it. Tr. at 408-09, CX 32.

3. Complaints About Pressure to "Pencil Whip"

According to Walker, while he was employed at LAX he had various discussions about "pencil whipping" with his own managers and with representatives of the Quality Assurance department. Walker testified he complained about "pencil whipping" to Ron Merrill, the production manager over the midnight shift to which Walker was assigned, but was told that such practices were an informal policy or an unwritten rule at LAX. Tr. at 278. He also testified that he attended several meetings of the QA department at which he discussed pressures on mechanics and production supervisors to get aircraft to the gate on time. Tr. at 311. This was confirmed by Starbuck, a QA supervisor, who testified that Walker attended several QA meetings starting in late 2000, where he commented on manpower shortages and pressure to get aircraft to the gates on schedule. Tr. at 1505-07. Another QA inspector, Warren Moore, also testified that Walker had periodically expressed concern about being pressured to sign off work and get planes to the gate. Tr. at 1556-57. Moore also testified that he observed managers vent

their anger at Walker when a B-check aircraft missed its scheduled morning flight because a replacement engine was not available. Tr. at 1562.

In addition, Walker testified that he discussed intimidation and pressure to sign work cards without doing the repair work individually with Starbuck. Tr. at 304-05. Starbuck confirmed this as well, testifying that he “talked extensively” with Walker about pressure to complete repairs and get planes to the gate, and that Walker had expressed some concern for his job. Tr. at 1510. Starbuck described Walker as “very upset” when he came to Starbuck’s office following various encounters with managers in the maintenance department. Tr. at 1510-11. Starbuck testified that Walker described the managers as having an attitude that “if the airplanes didn’t roll on time, it was his fault.” Tr. at 1511. Although Starbuck had received no indication of any managerial displeasure or concern with Walker from his own manager, Starbuck testified that on one occasion Walker “came in and told me that he was beginning to feel the pressure, that he was going to be terminated, and that he was going to have to sell his airplane.” Tr. at 1512. Starbuck also testified that Tom Chambers, another production supervisor, and several crew chiefs had expressed their concern to him about extra pressure on them from managers Mel Rogers and Mo Sharifi to move planes from the hangar line to the gate. Tr. at 1514.

4. Refusal to Sign Off Aircraft With Engine Vibration

Walker testified that in November of 2000, mechanics reported to him that an aircraft had come in with a pilot report of engine vibration. Tr. at 174-175, 260. According to Walker, the mechanics intended to take the plane to the hangar to run some tests, but when Bobby Canada, the crew chief, phoned in to take the plane out of service, Walker received a phone call from Merrill telling him the problem was “just a blade balance” and that he should “go out there and get it signed off and get it out.” Tr. at 261. Walker testified that when he refused to do so, Merrill apparently had Carl Anderson, another supervisor, go sign the log book so the aircraft was cleared to make its scheduled flight. Tr. at 261-62. Bobby Canada corroborated Walker’s account by testifying that when he physically went to check on the plane, “the aircraft was about to push back,” and “Carl Anderson was coming down the aircraft with the green sheet,” which is a copy of the pilot report of a mechanical problem which is removed after the problem is signed off. Tr. at 176.

5. Refusal to Sign Off Aircraft With Worn Aileron Bearings

Walker testified on cross-examination that in July 2001 manager Mo Sharifi had pressured him to sign off an aileron bearing that showed, according to Walker, wear beyond acceptable limits. Tr. at 829-34. Walker said Sharifi “threatened I’d be fired if I didn’t sign it off.” Tr. at 837. Walker also admitted that the bearings were “right at the limits” and that he did, in fact, sign them off. Tr. at 833. He also testified that although Bailey and Evans were not directly involved in this incident, “they were at the base, they were the managers, they were over it, and they knew exactly what went on with every aircraft.” Tr. at 832.

6. Alleged Phone Calls in June 2001

According to the Complainant, by June of 2001 he had become so concerned about manpower shortages and pressure from managers that he began voicing his complaints. Tr. at 323. Walker testified that he first went to Ron Merrill, a manager at LAX whom he trusted, but that Merrill declined to intervene on Walker's behalf.³ Tr. at 324. Walker attributed Merrill's refusal to support his position to Merrill's being on "second-step advisory" status, a classification in the Respondent's employee disciplinary process. Tr. at 324. Next, Walker testified, he called an FAA complaint number, an FAA employee in Chicago that he knew personally, and the FAA Flight Standards District Office at LAX. Tr. at 324-27. Finally, Walker testified that he called a special "hotline" that has been established for employees of American Airlines. Tr. at 324, 329. The hotline is managed by The Network, Inc. ("TNI"), a third party hired by American to receive and transcribe employee complaints, then transmit that information to American officials. CX 39. Walker testified that hotline brochures such as the one shown in Complainant's Exhibit 39 were mailed to American employees along with their paychecks. Tr. at 322. The brochure announces in bold type "Call Toll-Free And Confidentially," yet Walker testified that when he telephoned the hotline, he was told that "nothing would be done with this if you don't leave your name." Tr. at 332.

B. NBO-NBI Dispute

On June 12, 2001, John Lee, the LAX Supervisor of Production Control, presented Nasdeo with a batch of NBO exception sheets signed by various supervisors, including 14 signed by Walker. Tr. at 2399-2401. In response, Nasdeo told Rogers to "speak to his supervisors and have all the mechanics badge in and badge out." Tr. at 2401. On June 26, 2001, John Lee presented a second batch of NBO exception sheets to Nasdeo, this time with 18 NBOs signed by Walker. Tr. at 2401, RX 8, RX 10. On July 9, 2001, Nasdeo again spoke to Rogers, who responded that he had spoken to supervisors whose shifts started after Rogers' shift began, but not Walker, whose shift started earlier. Tr. at 2434, RX 10. Nasdeo then directed Rogers to speak to Walker and to tell him that "NBOs are unacceptable." Tr. at 2435, RX 10.

On the evening of July 9, 2001, the Complainant sent the following e-mail to Nasdeo:

You know as well as the rest of us that the no badge outs are the way we make the deals to get the planes out. If you wish for this to stop please send an e-mail to all of us. We will comply with whatever direction you issue.

RX 9. Walker testified that he wrote this e-mail to Nasdeo before Rogers spoke to him about the NBO issue. Tr. at 575. According to Walker, he composed the e-mail at the request of another supervisor who was confused by earlier statements directing that NBOs must stop. Tr. at 571-72. In addition, Walker asserted that his use of "we" in this e-mail was not meant to imply that he himself was making "NBO deals," only that he had been told it was being done by other supervisors. Tr. at 571-72.

³ Merrill was not called as a witness by either party.

At about 6 p.m. on July 10, 2001, Walker met with Rogers and John Glowacki, another supervisor, in the back room of the Manager on Duty's ["MOD"] office concerning NBOs. RX 12. In a handwritten memo dated July 11, 2001, the Complainant recounted:

I asked Mel [Rogers] about the rumors and he stated there would be no more deals or NBOs. I asked him if he knew the ramifications of what could happen if we stopped everything at once. He stated we could do things also, but I never understood what he meant.

RX 12.

In a second handwritten memo, the Complainant recalled that about an hour after the discussion with Rogers he saw Nasdeo in the MOD office, who asked him to step outside. RX 11. According to the Complainant's memo, Nasdeo then told Walker:

Pope had 27 NBOs and I had 18 NBOs and they needed to stop. I agreed with him whole heartedly. We also discussed manpower and how we should use it. I explained to Tony [Nasdeo] about the early calls and he said he would check into crews. If overtime was needed use it but they must badge out. I discussed this with B [check] [crew chiefs] and they want to talk to Jim [Bailey] and straighten or at least understand what was said.

RX 11.

On July 10, 2001 Walker's shift began during the afternoon and ended shortly after midnight. Tr. at 508, 600-01, 617, 622. At about 2:00 a.m. on the morning of July 11, Nasdeo was advised by Production Control that two aircraft undergoing B-checks were behind schedule and were likely to be delayed. Tr. at 507-08, RX 16. According to a memo Nasdeo wrote describing the events, the two early morning supervisors, Rushing and Pope, told him they were under the impression Nasdeo had cancelled all overtime, to which Nasdeo replied that he had said only NBOs had to stop. RX 16. The memo states that when Nasdeo arrived at the hangar, he observed both planes "completely opened, engines, panels, etc.," and was told by Rushing that none of the mechanics from earlier shifts, who were under the supervision of the Complainant, would stay for overtime. RX 16, Tr. at 1935. Nasdeo later spoke with Bailey and told him that "it seemed odd that I had spoken to [Walker] last night and a few hours later nothing is getting done." RX 16.

Pope testified that both he and Rushing attempted to get mechanics on their shifts to work voluntary overtime to finish the still-uncompleted B-check aircraft. Tr. at 2585-86. However, Pope testified, the mechanics refused, "because they were told by Mr. Walker that there wasn't any overtime." Tr. at 2587. Pope testified that "none of the work from [Walker's] earlier shift was completed" that night, yet Pope also testified that he had enough mechanics and time to complete the assigned work that night, but that "it just wasn't done." Tr. at 2588-89.

According to Nasdeo's memo, when Bailey was informed of the problems with the B-check aircraft, he asked Nasdeo to contact both Rogers and Walker to have them return to LAX

for a meeting, which was held in Bailey's office on the morning of July 11, 2001. RX 16. The purpose of the meeting, which was attended by Bailey, Nasdeo, Kimball, and Walker, was to discuss the failure of the B-check aircraft to meet their schedules departure times. According to Nasdeo's typewritten notes of the meeting, "[Walker] [d]idn't have crew meeting with crew after meeting with Nasdeo. Only spoke to crew chiefs. Told them NBOs have to stop. They agreed." RX 14. Nasdeo's notes also state, "[Walker] [s]aid understanding on floor is that once contract is ratified, all this stops because of more money." RX 14. The memo concludes, "Effective Thursday – Walker – hangar line / Schamber – B [check]." RX 14.

Kimball's typewritten notes of the July 11 meeting say that "Tony [Nasdeo] asked Paul [Walker] if Mel [Rogers] hadn't spoken to him about the NBO problem. Paul stated that he had not." RX 17. The key paragraph in Kimball's notes is as follows:

Jim [Bailey] and Tony [Nasdeo] both emphasized to Paul [Walker] the importance of making no "deals." They also told him that if he needed OT to get the job done, then hold the OT but the [mechanics] MUST badge out. There can be no "deals." Paul [Walker] stated that the understanding on the floor is that once the new contract is ratified, the deals would go away because the AMT's would then be making more money. Jim [Bailey], obviously frustrated with Paul's response, restated his position that there are to be no deals and told Paul that he wasn't sure he wanted Paul in his station. He also asked Paul what it was about this that he did not understand. Paul said that he understood. He also said that when Mel told him "no deals" that he told Mel, "you know, these aircraft are not going to fly." Jim then advised Paul that he was going to move him to the midnight shift within the next few days.

RX 17.

Bailey's typewritten notes of the July 11 meeting indicate that the meeting's purpose was to determine why the mechanics assigned to Walker "[h]ad not completed their assigned work cards during their scheduled shift." These notes also state that other managers on duty that night could not provide a clear explanation but that it was rumored that Walker had told his mechanics in a crew meeting that there was to be no more overtime at LAX. RX 18. However, the notes also indicate that Walker claimed to have met only with his two crew chiefs, and told them no more NBOs or deals. RX 18. After noting that he told Walker he was being reassigned to the "hangar line," Bailey wrote, "I told Paul that I felt he needed further evaluation, because I was not sure if I wanted him as a member of my management team." RX 18. The last paragraph of Bailey's notes reads as follows:

Paul Walker asked if he could speak to me alone, and I said yes. Paul asked if he could have an opportunity to transfer to another Class I city before I fired him. I told Paul that my intentions in calling him to my office were not to fire him, but to get the facts. I told Paul that I felt he had a lot to offer to the team, but that he needed to correct some things. I reiterated to Paul that he needed to take more responsibility for his B-check mechanics, and himself.

RX 18. During the trial, Bailey testified that before meeting with Walker he had spoken directly with supervisors Rushing and Pope, who had told him that the mechanics under their supervision were upset about something they had heard from Walker's B-check crew of mechanics, which somehow "led them not to produce the airplanes to be ready for schedule in the morning." Tr. at 1935. Bailey also testified he became frustrated with Walker only because he had argued during the meeting for a gradual phasing out of NBOs rather than immediately ending them, as directed by Bailey. Tr. at 1938-40.

According to Walker's trial testimony, when he arrived at Bailey's office on the morning of July 11, he encountered Rushing and Pope exiting from a meeting with Bailey. Tr. at 508. Walker testified that Rushing and Pope told him they had informed Bailey that Walker had held a meeting on the night of July 10 and told his crew chiefs to not complete the B-checks as a message to management. Tr. at 508-09. Walker further testified that "they told me that I was going to lose my job, not them." Tr. at 509. Walker testified that following the meeting he was somewhat confused regarding his status at LAX. Tr. at 511. However, Walker's own testimony indicates that he understood that, although Bailey was upset about the delayed aircraft and believed Walker was at least partly responsible for the delays, Bailey was not firing him but only transferring him to the hangar line. Tr. at 510-11, 1940-41.

Walker's testimony is partially corroborated by a letter written on July 16, 2004 by four crew chiefs who worked under Walker on the B-check line. CX 26 at 462. In the letter the crew chiefs set forth their version of the July 10 events and asserted that Walker had been "disciplined unjustly." Among other things, the crew chiefs reported that they held their usual meetings with their mechanics on the night of July 10th, but noted that Walker was not present at those meetings. CX 26 at 462. They did acknowledge, however, that Walker had informed them that they would not be able to authorize overtime as they had done in the past. CX 26 at 462. They also indicated that when it became clear that the B-checks were running behind schedule, Walker "was informed," but "was unable to get the overtime and told us to do the best we could to get the aircraft out on time." CX 26 at 462. The crew chiefs attributed the delay in part to the fact that the two aircraft in for B-checks that night "were late on arrival and had numerous heavy write ups." CX 26 at 462.

On July 15, 2001, Walker telephoned Merrill, who was apparently on vacation when the events of July 10-11 transpired. RX 19. Merrill then drafted a short summary of the conversation, which is as follows:

On Sunday July 15, 2001 Mr. Walker spoke with me regarding the NBI/NBO time sheets. He stated that when I was on vacation word came down from upper Management that this must stop. And when he held that discussion with his Crew Chiefs neither [B-check] made scheduled departure. I told him that if we needed overtime to hold it but that NBI/NBO's would not be tolerated and must stop immediately.

RX 19.

C. Hotline Complaint on July 16, 2001

On July 16, 2001, Walker telephoned American's employee hotline and spoke with Jay Stone, who had been a hotline interview specialist since December of 1999. RX 20, Tr. at 329, 2065. Before being employed as a hotline interviewer, Stone worked as a sportswriter for a variety of newspapers and he believes that his experience as a journalist is one of the reasons he was hired to be a hotline interviewer. Tr. at 2065-66. Stone testified that he usually takes 40 to 50 telephone calls each day. Tr. at 2067. When a call comes in, Stone punches in a code that brings up a computer screen showing the proper greeting for the applicable client company. Tr. at 2067. Stone testified that in July 2001 it was not his habit or practice to require callers to identify themselves by name, but that he let callers determine for themselves whether or not to leave a name. Tr. at 2068-69. As Stone proceeded through his list of questions, he would input information directly into the computer without making intermediate notes. Tr. at 2071. His standard questions seek such information as the caller's telephone number, the identity of the person responsible for the problem, when and where the problem occurred, how long the problem has been occurring, how the caller knows about the problem, whether there is any documentation that would help the company investigate the problem, whether the caller has reported the problem to anyone in management, and whether there is anyone else who knows about the problem. Tr. at 2072-77. Set forth below is the entire narrative portion of the summary of the Complainant's July 16, 2001 hotline complaint as prepared by Stone.⁴

WHAT: WALKER reported employee relations issues involving BAILEY, ROGERS, and NASDEO.

WHEN: Ongoing for the past 2 ½ months.

WHERE: At this location.

HOW: WALKER stated that BAILEY, ROGERS, and NASDEO have been intimidating him into signing off on tasks that have not been completed or are not safe just so they can get the plane out.

In late June, 2001, NASDEO went to midnight supervisor Larry POPE and told him to stop authorizing overtime, NBOs, or deals for hours changes. From then until 7/11/2001, rumors went around regarding the things NASDEO told POPE. On 7/11/2001 WALKER sent NASDEO an e-mail requesting clarification. Later that day he met with ROGERS and John GLOWOCKI (another supervisor) to ask for the same clarification.

ROGERS told him no overtime, NBOs or deals, and told WALKER to go tell all the other workers. WALKER asked if ROGERS was aware of the possible ramifications of this change, and ROGERS said he was, but there are "things he

⁴ The narrative presented here retains the all-capital terms used in the written text of the complaint summary and adds bold font for the question prompts. See RX 20.

could do.” WALKER did not understand what he meant, and asked for more explanation. ROGERS would not explain.

An hour later, NASDEO came to WALKER and told him to go out and tell the employees, that he was going to clean the shop up and make it a No. 1 station.

When WALKER went and told the crew chiefs, and two crew chiefs (Ed MEARS and Mark CHANEY) said they would go the next day and talk to BAILEY about it and try to get it straightened out.

WALKER did not hold a meeting with all the employees. POPE came in that night and was told the same things. POPE held a crew meeting and told them about the overtime, NBOs and deals. POPE’s crew came out and decided to work one card, finish their eight hours and go home. They left two “B-Check” 767s sitting in the maintenance bay, and those planes missed their flights.

07/12/2001 at 5:30 am, POPE and MOD Chris RUSHING called NASDEO and told him the two planes were not going to make it. WALKER was already home in bed. NASDEO called him and told him to come back in. He did, and when he got there NASDEO and BAILEY were meeting, and they were all saying WALKER caused this to happen. BAILEY told him he did not want him in the station any more. NASDEO, ROGERS, POPE and RUSHING all told BAILEY that WALKER was the one who caused this. WALKER said he avoided having it be worse by delaying having a meeting with the employees under him.

BAILEY also told WALKER if he discussed this with anyone, including company executives, he would be gone.

Later that day, BAILEY called him and told him he wanted him to stay.

WALKER said people are scared to go to work because they feel threatened with the managerial style of NASDEO, whose first response to anything is “who can we fire.”

HOW LONG HAS THIS BEEN OCCURRING AND HOW OFTEN IN THE PAST? Two and a half months.

HOW DO YOU KNOW ABOUT THIS? Caller was involved in the incident.

IS THERE ANY DOCUMENTATION THAT WOULD HELP THE COMPANY INVESTIGATE THIS? Yes. Walker’s written statements regarding the incident and emails.

HAVE YOU REPORTED THIS TO ANYONE IN MANAGEMENT? Yes.

Name: Ron MERRILL

Title, work area, or responsibility: Level V Maintenance manager

When reported: 07/15/2001

Action taken: None

IS THERE ANYONE ELSE WHO KNOWS ABOUT THIS? No.

INTERVIEW NOTES: None.

CALL BACK ARRANGEMENTS: WCB in 2 weeks if not contacted.

RX 20 (capitals in original, bold emphasis added).

During the trial, the Complainant testified that the document prepared by Stone is an accurate summary of his hotline complaint. Tr. at 765. The Complainant also testified that he gave his name to Stone only because he was told that nothing would be done about his complaint unless he gave his name. Tr. at 332. However, that testimony was not corroborated by Stone, who testified that it was not his habit or practice to require callers to leave their name, that he was not trained to make such a statement, and that he was fairly confident he had never told any caller nothing would be done on their complaint if the caller did not leave a name. Tr. at 2068-69, 2087-88. Stone further noted that his training directed him to respond to an inquiry about what would happen if a caller did not leave a name by saying that “it’s our understanding the company treats all of the complaints that we take in the call center here in the same fashion.” Tr. at 2090.

The Complainant also asserted during his testimony that he made his July 16, 2001 call to the hotline because of “the pressure, the threats, the manpower [shortages]” that caused managers to pressure supervisors and mechanics to sign off repairs or release aircraft prematurely. Tr. at 323-24. According to Walker, he felt that after Merrill declined to champion his complaints to Bailey and Evans, “there wasn’t anybody else to turn to” except the employee hotline. Tr. at 323. Finally, Walker testified that “most all of the crew chiefs and mechanics trusted me and thought I would do the right thing.” Tr. at 324.

On cross-examination, Walker admitted that he felt his job was in jeopardy after the July 11 meeting in Bailey’s office. Tr. at 698. Walker also admitted that his hotline complaint did not discuss any specific “pencil whipping” incidents prior to the date of the hotline call. Tr. at 774-76. Walker also admitted that his hotline complaint did not name Sharifi, even though he alleges that in July 2001 Sharifi had pressured him to sign off an aileron bearing that showed wear beyond acceptable limits. Tr. at 829-34, 837. Similarly, Walker stated that he knew that manager Carl Anderson engaged in “pencil whipping” as early as October 2000, but had failed to mention Anderson in the hotline complaint. Tr. at 770. In contrast, the three managers who were specifically named by Walker in the hotline complaint as “intimidating him into signing off on tasks that have not been completed or are not safe” were, in fact, the three managers Walker dealt with on the NBO and B-check issues in July 2001. Tr. at 843-45. On cross-examination, Walker also admitted that the bulk of the hotline complaint focused on the NBO issue rather than on the alleged pressure to “pencil whip.” Tr. at 848.

D. Investigation of Hotline Complaint and Resulting Discipline

1. The Investigation

After Stone prepared his summary of the Complainant's July 16 call, the summary was sent to Robert Scheuler, a Senior Security Representative for American. On July 17, 2001, Scheuler sent a letter to Evans requesting that he conduct an investigation of Walker's hotline complaint and provide a report within 21 days. Tr. at 3066, RX 21. A copy of Stone's hotline report was attached to the letter. On July 25, 2001, Evans faxed the hotline complaint to Kimball, the Human Resources representative assigned to work with managers in Aircraft Maintenance, and directed her to conduct the investigation. Tr. at 1259, 3067-68.

On July 25, 2001, Kimball began her investigation by conducting very brief interviews of each of the three managers named in the complaint (Bailey, Nasdeo, and Rogers) and asking them whether they had ever intimidated or threatened anyone at LAX into signing off work that was incomplete or had not been done. Tr. at 1261. They all denied any such actions or statements, and each of them prepared nearly identical one-sentence statements to that effect. Tr. at 1261-65, 1945-47, RX 22, RX 23, RX 27. Nasdeo's statement, for example, states that "I have never asked, hinted, or required anyone to sign off an unsafe aircraft or any incomplete aircraft paperwork."⁵ RX 27.

Later that same day, Kimball conducted a long interview of Walker in her office. Tr. at 1326. Before meeting with Walker, she prepared 17 typewritten questions asking about the dates, aircraft, exact statements, and witnesses to any acts of intimidation by any of the three managers named in the complaint. RX 24. The last typed question, number 17, asked "Why would you make such a strong statement without facts to back it up?" RX 24. According to Kimball, she added question 17 after she interviewed the three managers but before she interviewed Walker. Tr. at 1381-82. Kimball further testified that during the meeting with Walker she took notes of his replies to her typed questions and also made four pages of notes memorializing Walker's replies to additional questions composed during the interview. RX 24, Tr. at 1277. However, she did not make a tape recording of the conversation. Tr. at 1339-40. The typewritten questions to which answers were noted (with Kimball's handwritten notes of Walker's replies in italics) are as follows:

1. On what date(s) did Jim Bailey intimidate you into signing off tasks that have not been complete or were unsafe? *He's never directed it point blank. He wanted [aircraft] to move.*

6. On what date(s) did Tony Nasdeo intimidate you into signing off tasks that have not been complete or were unsafe? *I don't deal [with] Nasdeo.*

11. On what date(s) did Mel Rogers intimidate you into signing off tasks that have not been complete or were unsafe? *[Mel] wants [aircraft] fixed & out.*

⁵ Bailey's statement reads as follows: "I have never directed, asked, hinted, or required anyone. To sign off unsafe or incomplete work on any Acft. In order to return that Acft to service." RX 22. Mel Rogers wrote that "I have never asked, hinted, or directed any employee to sign off incomplete or unsafe paperwork." RX 23.

13. What exactly did he say to you? *Mel had told me to sign off [aircraft]. He didn't know they were unsafe.*

RX 24. The additional handwritten questions (with Kimball's handwritten notes of Walker's answers in italics) are as follows:

Directive to move [aircraft] incomplete or unsafe? *"Not directive. Just trying to move [airplanes]. Not when unsafe.*

Have any of these guys directed or intimidated you to sign off . . . *"No."*

Why these [complaints]? *[Managers] say do whatever it takes. Move [aircraft].*

Did [you] believe to mean sign off incomp[lete] or unsafe? *No.*

Why did [you] call network. *Right after deal in there. Feeling I got that I would be fired. Scared. Bad feels. Going down tubes—not good.*

Did you know claims were false. *Yes.*

Do [you] know it's falsification of [records] & misrep[resentation] of facts? *Yes. Didn't know where to turn.*

Crux? *Nasdeo—no OT, NBO's, deals.*

What [with] NBO's? *AMTs held on OT after badge out & fail to badge in. Mel said the NBO's have to stop. That's the way it is.*

Did [you] know NBO's wrong? *Yes, not good. Managers and [crew chiefs] all agree NBO out of [control].*

Why don't [you] require they [badge out]? *They won't stay.*

Why. *Then they have [to] stay full 2 hrs.*

Do you know that is wrong. *Yes.*

Fals[ification] of co[mpany] [records]? *Yes Short 6-7 [heads] per [night]. Nobody will work B [check].*

Do you know signing is falsif[ication]? *Yes, don't know where to turn.*

Any unsafe [aircraft] released fr[om] LAX? *I ASAP'd one. [Aircraft] flap. Paul and Dave Starbuck released B [check] & sent it out. [One month] later FAA*

caught out of limits had hail [damage]. Mel & Moe told him to sign off & release [aircraft]—Did not know had problem. “Nobody did.” Problem since 1996.

Why claim made. Scared. Pope & Rushing lied—no trust.

Discussed [with] Ron. This can't keep going. Need manpower.

Did Ron tell you to NBO? Yes. “Nobody wants to know about it. Make planes turn.

Conv[ersation] [with] Mo: [Overtime]. Manpower. How to handle.

Mo—“I don't know how to handle.”

Mel. “NBO's have to stop. That's the way it is.”

Ron. Directed to have AMT's [badge out] then [overtime].

Nasdeo said too many NBO's. Must stop. Thought [overtime] stop too.

Cleared [with] [Bailey], [Nasdeo], & me.

Why didn't [you] come to me? Scared. Didn't know [you] could help. Confused.

RX 24.

In addition to making notes of the Complainant's statements, Kimball had Walker write and sign a brief statement at the end of the interview. RX 26. That statement reads as follows:

Jim Bailey, Tony Nasdeo, Mel Rogers. With a feeling of intimidation from the above named, the statement I made was general and was made without a clear and concise recollection of what happened. The statement of signing off planes was not accurate to the point that they [did not] know what condition the planes were in. I was never directly told to sign off unsafe or incomplete paper work but the feeling was such that if the planes didn't go out I would no longer be working here.

RX 26. The bracketed phrase “did not” appears in the left-hand margin of the handwritten document rather than as part of the blocked text of the note. Kimball claims that she did not direct Walker to add the phrase “did not” in the margin, that none of the writing on the note is her handwriting, and that the note is a true and correct copy of the handwritten statement Walker wrote out in her office on July 25, 2001. Tr. at 1292-93. The Complainant, however, testified that after he wrote his statement, Kimball returned it to him and demanded that he add the words “do not” which appear in the left margin of the handwritten statement, and that it was accurate as originally written, i.e., that the managers did in fact know what condition the planes were in. Tr. at 345-47.

Following the meeting, Kimball prepared a typewritten document purporting to be a verbatim presentation of questions she asked Walker and his replies. RX 25. The typewritten document is a selection of Kimball's prepared and handwritten questions and expansions of

Walker's replies. It is generally faithful to the handwritten notes on which it is based. In a narrative section following the reconstructed question and answer dialogue, Kimball's report states that Walker "admitted several times that the allegations of being intimidated into signing off incomplete or unsafe tasks was false." RX 25. Although she testified that Walker made the statements she reported and that he did so willingly and voluntarily, Kimball did not present her summary to Walker for his verification or signature. Tr. at 1332-33. Kimball testified that she reported back to Evans that "Mr. Walker had retracted his entire statement." Tr. at 1295. Evans' testimony confirms that Kimball contacted him by telephone after she completed her investigation and told him that the three managers had not been involved in the activities identified in the hotline complaint. Tr. at 3069. Evans testified that Kimball "told me that Mr. Walker had admitted that he had made a false claim." Tr. at 3069. Kimball's typed report, Kimball's interview questions and notes, the statements of the three managers, and Walker's own statement were all sent to Evans shortly thereafter. Tr. at 3069-72.

The Complainant's account of the meeting differs in some respects from Kimball's account. According to the Complainant, on July 25, 2001 he was directed by his manager to report to Kimball's office. Tr. at 334-35. He testified that Kimball initially started inquiring into who had directed him to sign off NBOs. Tr. at 336. Walker testified that it then occurred to him that Kimball or management was looking for a scapegoat, so he announced, "You're looking for a scapegoat, and I think that scapegoat is going to be me. I think you're trying to fire me." Tr. at 336. Walker recalls Kimball glancing down at papers as she asked questions, but doesn't recall her taking any notes. Tr. at 338, 341. According to Walker, he felt that this was not a *bona fide* investigation and that he was being targeted. Tr. at 339. Walker also denied telling Kimball that he made a false complaint or that he called the hotline because he was afraid of losing his job. Tr. at 2896-97. Walker asserted that Kimball told him that if he did not write a statement retracting the charges made in his hotline complaint, he would be terminated. Tr. at 343. Walker further testified that their voices were raised at this point and that he was so fearful that Kimball was about to strike him with a pen or an envelope opener that he moved back and struck his arm on a filing cabinet.⁶ Tr. at 343-44, 862-63. Finally, Walker testified that at the close of the meeting he told Kimball that he had documents in his employee locker proving all of the allegations he had made in his hotline complaint. Tr. 355-56. Approximately one week after telling Kimball about these documents, Walker testified, he discovered someone had broken into his locker and taken all the documents, while leaving his jacket, dictionary, and various pieces of equipment. Tr. at 356-57.

According to Kimball's trial testimony, the Complainant made his statements to her willingly and voluntarily. Tr. at 1303, 1333. She acknowledged that she did ask Walker to provide a written statement about his hotline allegations, but denied telling Walker he would be terminated if he declined to do so. Tr. at 1292. She specifically denied physically approaching Walker or menacing him with a pen or any other instrument. Tr. at 1292. Furthermore, Kimball denied ever being told by Walker about his alleged possession of a collection of documents that would corroborate his allegations. Tr. at 1293. According to Kimball, the meeting ended relatively cordially: "I thanked him for his time, and I do recall specifically telling him, 'If you

⁶ Later, Walker also asserted that on occasion Kimball had been seen in the maintenance area hitting mechanics and yelling. Tr. at 863.

have any questions or concerns, bring them to me. You know, hopefully we can solve these things before they get so heated.” Tr. at 1294.

During her testimony, Kimball acknowledged that she has been living with Rogers since May 2002 but asserted that her romantic relationship with Rogers did not begin until September 2001. Tr. at 1297-98, 1319. However, during cross-examination she acknowledged that in June of 2001 she sat next to Rogers on a flight from LAX to London and a few days later had joined Rogers on a tour of Orly airport near Paris. According to Kimball, she was on the flight to London because she was “seeing somebody in London” and Rogers was on the flight because he was on his way to the Paris air show. Tr. at 1298, 1321, 1427-28. She elected to fly to Paris and attend the air show with Rogers only after she cut short her visit to London: “I was there about 24 hours and things went south.” Tr. at 1426-27. She explained that after her arrival in Paris she contacted an American Airlines maintenance manager who had air show tickets and then met a group, which included Rogers, at the airport. Tr. at 1428. Returning to Los Angeles, Kimball testified she and Rogers were on the same flight but sat in different sections of the aircraft. Tr. at 1429. According to Kimball, the fact that she and Rogers traveled on the same planes “was just a coincidence.” Tr. at 1429. Rogers testified that his relationship with Kimball did not begin until after September 11, 2001 and that he had no romantic relationship with her at the time she investigated Walker’s hotline complaint. Tr. at 2657-58. Rogers also testified that being on the same flight as Kimball to London was purely coincidental, and that he had originally planned to take a direct flight to Paris but ended up on a later flight connecting through New York and London due to an unexpected work assignment. Tr. at 2661-62. Evans testified that Kimball reported a romantic relationship with Rogers to him around December 2001, but that he had no knowledge of such a relationship before that time. Tr. at 3082-83. On cross-examination, Evans admitted that if there had been a romantic relationship between Kimball and Rogers in July 2001 and if he had known of it, he would have assigned the investigation of Walker’s hotline complaint to another human resources representative. Tr. at 3087-88.

The assertion that there was no romantic relationship between Kimball and Rogers until September of 2001 was disputed by three witnesses. One of these witnesses was Bruno Rosenthal, a mechanic who worked at the Respondent’s Paris maintenance facility before transferring to LAX in April of 2000.⁷ Tr. at 1654. According to Rosenthal, he observed Rogers and Kimball hugging and kissing in an LAX parking lot in May 2001. Tr. at 1658. Rosenthal also testified that in late May or early June 2001 Rogers asked him for suggestions on attractions to visit on “a romantic trip in Paris.” Tr. at 1659. In addition, Rosenthal testified that American Airlines employees in Paris had telephoned him in June 2001 to tell him that Kimball and Rogers had visited the maintenance offices at DeGaulle airport in Paris together. Tr. at 1659-60. The second witness, Susan Trechak, whose office at the LAX maintenance facility was near Kimball’s, testified that during May of 2001 she frequently observed Rogers and Kimball

⁷ Rosenthal has filed complaints with the California Department of Fair Employment and Housing and with the United States Department of Labor in connection with his termination by the Respondent in October 2001. Tr. at 1656-57, 1663-66. Rosenthal worked at American’s San Francisco airport maintenance department at the time of his termination. Tr. at 1656-57, 1663-66. OSHA was still investigating Rosenthal’s whistleblower complaint on the date he testified in this case. Tr. at 1665.

spending long periods of time together in Kimball's office.⁸ Tr. at 1782-83, 1787-88. Based on sounds she overheard, Trechak characterized the relationship between Kimball and Rogers as "a sexual affair." Tr. at 1783. The third witness to allege that Kimball was romantically involved with Rogers before September 2001 was the Complainant himself. According to his testimony, he observed Kimball and Rogers hugging and kissing in an LAX parking lot prior to July 2001. Tr. at 354, 926. However, this testimony is apparently inconsistent with a September 28, 2001 letter to Kimball in which Walker asserted that he had "been informed that you have some type of relationship [with Rogers] . . . that may affect your impartiality," thereby suggesting that he had become aware of the relationship only shortly before writing the letter. RX 46.

2. Disciplinary Action

As previously noted, after Kimball completed her investigation, she told Evans that "Mr. Walker had admitted that he had made a false claim." Tr. at 3069. According to Evans, after he received Kimball's report and the accompanying documents, including Walker's handwritten statement, he "read each document in its entirety" and concluded that Walker had admitted to making a false claim. Tr. at 3073. Evans characterized Walker's conduct as a violation of American Airlines Rule of Conduct No. 16, which provides that making false claims or false statements is punishable by discipline "up to and including termination." Tr. at 3073. Evans testified that he was at first inclined to terminate Walker, but Kimball, relying on direction she received from her manager in Human Resources and from an attorney employed by American, suggested a "Career Decision Day Advisory" instead. Tr. at 3112-13. Based on that advice, Evans made the decision to issue Walker a Career Decision Day Advisory letter. Tr. at 3113.

Kimball testified that on August 6, 2001, a meeting was held in Evans' office and Walker was given a Career Decision Day Advisory letter by Evans. Tr. at 1305. Evans read the entire letter aloud to Walker. Tr. at 1306. The letter summarized the results of Kimball's investigation of the hotline complaint as follows:

On July 16, 2001, you filed a formal complaint accusing three (3) managers of "intimidating you into signing off on tasks that have not been completed or are not safe just so they can get the planes out."

During a Company investigation into this matter you admitted that these allegations were untrue and that you made them because you were "scared and thought I would be fired."

Your actions as described above are not only totally unacceptable, but are also a direct violation of American Airlines Rules of Conduct, Rule 16 which states:

- Rule 16 – "*Misrepresentation of facts or falsification of records is prohibited.*"

⁸ Trechak was terminated from her position as a scheduler/planner at American's LAX maintenance facility in 2002. Tr. at 1777-78. According to Trechak, she had four whistleblower suits pending against the Respondent at the time she testified in the present case. Tr. at 1778-79.

In view of the above, you will be given a "Career Decision Day Off" with pay, to review and select one of the following options.

RX 30.

The letter then presented three options to Walker: (1) sign a letter of commitment to comply with all company rules, (2) resign with temporary company benefits in return for agreeing to not appeal, or (3) be terminated with the option to grieve. RX 30. According to Kimball, Walker offered to sign the letter of commitment immediately, but Evans informed him that he was required to spend one day considering the three options before making a decision. Tr. at 1307, 3076. Evans' testimony confirms Kimball's account of the meeting, noting in particular that Walker made no objections or corrections when Evans read aloud the paragraphs of the Career Decision Day Advisory letter stating that Walker had made false allegations and broken Rule 16 by misrepresenting facts. Tr. at 3077-78.

The following day, Walker returned to Evans' office and signed a letter of commitment. RX 31, Tr. at 1307. However, according to Kimball, Walker refused to sign the first letter of commitment she presented to him because it incorrectly included standard language referring to "prior coaching and counseling" normally provided to employees in the earlier stages of the employee discipline process. Tr. at 1307-08. After Evans directed Kimball to correct the letter, Walker signed the revised letter of commitment. Tr. at 1309. The letter of commitment which Walker did sign states, "I acknowledge that I have a performance problem," and pledges immediate compliance with all company policies and rules. RX 31. Evans' testimony fully corroborates Kimball's account of this second meeting. Tr. at 3080-81.

On August 16, 2001, Kimball sent an e-mail summarizing the resolution of the hotline complaint to Scheuler, the American Corporate Security official who had forwarded the matter to Evans in July 2001. RX 35. Her e-mail reads as follows:

This case has been thoroughly investigated.

During a meeting with the caller, he admitted that his allegations were not true. He stated that he was afraid of being fired for some other issues that were occurring at LAX.

A copy of my investigation notes is attached for your review.

The employee has been placed on a Career Decision Day Advisory for violation of Rules of Conduct, Rule 16 for misrepresentation of facts.

RX 35. Scheuler replied, "Susie, nicely done. Not often that the caller becomes a stat." RX 35.

Walker's version of the two meetings is largely in agreement with the accounts offered by Evans and Kimball. Walker testified that on August 6, 2001 he reported to Evans' office, where Evans read the text of the Career Decision Day Advisory letter to him. Tr. at 359-60. He testified that he returned the following day as directed, and exercised the first of the three options

by signing the letter of commitment after Kimball corrected it to eliminate the reference to employee counseling. Tr. at 366, 369. However, Walker reaffirmed in his testimony that, despite the wording of the letter of commitment, he did not admit to Kimball that his hotline statements were false or that he made them because he was afraid of being terminated. Tr. at 364. According to Walker, Evans told him he could either sign the letter or be terminated. Tr. at 367-68. Walker testified that he replied, "I don't want to lose my job and I definitely would like to make it to retirement," then signed the document. Tr. at 368. Walker denied that in signing the letter he was doing so voluntarily, testifying that he signed it "because I didn't want to be terminated." Tr. at 369.

E. Alleged Protected Activities After the Career Decision Day

After the July 25, 2001 interview with Kimball, the Complainant continued to work as a supervisor and continued to have responsibility for signing off aircraft. According to the Complainant's testimony, there were at least nine incidents during August and September of 2001 in which he had disputes with his managers concerning aircraft safety issues. These alleged incidents are presented below.

1. Refusal to Sign Off Flight Management Computer

According to Walker, sometime in early August of 2001 a flight management computer (FMC) on American Airlines aircraft 5EY was flagged as "FMC fail" when the aircraft arrived at LAX.⁹ Tr. at 94, 100. During his testimony, Walker asserted that the equipment needed to properly repair the FMC was not available at LAX when the problem was originally reported. Tr. at 95. As a result, he testified, neither he nor the avionics supervisor and mechanics on duty that night would sign off the FMC problem as resolved when directed to do so by Sharifi. Ultimately, Walker testified, Sharifi signed the logbook himself and the aircraft was released for its assigned flight. Tr. at 95-96, 250-52. Walker further asserted that he recounted this incident directly to Evans in person when he was in Evans' office in connection with the Career Decision Day meetings on August 6 and 7, 2001. Tr. at 258-59, 369. Walker claims that Evans replied that Walker didn't have enough experience to determine what is or isn't safe, and "told me to go use the hotline again and then get out." Tr. at 259.

According to Sharifi, an FMC unit would be the responsibility of an avionics supervisor and team, not Walker and his mechanics, so he would not have directed pressure at Walker to sign off a faulty FMC unit. Tr. at 2131. Furthermore, Sharifi denied ever threatening any supervisor or mechanic to sign off a logbook entry when the repair work was not performed. Tr. at 2138-39. While Sharifi had no specific recollection of the incident in question, he affirmed that the signature in the 5EY logbook was his and that the notation "Reset systems ops, cks normal" means that he must have gone to the aircraft, reset it, and made sure it was working before signing it off. Tr. at 2139, RX 29.

⁹ Maintenance documents show that initial work on the FMC was performed on August 4, 2001, with follow-up work on August 7, 2001. Tr. at 474-75, 907, CX 18 at 292, 293.

Although Evans generally denied that Walker ever came to him with complaints about being pressured to sign off incomplete work or unsafe planes, Evans was not asked and did not specifically deny any conversation with Walker about Sharifi or an FMC problem. Tr. at 3086.

2. Submission of Second ASAP

According to Walker, on August 6, 2001 several crew chiefs and supervisors were arguing over what needed to be done to release aircraft R34, and Walker was asked by Anderson and Sharifi to review the airplane's log book. Tr. at 377-78, 466-67, CX 18 at 294. Walker testified that he called a Mr. Metz, an advisor with Tech Services in Tulsa, who told Walker that the necessary repairs had been performed earlier in Reno. Tr. at 378, 468. Walker testified that he was uncomfortable with this explanation, but nevertheless voided out a line in the log book under Metz's direction. Tr. at 378, 381. Walker then entered a new placard on the autopilot identifying items of equipment that were not yet repaired and the aircraft was released.¹⁰ Tr. at 378, CX 2. Walker testified that the crew chief working on this aircraft was new and not fully qualified for this type of repair, so Walker was the person who actually released this aircraft. Tr. at 466, 473.

Walker further testified that shortly thereafter the FAA discovered that the placard had expired and the lapse was then investigated by Paul Wince, an American inspector out of Tulsa, and Nasdeo from LAX. Tr. at 471. According to Walker, Wince asked Metz about repair work on the aircraft, at which point Metz filed an ASAP over this item because "he had removed placards without the work being done, and the FAA had found that." Tr. at 378, 471. Walker testified that Nasdeo then had him contact Mince, who asked Walker about why he voided out a line in the aircraft's log book. Tr. at 472. Walker claims that Wince and Nasdeo wanted to hold a Board of Inquiry on Walker's actions, despite his objections that the plane was the responsibility of Rogers and Holland Smith and that Walker had only been following the direction of Metz. Tr. at 382, 473. According to Walker, Wince and Nasdeo wanted him "to just send a statement in," but instead on August 20, 2001 Walker filed his own ASAP disclosing the log book item he voided under the direction of Metz, which apparently concerned the improperly removed placards. Tr. at 378, 473, CX 2. On the ASAP form, Walker wrote that Metz "told me to void the cleared MEL 080001 because the two placards were already installed. This entry was in error." CX 2 at 29. Subsequently, American's ASAP Program Manager sent Walker a form letter dated November 2, 2001, acknowledging his ASAP submission and "closing the matter" with no additional comment. CX 2 at 28.

According to Walker, after Nasdeo learned of the placard incident, he called Walker to his office. Tr. at 382. Along the way, Walker testified, he encountered Bailey and told him "about R-34 and the placards and getting signed off, and that Nasdeo was trying to hang me for it and was trying to blame me for the items and the stuff that were going on." Tr. at 382.

¹⁰ A placard is a sticker that is placed in a log book highlighting an entry identifying a particular piece of equipment as being inoperative for a short period of time. Placards are issued or approved only by engineers at the Respondent's Tulsa facility. Only items of equipment identified on the aircraft's minimum equipment list ("MEL") are eligible for placarding. The piece of equipment is tagged with a sticker to indicate its inoperative status, while the placard itself is placed in the log book to notify pilots of the equipment problem. Placards are separately tracked to ensure the repairs are performed promptly. A placard should be removed only after the equipment has been properly repaired. Tr. at 378-80, 469, 1920-22.

According to Walker, Bailey then asked if Walker still felt Bailey was harassing and intimidating him, to which he replied in the affirmative and explained, “You’re the head of the department, you’re the one that runs this place. You’re over Nasdeo. You’re the one that demands that we get these airplanes to the gate.” Tr. at 382, 482-84.

Bailey testified he had no recollection of any of Walker’s ASAP reports, noting that he rarely had a conversation with Walker and that he “didn’t have a lot of interaction with Paul at all.” Tr. at 2063. Bailey also denied receiving any communication from Walker regarding problems with aircraft R34, and specifically denied Walker’s claim they had such a conversation in the hallway outside Bailey’s office. Tr. at 2063-64.

3. Refusal to Sign Off Damaged Flap

The Complainant testified that in August of 2001 he observed out-of-limits flap damage on aircraft N-386. Tr. at 1000, 1155. He further testified that he was directed to sign off the paperwork on the flap by Rogers and Sharifi, but refused to do so. Tr. at 1000. Sharifi testified he had no recollection of any interaction with Walker concerning flap damage to aircraft 386 on or around August 18, 2001. Tr. at 2166-67.

4. Refusal to Change Temperature Report

The Complainant testified that on August 10, 2001, a pilot reported an engine exhaust gas temperature reading of 898 degrees, which is above acceptable limits. Tr. at 451, 459, CX 18 at 297. According to Walker, such an “overheat condition on take-off” normally requires inspection of the engine with a laboroscope to check for heat damage. Tr. at 452. Walker testified that rather than do a laboroscope inspection, Sharifi telephoned Technical Services and obtained their approval to release the aircraft for its flight if it was signed off with a temperature of 897 degrees. Tr. at 455-56. When both Walker and Leigh refused to do so, Walker continued, Sharifi then signed the log book himself reporting 897 as the temperature. Tr. at 457. Walker stated he viewed the log book after Sharifi’s entry and recognized his handwriting. Tr. at 458. Walker’s account is partly corroborated by the testimony of Albert Leigh, who testified that the reported temperature was “into the borderline area where it required boroscope inspection.” Tr. at 1196. Leigh testified that after several telephone calls, “an Engineering override” was obtained so no boroscope inspection was performed. Tr. at 1196. Sharifi testified that he had no recollection of this event, but asserted that he would not misrepresent reported data in order to release a plane. Tr. at 2140. Furthermore, Sharifi testified that sometime after September 28, 2001 an FAA inspector at LAX investigated this and other allegations made by Walker, but after two weeks had reported back to Sharifi that he was closing the investigation with no findings of wrongdoing. Tr. at 2142-43.

5. Complaint About Damaged Thrust Reverser

According to Walker, on August 11, 2001 he observed a thrust reverser on aircraft 362 that was “out of limits” be placarded and sent out rather than given a full repair. Tr. at 445-46, CX 18 at 298. Walker testified that he complained to Rogers, the manager who had instructed a crew chief to placard the damaged thrust reverser, but was told by an upset Rogers to “get into

the game.” Tr. at 445-46. Rogers, however, testified that when a placard is assigned, it means the plane is safe to fly within the limits prescribed by the applicable guidelines. Tr. at 2645. Rogers also testified that he would not release an aircraft with loose material in its thrust reverser. Tr. at 2646.

6. Refusal to Sign Off Cowl Repair

On August 12, 2001, the Complainant testified, he observed aluminum, a “lighter grade metal,” being used for a cowl repair on aircraft N304 rather than a better grade metal or titanium. Tr. at 1154. He testified that he spoke with mechanics who were “using the improper materials” and they told him “you don’t want to know about this.” Tr. at 988. Later, he testified, he encountered manager Rogers as he was informing a group of supervisors “that he wanted it signed off and out.” Tr. at 988. Walker testified that he refused to sign off on the repair and walked away from the group. Tr. at 988. On cross-examination, Walker admitted that, apart from the statements made to him by the mechanics, he had no knowledge of whether there had been any communication with American’s technical services or engineering units regarding this specific repair. Tr. at 993. Rogers denied that any such incident ever took place. Tr. at 2644.

7. Complaint About Improper Mixing of Hydraulic Fluids

On or around August 13, 2001, Walker testified, he discovered that the hydraulic fluids used in servicing aircraft struts were not being properly mixed. Tr. at 395-96, CX 18 at 300, CX 22 at 338-39. Walker testified that he reported this condition to several managers, but nothing was done to correct it. Tr. at 397-99. Rogers, however, testified that Walker misread the maintenance manuals, stating that unmixed 5606 fluid is acceptable for the 767 aircraft, and needs to be mixed with an additive only for flap transmissions on the 757 aircraft. Tr. at 2647-48, RX 3.

8. Complaint About Leaking Fuel

On August 31, 2001, the Complainant testified, he observed fuel leaking from the wing of an aircraft that was undergoing maintenance. Tr. at 477, CX 18 at 288. According to Walker, Sharifi and Rushing directed him to sign it off as just “a fuel drip.” Tr. at 478. Walker testified that he objected that it was a leak, not a drip, and brought QA supervisor Starbuck into the conversation, who also refused to sign it off. Tr. at 479. Walker testified that even though he complained about this incident to Sharifi, Rogers, and Merrill, the aircraft was gone when he returned to work the next day. Tr. at 479-80. According to Starbuck, Walker went in to see Sharifi and Rushing only after he and Walker observed the fuel leak and Starbuck said he would not let the aircraft go. Tr. at 1508. According to Starbuck, when Walker told Sharifi about the fuel leak, Walker was told to “leave it alone” and that the leaking fuel should simply be wiped off. Tr. at 1508. According to Starbuck, the proper procedure would be to call in an outside contractor to repair the fuel tank. Tr. at 1509. Sharifi testified that he could not recall the incident, noting by way of explanation that he supervises approximately 60 planes per day. Tr. at 2168-69. Rushing testified that no such event ever occurred and that he “did not recommend anything of that nature.” Tr. at 2617.

9. Complaint About Procedures For Adding Fuel Oil

According to Walker, on September 2, 2001, he and Leigh discovered that, despite a “fueler’s” representations, aircraft 335 had insufficient fuel oil. Tr. at 415-16. Walker claimed that he had been concerned about fuel oil procedures for months because there was an ongoing practice of having mechanics sign off on fuel oil levels even though “fuelers” actually added the oil. Tr. at 415, 418. Hence, Walker testified, on September 2, 2001 he sent a handwritten note to Evans, Bailey, and other managers complaining about procedures at LAX for adding fuel oil to aircraft. CX 18 at 286, Tr. at 418, 424-25. Leigh corroborated Walker’s account of aircraft 335 and also supported Walker’s contention that fuel oil procedures at LAX were inadequate. According to Leigh, similar problems occurred “every night” and the “fuelers” often failed to accurately record how much fuel oil they had added to an aircraft. Tr. at 1191, 1195-96. Leigh noted that he had communicated this problem to Sharifi, Rogers, and Bailey on various occasions. Tr. at 1192. Rogers testified that he had never seen Walker’s handwritten note identifying a fuel oil problem at LAX, and asserted that Walker never raised this with him as a problem. Tr. at 2649. Likewise, Bailey testified that he had never before seen Walker’s handwritten note about the fuel oil problem, and denied that Walker had ever sent him an e-mail communicating a safety problem. Tr. at 1943-44.

D. Decision to Lay Off the Complainant

In the months immediately following the terrorist attacks of September 11, 2001, there was a dramatic reduction in the volume of airline passenger transportation. As a result, virtually all domestic air carriers reduced their flights and laid off employees. Tr. at 1947-48. As part of this process, in September of 2001 Bailey was informed that he needed to lay off one Level 5 manager and three Level 4 supervisors. Tr. at 1948-49. Bailey testified that after receiving the directive he reviewed personnel files of all his managers and supervisors to determine who would be laid off. Tr. at 1949. After conducting this review, Bailey testified, he decided that Walker should be “included in the layoff because [he] had the Career Decision Day and the letter of commitment in his personnel file,” and because no other manager or supervisor had any record of discipline. Tr. at 1949-50, 2003. According to Bailey, he was unaware of the reason for Walker’s Career Day discipline when he made this layoff decision and learned that it arose from the hotline complaint only when he later reviewed Walker’s personnel file with Evans as part of the layoff process. Tr. at 1975-76. Bailey testified that “there was no doubt in my mind at all” that the discipline in Walker’s personnel file was properly imposed and was not there inappropriately. Tr. at 1951-52. Bailey also denied having any knowledge of the two ASAPs filed by Walker or of any of Walker’s other safety complaints. Tr. at 1954. In response to a question regarding whether Walker had ever talked to him about safety issues or concerns about safety rule violations, Bailey answered, “No, never.” Tr. at 1954. On cross-examination, Bailey testified that “nothing was brought to my attention as far as [Walker] having any type of performance problems,” and he admitted that he had never received any complaints from crew chiefs or mechanics who worked for Walker. Tr. at 1963-64. Bailey also testified that he had not heard from any source about any of the disagreements between Walker and his managers over releasing planes or signing off maintenance work. Tr. at 2061-62.

On cross-examination, Bailey testified that he prepared a “2001 Reduction in Force Employee Profile Sheet” on Walker, which was signed by Evans on September 24, 2001. Tr. at 2005-06, CX 38, RX 42. On the second page of this document, the “no” options were selected in response to two “yes or no” questions asking if Walker was recommended for rehire in his same job or elsewhere within American Airlines. RX 42. According to Bailey, the profile sheet was not part of the evaluation process and was not prepared until after it had been determined that Walker would be laid off. Tr. at 2005-06. Bailey also testified that Walker’s actual performance was taken into account only when rating him as “competent” in the form’s “knowledge/experience/technical skills” category and acknowledged that he had considered Walker’s Career Day discipline when rating Walker “below expectations” in the “abilities” category and “poor” in the “performance” and “criticality” categories. Tr. at 2006-08. Bailey also admitted that he did not take any of Walker’s prior performance reviews into account when determining that Walker would be recommended for layoff and acknowledged that the controlling factor in his decision was the fact that Walker was the only manager or supervisor with a Career Decision Day Advisory and a letter of commitment in his file. Tr. at 2010-11, 2058. Bailey admitted that, apart from these two items, there was nothing negative in Walker’s personnel file. Tr. at 2019.

Evans’ testimony confirmed that Bailey initially reviewed the personnel files and then met with Evans to make recommendations concerning who should be laid off. Tr. at 3166. However, Evans maintained that he never told Bailey that Walker had made the July 16, 2001 hotline complaint that named Bailey. Tr. at 3166-67. Evans testified that he did not discuss the hotline complaint with Bailey when reviewing Walker’s personnel file, just the Career Decision Day Advisory and the letter of commitment. Tr. at 3167-68. On redirect, however, Evans replied to the Respondent’s counsel that it was possible he indicated to Bailey during the layoff discussion that Bailey had been named in the hotline complaint. Tr. at 3188. Evans also testified that “recall rights” do not apply to management employees and that Walker’s separation from the company was intended to be permanent. Tr. at 3184.

Like many other airline employees, in the weeks following the September 11 terrorist attacks the Complainant was apprehensive that he would be laid off. In fact, as early as September 14, 2001, the Complainant commented to a fellow American employee in Tulsa that “they are already testing the waters about layoffs out here.” RX 39. On September 21, 2001, he sent the same employee an e-mail saying “this is it if you don’t hear from me on Monday always keep the faith and I will be thinking about you. Best of luck in everything.” RX 40. On September 24, 2001, at 10:30 p.m., Walker telephoned manager Ron Merrill to inquire about “what was going on with the layoffs . . . and did this include management personnel.” RX 41. According to a memo prepared by Merrill, he replied that management would be affected and that reductions would be based on performance. RX 41. Walker then told him that “he would be off work effective immediately” and indefinitely, for medical reasons that were “between him and his doctors.” RX 41. On September 25, 2001, Merrill sent an e-mail to Kimball summarizing that conversation, noting that Walker “stated that he was stressed out and felt that he may hurt someone.” RX 43. In the e-mail, Merrill also stated that Walker claimed to have started “paperwork with American medical at Los Angeles prior to the 17th of September,” and that he would be out “a minimum of 3 to 4 months.” RX 43.

On September 28, 2001, Walker was informed by telephone and in documents delivered by Federal Express that he was being laid off. Tr. at 3176. A document entitled "Reduction in Force Meeting Notes," dated "9/28/01 via phone," purports to contain notes of the telephone conversation, which included Walker, Merrill, and Kimball. In the notes, Walker is described as "very negative & upset the way he feels he is being treated." RX 44. Under the heading "Employee's State of Mind," the handwritten notes indicate Walker claimed to be "under doctor's care" and that he said, "I don't understand what's going on. I've contacted a lawyer. Nobody's supposed to touch me. This was caused by American Airlines." RX 44. The names of Merrill and Kimball are handwritten at the bottom of the form. RX 44.

The same day that Walker was notified of the layoff, he wrote a letter to Kimball requesting reinstatement. RX 46. In the letter, Walker asserted that he believed that he was "being laid off in retaliation for my complaints to the FAA, the Department of Fair Employment and Housing and the EEOC." RX 46. Walker requested that "the company conduct an investigation" into the allegations made in his complaints and into his layoff as retaliation for making the complaints, and asked that he be reinstated pending the outcome of the investigation. RX 46. As previously noted, Walker also asserted that he had been informed that Kimball had "some type of relationship, outside of the working environment" with Rogers. RX 46. In a letter dated October 5, 2001, Kimball replied to Walker as follows.

American Airlines has received your September 28, 2001 letter asking for a reconsideration of the decision to place you in a layoff status. Please understand that the layoff decisions that were made are final and are not subject to appeal or reconsideration.

Although you claim in your letter that your layoff was in retaliation for complaints you had made to the FAA, EEOC and DFEH, the Company was unaware of any such complaints at the time of your layoff.

RX 47. Walker renewed his request for an investigation and reinstatement in separate letters on October 8, 9, and 10, 2001. RX 48.

On October 23, 2001, the Complainant submitted an AIR21 whistleblower complaint to the Occupational Health and Safety Administration (OSHA). RX 49. In that complaint, Walker claimed that "I was being coerced, intimidated and threatened to sign off aircraft with out the proper repairs or signatures. . . . I turned in a formal complaint to the proper parties and was given a career day off or termination." RX 49. The letter also listed three specific incidents in which Walker claimed to have engaged in protected activities. Walker's letter identified the period he worked as a B-check supervisor, between January and July 2001, as the period during which he was allegedly pressured to improperly sign off paperwork, yet the three specific incidents listed in the letter all occurred after he had been transferred to a job on the hangar line in August of 2001. RX 49.

On November 30, 2001, the Respondent submitted a 10-page reply to the OSHA complaint. CX 48. The reply states that Walker's complaint that he was forced to sign improper maintenance paperwork "was a lie," that "Walker has freely admitted that this complaint was a

lie,” and that “American disciplined Walker for telling that lie and that disciplinary action led ultimately to Walker’s layoff.” CX 48 at 730. The reply presents Kimball’s transcribed notes of her interview with Walker as a “colloquy,” saying that Walker and Kimball “engaged in the following Q & A.” CX 48 at 733-35. A later excerpt from Kimball’s transcribed notes is presented as “Walker’s own words.” CX 48 at 737, Tr. at 1345-48. However, the Respondent did not apparently provide OSHA with a copy of the handwritten statement that Walker gave to Kimball at their interview. RX 26.

ANALYSIS

Under the Act, an employee of an air carrier, its contractors, or its subcontractors may seek redress from the Secretary of Labor if the employee has been discriminated against “with respect to compensation, terms, conditions, or privileges of employment” in retaliation for having provided safety-related information to the employer or to the Federal Government. 49 U.S.C.A. §42121(a). Protected activities include providing or causing to be provided to the employer or to the Federal Government information related to the violation of FAA standards or regulations or other Federal laws related to air safety; filing or causing to be filed a proceeding relating to such violations; testifying in such a proceeding; and assisting or participating in such a proceeding. 49 U.S.C.A. §42121(a). To prevail, the employee must show that the employer had knowledge of the employee’s protected activity. *Id.* Under the Act responsibility for conducting preliminary investigations of employee complaints has been delegated by the Secretary of Labor to OSHA. 49 U.S.C.A. §42121(b)(2)(B); 29 C.F.R. §1979.103(c). Either party may object to OSHA’s determination and obtain a hearing before an Administrative Law Judge. 29 C.F.R. §1979.106.

At a hearing before an Administrative Law Judge, a complainant must show by a preponderance of the evidence that a protected activity was a “contributing factor” in the adverse action taken by a respondent. 49 U.S.C.A. §42121(b)(2)(B)(iii); *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR-03, slip op. at 9 (Jan. 30, 2004). If a complainant meets this burden, a respondent may nevertheless avoid liability if the respondent “demonstrates by clear and convincing evidence” that it would have legitimately taken the same adverse action despite the complainant’s actions. 49 U.S.C.A. §42121(b)(2)(B)(iv); 29 C.F.R. §1979.109(a); *Peck*, slip op. at 9. The “burden shifting pretext framework” applied to adjudication of complaints under the amended Energy Reorganization Act (“ERA”) whistleblower statute also applies to AIR21 complaints, so “unless a complainant proves that the employer fired him in part because of his protected activity, it is unnecessary to proceed to determine whether the employer has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.” *Peck*, slip op. at 10; *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003). Although the Act provides protection for a wide variety of safety-related complaints, the case law interpreting other similar whistleblower protection statutes indicates that no protection under the Act will be extended to persons who did not have an actual belief in their allegations or lacked a reasonable basis for their allegedly protected activities. *See Melendez v. Exxon Chemicals Americas*, ARB No. 96-051 (ARB July 14, 2000); *Stephenson v. NASA*, ARB No. 98-025 (ARB July 18, 2000); *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB April 8, 1997); *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec’y January 25, 1995); *Abu-Hjeli v.*

Potomac Electric Power Co., 89 WPC-1 (Sec'y September 24, 1993). See also *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

In this case, the Complainant contends that he made a series of internal safety complaints, including his hotline complaint of July 16, 2001, and that these protected activities caused American to retaliate against him by coercing him into signing a letter of commitment and then ultimately terminating his employment. He further contends that the investigation into his hotline complaint was a sham that was conducted by Rogers' paramour and that the testimony of both Bailey and Evans concerning their reasons for the adverse actions is unworthy of belief.

In contrast, the Respondent contends that the protected activities cited by the Complainant were not undertaken in good faith, did not in fact occur, or were unknown to the members of management who took the adverse actions against Walker. In addition, the Respondent asserts that the Complainant's protected activities were not in any way a contributing factor to any of the disputed adverse actions. Finally, the Respondent contends that even if the Complainant's protected activities were a contributing factor to the adverse actions, there is clear and convincing evidence that Walker's purported admissions to having made false statements during his July 16, 2001 hotline call fully justify those adverse actions.

For the reasons set forth below it has been concluded that the Complainant did in fact have a good faith and reasonable basis for some of his safety-related complaints, but that he has failed to show by a preponderance of the evidence that he had a good faith and reasonable basis for his July 16, 2001 hotline complaint that Bailey, Rogers and Nasdeo were intimidating him into signing off on tasks that had not been completed just so that they could get planes out. It is further concluded that the Complainant has failed to show by a preponderance of the evidence that his *bona fide* protected activities were a contributing factor in the adverse actions taken against him. Finally, it is concluded that even if the Complainant's protected activities did in fact contribute to the adverse actions, clear and convincing evidence shows that the same adverse actions would have been taken by the Respondent for reasons unrelated to the Complainant's protected activities.

1. Protected Activities

The protected activities alleged by the Complainant fall into three categories: (1) a series of safety related actions that occurred prior to July 16, 2001, (2) the July 16, 2001 hotline complaint, and (3) a series of safety related activities that occurred during August and September of 2001.

a. Activities Before July 16, 2001

Review of the evidence concerning the Complainant's safety related activities occurring before July 16, 2001 indicates that during that period the Complainant did in fact have *bona fide* and reasonable concerns that aircraft safety was potentially being jeopardized by inadequate staffing of the work crews he supervised and by what he perceived as unreasonable pressures on supervisors and others to meet departure deadlines. Evidence supporting this conclusion can be

found in the testimony of Starbuck, Leigh, Rosenthal, Canada, and Moore. Although various managers have denied Walker's allegations that they would become angry or yell at subordinates when planes failed to meet their scheduled departure times, this testimony was not credible. In fact, there is very little credible evidence to suggest that the Complainant did not have at least some *bona fide* concerns about staffing levels and management pressure to meet deadlines before his July 16, 2001 hotline call.

b. Hotline Complaint

In contrast to the evidence concerning the activities occurring before July 16, 2001, there are substantial inconsistencies in the evidence concerning the Complainant's state of mind when he made his hotline call.

On one hand, there is clear evidence suggesting that the Complainant could have had a reasonable and good faith basis for reporting to the hotline that work crews at LAX were undermanned and that managers intimidating him to get planes to their gates in time for their scheduled departures. This evidence primarily consists of trial testimony and documents showing that prior to July 16, 2001 the Complainant did in fact express concerns about staffing levels and the intense pressures to meet deadlines. In fact, the Complainant reiterated these concerns in his answers to some of the questions Kimball asked during the July 25, 2001 interview and in the last sentence of the handwritten statement he gave to Kimball at the conclusion of that interview. As previously indicated, in that sentence the Complainant asserted "I was never directly told to sign off unsafe or incomplete paper work but the feeling was such that if the planes didn't go out I would no longer be working here." It should also be noted that the Complainant's concerns about understaffing were apparently exacerbated by Bailey's decision to terminate the use of NBOs and NBIs at LAX.

On the other hand, however, there is also a substantial amount of evidence indicating that insofar as the Complainant led the hotline operator to report that managers were intimidating him into knowingly releasing unsafe aircraft, the allegation was neither *bona fide* nor reasonable. Highly significant in this regard is the evidence suggesting that the Complainant made his hotline call in order to discourage Bailey from attempting to fire him for having disregarded instructions concerning NBOs and for having possibly incited a work slowdown by the mechanics on duty on the night of July 10, 2001. For example, such a motive is strongly suggested by the fact that the hotline call occurred less than a week after Bailey had expressed doubts about his willingness to allow Walker to keep working at LAX. Also important in this regard is the fact that Stone's nearly verbatim summary of the Complainant's allegations is almost entirely devoted to explaining the Complainant's version of the July 10 NBO dispute and contains only one sentence on the subject of management's alleged use of intimidation to coerce supervisors into signing off on work that had not been done. It should also be noted in this regard that if the hotline call was truly motivated by safety concerns, it is likely that the Complainant would have offered at least some examples of specific incidents in which safety had been compromised. Instead, he offered no such examples. The Complainant's lack of a good faith belief in his safety allegation is also suggested by the fact that he told Stone that his complaint involved the same three people most directly involved in the NBO dispute (Bailey, Rogers and Nasdeo), but did not mention the

names of the other managers who had allegedly pressured him to engage in “pencil whipping” (e.g., Merrill and Sharifi).

In addition, Walker’s willingness to give his name to Stone indicates that Walker actually wanted American’s management to know that he had made the hotline complaint. It is recognized in this regard that Walker testified that he was reluctant to give his name and had decided to identify himself only because a hotline operator had told him that nothing would be done about his complaint unless he gave his name. For several reasons, however, Walker’s testimony on this issue is not credible. First, it seems unlikely that hotline operators would deprive the hotline of potentially important information by telling callers that nothing would be done about their concerns unless they gave their names. Secondly, Stone credibly testified that he does not make such statements to callers and that such statements are contrary to his training. Third, Walker has made a number of other statements of doubtful accuracy. For example, Walker’s assertion that documents concerning “pencil whipping” were stolen from his work locker after he told Kimball he was storing such papers in his locker is completely uncorroborated and inconsistent with Walker’s alleged distrust of Kimball. Likewise, Walker’s insistence during his trial testimony that he never personally authorized the use of NBOs is directly inconsistent with a variety of documents indicating that he viewed NBOs as an essential supervisory tool and had in fact repeatedly signed documents authorizing NBO payments to the mechanics under his supervision. It should also be noted that the Complainant’s initial AIR21 complaint letter to OSHA inaccurately suggests that safety-related actions that the Complainant took in August of 2001 preceded his Career Day discipline, even though that disciplinary action actually occurred at the end of July 2001.

Finally, it must be emphasized that Kimball’s interview notes contain direct evidence that Walker’s hotline complaint was not made in good faith. As previously set forth, various passages in these notes indicate that Walker explicitly admitted to Kimball that his claim about being intimidated into signing off on unsafe aircraft was false. *See* RX 24. In addition, these same interview notes contain other passages indicating that Walker also admitted that he had called the hotline because he had a feeling that he was about to be fired. *See* RX 24. It is of course recognized that Walker contends that when Kimball conducted the investigation she was already involved in a romantic relationship with Rogers and, for that reason, was a biased investigator. In addition, it is also recognized that Walker has repeatedly denied making the admissions memorialized in Kimball’s notes and asserts that Kimball threatened that he would be fired if he did not retract his allegations. Indeed, Walker even asserts that Kimball was so adamant that in one instance he flinched in fear that she was about to strike him.

Review of the evidence indicates that there is in fact overwhelming merit to the Complainant’s allegation that Kimball conducted a biased investigation.¹¹ For these reasons,

¹¹ Although Kimball and Rogers have both testified that their romantic relationship did not begin until well after the investigation was completed, that testimony is less credible than the countervailing testimony indicating that their affair had in fact begun as early as May of 2001. Moreover, it is quite clear that Kimball’s investigation was in fact heavily biased against Walker. This bias is illustrated by the fact that Kimball did not bother to ask the Complainant about the details of his allegation until after she had solicited denials from Bailey, Rogers and Nasdeo. Kimball’s bias is also demonstrated by the fact that she asked very few questions of Bailey, Rogers and Nasdeo but grilled the Complainant for a prolonged period. Most significantly, even before interviewing the Complainant, she drafted a question that assumed that the Complainant had admitted that his complaint was untruthful.

Kimball's testimony and report to Evans have been viewed with great skepticism. However, it has been concluded that Kimball testified truthfully insofar as she testified that the Complainant admitted making false statements during the hotline call. There are four reasons for this conclusion. First, after the Complainant was given a Career Day Decision letter which explicitly asserted that he had admitted making a false statement to the hotline, he failed to dispute that allegation during either of his two subsequent meetings with Evans concerning that allegation. Second, Kimball would have probably been deterred from falsely attributing admissions to the Complainant by American's own internal disciplinary procedures, which give employees two separate opportunities to dispute the allegations leading to the imposition of Career Day discipline. Third, Kimball's testimony is corroborated by her interview notes, which were submitted to Evans well before she had any reason to believe that the Complainant would deny her version of the interview. Finally, although Kimball was not an entirely credible witness, the Complainant's trial testimony, including his allegation that Kimball was physically menacing and threatened to have him fired, was even less credible.

In sum, the evidence shows that the Complainant might have had a good faith and reasonable basis for making a hotline complaint alleging that understaffing and deadline pressures at LAX had the effect of encouraging workers to do hurried or sloppy work that unintentionally endangered aircraft safety. However, the preponderance of the evidence indicates that the Complainant did not have a good faith and reasonable basis for making his actual hotline allegation that Bailey, Rogers and Nasdeo were intimidating him into signing off on tasks that they knew had not been completed or were not safe just so they could get the planes out.¹² Although the distinction between these allegations may seem small, it is a distinction between accusing Bailey, Rogers and Nasdeo of unknowingly causing safety problems by pushing employees too hard to meet deadlines and accusing them of intentionally disregarding known safety problems. Significantly, in the third sentence of the handwritten statement the Complainant gave to Kimball on July 25, 2001 the Complainant himself recognized this distinction and admitted that his statement to the hotline operator was "not accurate" to the extent that it accused Bailey, Rogers and Nasdeo of knowing that the planes were unsafe. Specifically, in that sentence he admitted that his hotline "statement of signing off planes was not accurate to the point that they [Bailey, Rogers, and Nasdeo] did not know what condition the planes were in." Although the Complainant asserted during the trial that Kimball directed him to add the words "did not" to the foregoing sentence, that testimony is simply not credible. Indeed, if the Complainant really believed that Bailey, Rogers and Nasdeo did know the allegedly unsafe condition of the planes, there would have been no reason to have used the words "not accurate."

c. Safety Related Activities Occurring During August and September of 2001

As previously explained, the Complainant contends that after he was asked to make a Career Day commitment on August 6, 2001, he engaged in a series of at least nine actions that would ordinarily constitute protected activities under AIR21. If all nine incidents occurred as claimed by the Complainant, each of the incidents would constitute a protected activity under

¹² Although the Complainant's statement to the hotline operator about being pressured to sign off unsafe aircraft can arguably be interpreted in different ways, during the trial the Complainant admitted that it was his intention to allege that Bailey, Rogers and Nasdeo were pressuring him to sign off items that they knew were unsafe. Tr. at 909.

AIR21. However, the evidence indicates that only three of the incidents were even allegedly known to Bailey or Evans. Hence, only those three incidents are relevant for purposes of determining if the adverse actions Bailey and Evans took against the Complainant were in violation of AIR21. Because the evidence indicates that both Evans and Bailey were terminated from their jobs for allegedly embezzling from American, their testimony concerning these three incidents as well as their representations on all the other factual issues in this case has been weighed with considerable skepticism. However, the Complainant has made so many inconsistent and implausible statements that it has also been necessary to weigh his testimony with comparable skepticism. As a result, when there have been conflicts between the testimony of Evans or Bailey and the testimony of the Complainant, decisive weight has been given to the testimony of other witnesses or to other kinds of evidence.

The first of the three incidents allegedly known to Bailey or Evans occurred during the first week of August of 2001 when the Complainant alleges that he refused an order from Sharifi to sign off on a malfunctioning flight management computer. The Complainant further alleges that he described this incident during his second meeting with Evans concerning his Career Day discipline and that Evans sarcastically told him to go call the hotline again. Evans was not asked specifically about this alleged incident, but he did generally deny that the Complainant had made any complaints to him about being pressured to sign off unsafe aircraft. If Evans had in fact made a sarcastic remark about calling the hotline, it seems likely that the remark would have been at least mentioned in the Complainant's October 23, 2001 AIR21 complaint letter to OSHA, which specifically lists the alleged dispute with Sharifi over the flight management computer as one of the purported causes for his layoff. Moreover, the Complainant's assertion that he raised this complaint when he met with Evans about his Career Day discipline on August 7, 2001 seems to be inconsistent with his testimony that he was "shaking" and "scared to death" during that meeting. Tr. at 365-69. Accordingly, it is concluded that the preponderance of the evidence fails to show that Evans was ever aware of the Complainant's alleged refusal to sign off on the flight management computer.

The second incident allegedly involved an ASAP the Complainant filed on August 20, 2001 concerning the removal of a placard on aircraft R34. The Complainant asserts that after filing his ASAP he encountered Bailey in a hallway and complained that Nasdeo was trying to blame him for the problem. In addition, the Complainant asserted, he told Bailey that he believed that Bailey was harassing and intimidating him. As previously noted, Bailey has denied that any such conversation ever occurred. Because there is no corroborating evidence concerning this conversation, it is concluded that the conversation has not been proven by a preponderance of the evidence.

The third incident involves a one-page document describing potential problems with the procedures used at LAX for adding fuel oil to aircraft. CX 18. The document, which is entirely handwritten, is dated September 2, 2001 and is neither addressed to anyone nor signed by anyone. The Complainant alleges he sent copies of the document to Bailey, Evans and other managers. Evans was not asked about the document but Bailey explicitly denied that he had ever seen it. In view of the fact that the document is not addressed to anyone or signed by anyone, it has been concluded that there has not been a sufficient showing that either Bailey or Evans ever

saw the document or knew that it had been written by the Complainant. It is also noted that the Complainant failed to mention this document in his initial complaint letter to OSHA.

2. Contributing Factor

As previously explained, a complainant under the whistleblower provisions of AIR21 has the burden of showing that a protected activity was at least one contributing factor to an adverse action. In this case, the adverse actions against the Complainant were imposed by Bailey and Evans and there is some evidence that both Bailey and Evans had at least some knowledge of some of the Complainant's protected activities before imposing adverse actions. For example, the Complainant testified that he had expressed concerns about staffing levels and deadline pressures at various managerial meetings that Bailey and Evans attended prior to July 16, 2001. In addition, Kimball gave Evans interview notes that contained passages in which the Complainant was quoted as complaining that there was insufficient staffing for the B-checks. Moreover, in the last sentence of the handwritten statement that the Complainant gave to Kimball, he in effect asserted that although managers never "directly" told him to sign off unsafe or incomplete paperwork, they were indirectly encouraging such improper behavior by giving him the feeling that he would no longer be employed by American if the planes didn't go out as scheduled. The evidence shows that Kimball's notes and the Complainant's handwritten statement were provided to Evans, who considered them before deciding that the Complainant would be subjected to Career Day discipline. Hence, it is conceivable that the safety-related complaints that the Complainant made during the managerial meetings or the "fall back" safety complaints that he made during the investigation of the hotline complaint (e.g., the allegations that there was insufficient staffing and unreasonable pressure to meet departure deadlines) could have contributed to the decision to impose Career Day discipline or the later decision to lay off the Complainant. However, there is no direct evidence that these protected activities contributed to either of the adverse actions. Moreover, although there is circumstantial evidence that could support an inference that there was such a contribution (e.g., the fact that these protected activities were known to Bailey and Evans before the adverse actions were imposed), this circumstantial evidence is not sufficient to warrant a conclusion that the preponderance of the evidence shows that the adverse actions were even partly motivated by the Complainant's protected activities. Rather, the preponderance of the evidence indicates that the adverse actions were solely motivated by the fact that the Complainant had admittedly made a false hotline complaint. Accordingly, it has been concluded that the Complainant has failed to show by a preponderance of the evidence that any of his protected activities contributed to any of the adverse actions.

3. Clear and Convincing Evidence

As previously explained, if a complainant fails to show by a preponderance of the evidence that a protected activity was a contributing factor to an adverse action, it is unnecessary to consider the question of whether a defendant employer has shown "clear and convincing" evidence that the same adverse action would have been taken even if there had been no protected activity. Hence, it is not necessary to resolve that issue in this proceeding. However, it is noted that if it were necessary to resolve this issue, it would be concluded that the Respondent has in fact shown by clear and convincing evidence that the same adverse actions would have been

imposed on the Complainant even if he had not engaged in any protected activities. In this regard, it should be recognized that although Kimball's investigation of the Complainant's hotline complaint was unquestionably biased, the preponderance of the evidence nonetheless shows that the Complainant did in fact make a truthful, non-coerced admission to Kimball that he made a knowingly false hotline complaint because he was afraid that he was about to be fired due to the NBO dispute. Arguably, that admission alone would have been sufficient to justify a decision to terminate the Complainant's employment and the admission was certainly sufficient to warrant the Respondent's decision to impose Career Day discipline. Moreover, there is clear and convincing evidence that the decision to select the Complainant for lay off in late September of 2001 was solely the result of the fact that, unlike any other supervisor at LAX, he had a record of recent discipline in his file. Finally, it is noted that it could be argued that when Bailey filled out the Reduction in Force Employee Profile Sheet, he should not have made the recommendation that the Complainant not be re-hired in the future. However, it must be recognized that the Profile Sheet required Bailey to chose between making two alternative recommendations: (1) that the Complainant be rehired or (2) that the Complainant not be rehired. The evidence is clear and convincing that the Complainant's admission that he had made a false hotline complaint justified Bailey's decision not to recommend that the Complainant be rehired. Hence, there are also clear and convincing reasons justifying the recommendation that the Complainant not be rehired.

ORDER

The AIR21 complaint of Complainant H. Paul Walker is hereby dismissed.

A

Paul A. Mapes
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile

transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).