



**In the Matter of:**

**JAN SVENDSEN,**

**ARB CASE NO. 03-074**

**COMPLAINANT,**

**ALJ CASE NO. 02-AIR-16**

**v.**

**DATE: August 26, 2004**

**AIR METHODS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

***Jan Svendsen, pro se, Moline, Illinois***

***For the Respondent:***

***Elizabeth J. McNamee, Esq., Davis, Graham & Stubbs LLP, Denver, Colorado***

**FINAL DECISION AND ORDER**

Jan Svendsen filed a complaint under Section 519, the employee protection provision, of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C.A. § 42121 (West 2003), alleging that Air Methods (AM) had terminated his employment as an air ambulance pilot on November 12, 2001, in violation of AIR21. Specifically, Svendsen alleged that AM terminated his employment because he had reported an air safety hazard to authorities on November 3, 2001. A Department of Labor Administrative Law Judge (ALJ) heard the case and in a February 26, 2003 Recommended Decision and Order (R. D. & O.) found that Svendsen had failed to establish that air safety-related activity protected by AIR21 had contributed to AM's termination decision.<sup>1</sup> Svendsen petitioned this Board for review and both parties filed

<sup>1</sup> Although the ALJ signed the R. D. & O. on February 26, 2003, the Service Sheet indicates that the decision was issued on March 3, 2003. Pursuant to the interim final regulations implementing AIR 21 at 29 C.F.R. Part 1979 that were in effect from April 1, 2002, until the final regulations became effective March 21, 2003, "issuance of the ALJ's decision" triggered the period for appealing that decision to the Board. 29 C.F.R. § 1979.110 (2002); see Notice of final rule, 29 C.F.R. Part 1979, 68 Fed. Reg. 14,100 (Mar. 21, 2003).

briefs in support of their respective positions.<sup>2</sup> For the reasons set forth below, we adopt the ALJ's recommendation to deny the complaint.

### FACTUAL BACKGROUND

The ALJ assiduously reviewed the evidence, carefully resolved any material conflicts, and rendered the factual findings necessary to dispose of this AIR21 complaint. We provide the following factual background to focus our review of the ALJ's recommended disposition.

Svendsen worked for AM as an air ambulance pilot from July 27 through November 12, 2001. Pursuant to a contractual agreement between AM and Flagstaff Medical Center, based in Flagstaff, Arizona, AM employed pilots to fly planes owned by Guardian Air, a Flagstaff Medical Center affiliate. Svendsen and the other AM air ambulance pilots operated under a Federal Aviation Regulation Part 135 operations certificate. Guardian Air employed the medical crews necessary to staff the air ambulance flights and coordinated the dispatching of AM pilots. Svendsen flew a King Air, two engine aircraft on assignments that originated at Parker Airport, in Parker, Arizona. The airport in Parker is a private airfield that the Colorado River Indian Tribes own and operate. It does not have a control tower and is not an official weather reporting station. Svendsen was based in Parker along with at least two other AM pilots, including the AM base manager Mario Grajeda.

As the base manager, Grajeda was responsible for the day-to-day operations at the Parker base, for example airplane and equipment maintenance. Although the pilots there reported to Grajeda, he was not involved in disciplining those pilots. AM's higher level

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<sup>2</sup> We reject AM's contention that Svendsen's petition for review is inadequate because 29 C.F.R. § 1979.110(a) (2003) requires that the petition "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." AM relies on a provision contained in the final regulations implementing Section 519 of AIR21. Air Methods' June 29, 2004 Reply Brief at 4. That provision did not become effective until March 21, 2003, the date the AIR21 final regulations were published in the Federal Register. Notice of final rule, 68 Fed. Reg. at 14,105. The interim final regulations were in effect from April 1, 2002 until March 21, 2003, and thus were in effect when Svendsen's petition for review was filed on March 18, 2003. Notice of interim final rules, 67 Fed. Reg. 15,454 (Apr. 1, 2002); *see* 68 Fed. Reg. 14,100. Section 1979.110 of the interim final regulations did not set any requirements for the contents of a petition filed with the Board. Notice of interim final rules, 67 Fed. Reg. at 15,456; *see* 68 Fed. Reg. at 14,105. Acting *pro se*, Svendsen filed a petition on March 18, 2003, that identifies for appeal three issues that are key to the ALJ's recommended decision. Although the contentions advanced in Svendsen's two briefs focus primarily on Svendsen's view of the evidence and offer little legal argument assigning error to the ALJ's analysis, Svendsen has cited a number of issues for the Board's consideration in its review of the R. D. & O. Furthermore, consistent with our practice, we have construed Svendsen's *pro se* briefs regarding the merits of his complaint liberally, within the context of the standard of review applicable to this appeal. *See Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 3 n.1 (ARB Feb. 28, 2003).

managers made disciplinary decisions. The offices of those managers, including the chief pilot, Michael Wheeler, and the operations officers, Andy McJohnston and Jeff Freeman, were located in Denver, Colorado. AM employed about 170 pilots who were based at approximately 30 locations. Grajeda did act as intermediary between higher level AM managers and the pilots working at Parker, including Svendsen.

The pilots received their assignments from a dispatcher at Guardian Air. Each pilot was on duty for twelve-hour shifts on five consecutive days followed by five days off. During on-duty hours, the AM pilots awaited assignments from the dispatcher at a house Guardian Air maintained as an operations base, a few miles from the Parker Airport. Two flight nurses also worked on each air ambulance assignment, which typically involved transporting patients either from Parker or a nearby airport to Phoenix. The flight nurses, like the pilots, waited for assignments while on duty at the operations base house in Parker.

The pilots and flight nurses worked under especially stressful conditions. Most patients were critically ill, and the air ambulance teams were required to be airborne within twenty minutes after receiving a dispatch call from Guardian Air. The intensity of the air ambulance assignments coupled with the long hours on duty at the Parker operations base required a commitment to professionalism and teamwork by both the pilot and the medical crews. AM emphasized this aspect of the air ambulance operations with its pilots during their orientation and training. Although Mayo Aviation, AM's predecessor contractor, had employed Svendsen, AM management required Svendsen to undergo approximately a month of orientation and training in June – July, 2001. At that time, Svendsen was advised regarding AM policies and procedures related to wearing uniforms, handling equipment maintenance and the importance of professional interaction with other AM pilots, Guardian Air staff and other personnel while on duty.

AM managers had reservations about Svendsen's interpersonal skills and his commitment to AM administrative policies and procedures at the time Svendsen was hired in July. AM managers received reports of deficiencies in these aspects of Svendsen's performance beginning in August. The problems revolved primarily around Svendsen's lack of effective interaction with Grajeda and Svendsen's failure to comply with AM administrative policies. In addition, three significant concerns, each related to a pattern of conduct on Svendsen's part that had occurred over a period of months, reached McJohnston, AM's chief operations officer, during the early part of November.

Wheeler voiced the first concern. He had received a letter from Svendsen about requests for reimbursement for expenses Svendsen had incurred for repairs and fuel for the tug used at Parker to tow the aircraft from the hangar. Svendsen, contrary to company procedure, had bypassed Grajeda and had initially sent his request for reimbursement directly to McJohnston. In turn, McJohnston sent the paperwork back to Grajeda, who left a note for Svendsen pointing out his error. In the letter to Wheeler, which Svendsen mailed on November 3, Svendsen addressed problems he had encountered with obtaining repairs to the tug, and he protested Grajeda's suggestion that Svendsen could have replaced a spark plug in the tug himself. Svendsen also stated that he would not personally pay for any company expenses in the future. Wheeler was annoyed by the tone of the letter and shared his concern with McJohnston, telling him that Wheeler considered it to be insubordinate and unprofessional.

The second concern that reached McJohnston in early November originated with Richard Titus, a flight paramedic, who complained about Svendsen to Jeanine Hanson, the Guardian Air program director. The paramedic had served as a flight nurse on assignments with Svendsen in the previous months and on November 8 expressed concerns to Hanson about Svendsen's conduct and appearance. Specifically, Titus told Hanson that Svendsen did not wear a uniform, that Svendsen often expressed himself in an angry or abrupt manner, and that Svendsen and another pilot repeatedly made demeaning remarks about Grajeda and the Guardian Air operation. The paramedic said that Svendsen's negative demeanor and unprofessional conduct made it difficult for the air ambulance teams to work together effectively. Hanson relayed these concerns to McJohnston. A day or two after November 8, Titus also told Grajeda about making the complaint to Hanson. Grajeda discussed this report with Wheeler. Ultimately, Titus wrote a letter to Grajeda memorializing his report to Hanson.

Balis Kelley, the manager of the Parker Airport, brought the third concern about Svendsen's conduct to McJohnston's attention. Kelley's complaint resulted from his November 3 discussion with Svendsen regarding a tribally-sponsored car race that was being run from a race course adjacent to the airport and which was creating a dust cloud. Kelley reported that Svendsen objected in a "loud and belligerent" manner to the race being held near the airport. Kelley had been concerned on previous occasions that Svendsen was overbearing in his interaction with airport employees. Kelley concluded his complaint to AM headquarters about the November 3 confrontation with a request that Svendsen be reassigned to another airport unless his demeanor changed.

In addition to discussing the dust cloud with Kelley on November 3, Svendsen reported it to the nearest flight service station, located in Prescott, Arizona. Svendsen did this because, although he was able to take off safely, he believed the reduced visibility posed a hazard for incoming aircraft at Parker. Because Parker was not an official weather reporting station and also because the hazard was being produced by a car race near the airport rather than by a source on the airport grounds, the Prescott Flight Service Station advised Svendsen that they could not electronically post a notice to airmen about the reduced visibility. Prescott suggested that Svendsen report the situation to the local police instead, and Svendsen did so. The ALJ found that Svendsen's reporting the dust cloud to these authorities was protected activity.

On Friday, November 9, Grajeda advised Svendsen that he was scheduled to meet with higher management at the AM offices in Denver on Monday, November 12. McJohnston conducted the November 12 meeting, with Freeman, Wheeler, and two managers from the human resources department – Kathleen Bailey and Mary Marley – also in attendance. McJohnston confronted Svendsen regarding Svendsen's failure to comply with AM policies and procedures, Svendsen's conduct toward Grajeda, and Svendsen's lack of interpersonal skills. At the close of the meeting, McJohnston advised Svendsen that his employment was terminated. On December 12, 2001, Svendsen filed an AIR21 complaint, alleging that AM discharged him in retaliation for his reporting the visibility hazard at Parker Airport on November 3.

## ISSUES

The primary issues here are:

- 1) Did Svendsen engage in air safety-related activity that is protected by AIR21?
- 2) Did Svendsen fail to establish, by a preponderance of the evidence, that his protected activity contributed to AM's decision to terminate his employment?

## JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's recommended decision under Section 519(b)(3) of AIR21, 49 U.S.C.A. § 42121(b)(3), as implemented at 29 C.F.R. § 1979.110 (2002). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, Section 519 of AIR21).

The interim final regulations implementing AIR21 were in effect when this appeal was filed on March 18, 2003.<sup>3</sup> Pursuant to those regulations, the Board's review of the ALJ's decision is not limited. 29 C.F.R. § 1979.110 (2002). Accordingly, as provided by the Administrative Procedure Act, the Board, as the Secretary's designee in this appeal, acts with all the powers that are vested in the Secretary to render final agency decisions under the AIR21 statute. 5 U.S.C.A. § 557(b) (West 2004). We therefore review the ALJ's findings of fact and conclusions of law de novo. *See* 49 U.S.C.A. § 42121(b)(3). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *See Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389-90 (8th Cir. 1995); *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991). Furthermore, as the presiding officer at hearing, the ALJ has the opportunity to observe the witnesses and assess their credibility based on those observations. Although the Board will review the evidence de novo and is otherwise not bound by the ALJ's credibility determinations, we will defer to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *See Martin v. AKZO Nobel Chemicals, Inc.*, ARB No. 02-031, ALJ No. 01-CAA-16, slip op. at 5 and cases there cited (ARB July 31, 2003).

## DISCUSSION

AIR21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety.<sup>4</sup> Air carriers,

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<sup>3</sup> *See* nn. 1,2 *supra* regarding the effective dates of the interim final and final regulations implementing AIR21.

<sup>4</sup> The regulations implementing AIR21 whistleblower protections define "employee" as follows:

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contractors and their subcontractors are prohibited from discharging or “otherwise discriminat[ing] against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee),” engaged in the air carrier safety-related activities the statute covers. 49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102(a) (2002). These activities all relate to an employee’s pursuit of concerns about compliance with Federal Aviation Administration orders, regulations or standards, or any other provision of Federal law relating to air carrier safety. 49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102(b).<sup>5</sup> Those concerns may be pursued through reports to an employer or the

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[A]n individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.

29 C.F.R. § 1979.101 (2002).

<sup>5</sup> Activities protected by AIR21 are described in the implementing regulation as follows:

- (1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States;
- (2) Filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code, or under any other law of the United States;
- (3) Testified or is about to testify in such a proceeding; or
- (4) Assisted or participated or is about to assist or participate in such a proceeding.

29 C.F.R. § 1979.102(b) (2002).

Federal Government of a violation or an alleged violation of the foregoing air carrier safety standards, or through the initiation of or participation in a proceeding regarding such violation. *Id.*

We agree with the ALJ that the evidence establishes that Svendsen qualified as an employee for purposes of the AIR21 employee protection provision. 49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.101 (quoted *supra* at n.4); *see* R. D. & O. at 46 n.12. We also agree with the ALJ's conclusion that AM qualified as a covered air carrier based on its air ambulance operations under 14 C.F.R. Part 135. 29 C.F.R. § 1979.101; *see* R. D. & O. at 46 n.12; 14 C.F.R. Part 135 (2001)(covering commuter and on-demand air transport operations).

To establish that AM violated AIR21 in this case, Svendsen must establish, by a preponderance of the evidence, that he engaged in protected activity, that AM knew of that activity, and that the activity contributed to AM's decision to terminate Svendsen's employment on November 12, 2001. 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a) (2002). If Svendsen carries that burden, AM may nonetheless escape liability if it can prove, by clear and convincing evidence, that it would have terminated Svendsen in the absence of protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); *see Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9-10 (ARB Jan. 30, 2004) (construing parties' burdens under 49 U.S.C.A. § 42121(b)(2)(B) and 29 C.F.R. § 1979.109(a) (2003) and comparing those to burdens under the Energy Reorganization Act, 42 U.S.C.A. § 5851, as discussed in *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 and nn.12-19 (ARB Sept. 30, 2003)).<sup>6</sup>

The ALJ concluded that Svendsen did engage in activity protected by AIR21 on November 3, 2001, when he contacted the Prescott Flight Service Station and the local police regarding the dust cloud created by the car race being run adjacent to Parker Airport. R. D. & O. at 48 – 50. The ALJ further found that Svendsen's employer received word of this protected activity when Kelley contacted AM headquarters a few days after November 3. *Id.* at 50 – 51. Relevant evidence clearly supports these conclusions, and the ALJ's reasoning is sound and fully in accord with pertinent law. Specifically, the ALJ's factual findings regarding Svendsen's contacts with authorities on November 3 reflect a thorough review of the relevant evidence. R. D. & O. at 39 – 41. The ALJ also provides a complete explanation of the bases on which he relied to resolve issues of witness credibility and to reconcile conflicts in the evidence. *Id.* Similarly, the ALJ clearly explains the legal precedent he applied. R. D. & O. at 48 – 51.

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<sup>6</sup> The text of Section 1979.109(a) that describes the parties' burdens and implements the AIR21 provisions at 49 U.S.C.A. § 42121(b)(iii), (iv) – the second and third sentences of Section 1979.109(a) – was not modified when the final AIR21 regulations replaced the interim final regulations on March 21, 2003. Notice of final rule, 29 C.F.R. Part 1979, 68 Fed. Reg. 14,100, 14,105 (Mar. 21, 2003).

The ALJ found that a preponderance of the more probative evidence demonstrated that Svendsen's protected activity did not contribute to AM's decision to discharge him. Rather, the ALJ determined that Svendsen's unprofessional behavior toward Parker Airport personnel that Kelley complained about, and Svendsen's poor interpersonal skills with co-workers that Titus related, and Svendsen's disrespectful conduct toward his supervisor Grajeda led to the termination decision. R. D. & O. at 51 - 54.

As the ALJ's analysis reflects, the evidence relevant to the issue of retaliatory intent requires careful examination. R. D. & O. at 50 – 54. McJohnston learned of Svendsen's protected activity when Kelley called AM headquarters to complain about the November 3 exchange with Svendsen. R. D. & O. at 50 – 51. The temporal proximity between McJohnston learning of Svendsen's November 3 protected activity and the termination decision weighs in favor of Svendsen's position. R. D. & O. at 52. However, as the ALJ explained, McJohnston received complaints from Kelley and Titus regarding Svendsen's poor interpersonal skills and lack of professional conduct just a few days before the termination meeting was held on November 12. *Id.* Although Kelley's complaint was linked to Svendsen's protected activity regarding the off road race, the complaint focused on the "loud and belligerent" manner in which Svendsen raised his concern to Kelley, rather than the fact that Svendsen raised an air safety concern. *Id.* at 53. In view of the testimony of Titus, Kelley, Wheeler, Bailey and Grajeda demonstrating a history of concerns that Svendsen's interaction with co-workers and airport employees provoked, we agree with the ALJ's finding that McJohnston was acting on Kelley's concern about Svendsen's conduct on November 3 and not Svendsen's report of the visibility hazard. The ALJ properly determined that Svendsen's safety concern was protected by AIR21, but the "belligerent and unprofessional" manner in which Svendsen discussed the issue with Kelley was not. *Cf. Smalls v. South Carolina Elec. & Gas*, ARB No. 01-078, ALJ No. 2000-ERA-0027, slip op. at 22-23 (ARB Feb. 27, 2004) (holding that "below expectations" performance rating was based on deficiencies in communications and teamwork skills rather than the raising of nuclear safety-related issues). We thus agree with the ALJ that Svendsen's protected activity of November 3 did not contribute to AM's termination decision.

The ALJ's conclusion that Svendsen did not carry his burden of proof is based on sound findings of fact and careful analysis of those facts in light of the relevant law. Furthermore, in evaluating the relevant evidence, the ALJ gave special attention to resolving the conflicts in the evidence regarding the most critical factual dispute in the case, the question of whether Svendsen and Kelley had conversed at the airport on November 3. R. D. & O. at 41 – 43. The ALJ fully explained his credibility determinations on this and other contested facts that are relevant to Svendsen's performance at AM. R. D. & O. at 35 – 39, 41 – 46.

### **CONCLUSION and ORDER**

In sum, we have examined the entire record in this case and conclude that the ALJ thoroughly and carefully evaluated the evidence. We further conclude that the ALJ's

legal conclusions are sound and wholly in accord with relevant authorities. We therefore adopt those findings and conclusions, which are attached and are thereby incorporated into this decision. We therefore **DENY** the complaint.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**