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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT KREB, Petitioner, v. U.S. DEPARTMENT OF LABOR, Respondent.	No. 20-73497 LABR No. ARB Case No. 2018-0065 MEMORANDUM*

On Petition for Review of an Order of the Department of Labor

Submitted June 16, 2022**

Before: WALLACE, FERNANDEZ, and SILVERMAN, Circuit Judges

Robert Kreb petitions for review of a final order of the Department of Labor Administrative Review Board dismissing his complaint alleging that his employer fired him in violation of 49 U.S.C. § 42121. We have jurisdiction pursuant to 49 U.S.C. § 42121(b)(4)(A). We affirm the Board's decision, unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or the factual findings are unsupported

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

by substantial evidence in the record as a whole. 5 U.S.C. § 706(2); *Calmat Co. v. US. Dep't of Labor*, 364 F.3d 1117, 1121 (9th Cir. 2004). We deny the petition for review.

Substantial evidence supports the administrative law judge's finding, as affirmed by the Board, that Kreb did not engage in protected activity. *See* 49 U.S.C. § 42121 (defining protected activity and setting forth the elements of a prima facie case). Specifically, Kreb did not have a good faith, objectively reasonable belief that his communications related to safety violations because he exaggerated and misrepresented the risks of the scheduled flight. Furthermore, he only raised possible problems that might occur and could be safely and appropriately resolved later in his shift. He also failed to establish that a pilot with his training and experience would have agreed that accepting the flight assignment would have posed a safety risk.

We decline to consider issues not raised to the Board or not properly raised in the the opening brief. *See* 29 C.F.R. § 1979.110(a) ("The petition for review [filed with the Board] 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."); *Coupar v. U.S. Dep't of Labor*, 105 F.3d 1263, 1267 (9th Cir. 1997) (as a general rule, an issue raised for the first time on review and not considered in administrative proceedings has been waived); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (issues listed,

but not argued in the body of the opening brief, have been waived).

PETITION FOR REVIEW DENIED.

[SEAL]

U.S. Department of Labor
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(856) 486-3800
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Issue Date: 06 August 2018

Case No.: 2016-AIR-00028

In the Matter of

ROBERT KREB
Complainant

v.

JACKSON JET CENTER
Respondent

DECISION AND ORDER DENYING RELIEF

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure.[1] Implementing regulations are at 29 C.F.R. Part 1979, published at 67 Fed. Reg. 15453 (Apr. 1, 2002). The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed the arguments of the parties, and the applicable law.

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[1] Pub. L. 106-181, tit. V. § 519(a), Apr. 5, 2000, 114 Stat. 145. *See* 49 U.S.C. § 42121.

PROCEDURAL BACKGROUND[2]

Complainant filed an AIR 21 complaint with the Occupational Safety and Health Administration ("OSHA") against Jackson Jet Center ("JJC" or "Respondent") and Life Flight Network ("LEN") on October 7, 2014, and amended his complaint to include the allegation of blacklisting in a letter dated June 10, 2015.[3] In its August 4, 2016 letter, OSHA made the

[2] The Tribunal is also aware that Complainant filed suit in state court, that later was removed to federal district court (*see* CX 21), where Respondent is one of the named parties, and included within that suit is an AIR 21 claim. *Kreb v. Life Flight Network, LLC et al*, Case No. 3: 16-cv-00444-REB, 2018 U.S. Dist. LEXIS 42018 (D.C. ID., Mar. 12, 2018). In those proceedings, Respondent filed a motion for summary judgment, which the district court granted as to Complainant's AIR 21 claims. *Id.* at 8-9.

The Tribunal proceeds to issue this decision because a superior court has not found that this Tribunal lacks jurisdiction over the matter. Further, exclusive venue for AIR21 complaints lies with the Office of Administrative Law Judges. Unlike other whistleblower statutes, AIR 21 does not contain a "kick-out" provision to federal district courts. A complainant must exhaust his administrative remedies before the Department of Labor, after which judicial review lies with the appropriate Court of Appeals. *See* 49 U.S.C. § 42121(b)(4)(A); *Bombardier v. U.S. Dep't of Labor*, 145 F.3d 21(D.C.D.C. 2015); *see also Hobek v. Boeing*, 2017 U.S. Dist. LEXIS 115343 (D.S.C., Jun. 8, 2017) (magistrate report and recommendation), *adopted by, Hobek v. Boeing Co.*, 2017 U.S. Dist. LEXIS 112939 (D.S.C., July 19, 2017). This also appears to be the Idaho District Court's position as well given its grant of defendant's motion for summary decision on that portion of complainant's case. *Kreb, supra*, at 8-9.

[3] Throughout the hearing and in Complainant's briefs he references "Respondents". There is only one respondent in these proceedings; the other party initially involved in this matter (LFN) was dismissed prior to the hearing. *See* Procedural History, *infra*.

following determinations: Complainant timely filed his complaint; Respondent is an air carrier within the meaning of the Act, and Complainant is a covered employee. OSHA also found that he neither engaged in protected activity nor was Complainant blacklisted. Accordingly, OSHA dismissed the complaint. On August 17, 2016, Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

Subsequently, on August 24, 2016, the undersigned received assignment of this matter. On August 26, 2016, the Tribunal issued the Notice of Assignment and Conference Call. Complainant responded to the Notice of Assignment by letter dated September 9, 2016, and attached his statement, which was originally transmitted as part of his Complaint to OSHA. Respondent also responded to the Notice of Assignment on September 9, 2016, and submitted Initial Disclosures pursuant to 29 C.F.R. § 18.50(c)(1)(i) by letter dated September 16, 2016. This Tribunal issued a Notice of Hearing and Pre-Hearing Order on September 16, 2016, and set the hearing for May 8 through 12, 2017[4] in the Seattle area,

On February 24, 2017, following a Joint Request to Move Hearing Date and Other Case Deadlines filed on February 16, 2017, and subsequent teleconference

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[4] The original Notice of Hearing referenced May 8-12, 2016, therefore on September 19, 2016 an Amended Notice of Hearing and Pre-hearing Order was issued correcting this ministerial error.

held on February 21, 2017, this Tribunal issued an Order Rescheduling Hearing and Setting New Pre-hearing Deadlines. In this Order, the Tribunal rescheduled the hearing for July 17 to 21, 2017 in the Seattle, Washington area.[5]

On April 21, 2017, LFN submitted a Motion for Summary Decision. Complainant filed his response on May 5, 2017. On May 17, 2017, Complainant filed a Motion for Sanctions against Respondent for spoilation of evidence. On May 31, 2017, Respondent submitted its opposition to this motion.

On June 12, 2017, the Tribunal issued an Order Denying Respondents' Motion for Summary Decision and Denying Complainant's Motion for Sanctions.

On June 13, 2017, Complainant and LFN submitted a Joint Request to Approve and Seal Settlement Agreement. On June 15, 2017, this Tribunal issued an Order Approving Settlement Between Complainant and Respondent Life Flight Network Only, Sealing Settlement Documents, and Filing Redacted Settlement Documents.[6]

The parties submitted their prehearing statements and proposed exhibit lists on June 30, 2017. On

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[5] On June 30, 2017, the Tribunal issued a Notice of Hearing Location informing the parties that the hearing would be held in a U.S. District Court courtroom, in Tacoma, Washington.

[6] On July 13, 2017, Complainant and LFN filed a request that the claim against it be dismissed from this matter due to settlement. On August 15, 2017, the Tribunal issued an Order Dismissing LFN and Amending Caption.

July 7, 2017, Respondent submitted objections to Complainant's hearing exhibits and witnesses.

The Tribunal held a hearing in this matter in Tacoma, Washington from July 17 to 20, 2017.[7] Complainant and Respondent's representative were present during all of these proceedings. At the hearing, this Tribunal admitted Joint Exhibits ("JX") 1 – JX 25,[8] Respondent's Exhibits ("RX") 1-RX 83,[9] Complainant's Exhibits ("CX") 1-4, 13-15, 17, 18, 30-32, 35, 36, 40-44, 58, 61-64, 68-74, 84 (pages 1 and 2 only), 85, 89 and 91.[10,11] In addition, portions of CX 95-98, which are depositions, were also admitted.[12] Both parties made an opening statement. Tr. at 3-55.

Complainant submitted its closing brief on September 29, 2017.[13] Respondent submitted its closing

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[7] The Transcript of the July 17-20, 2017 proceedings will hereafter be identified as "Tr." Both parties provided brief opening statements. Tr. at 31-55.

[8] Tr. at 13.

[9] Tr. at 16 and 687.

[10] Tr. at 107, 118, 120, 125, 171, 198, 544, 750 and 764.

[11] Additionally, at the end of the hearing the Tribunal specifically asked the parties to verify that these were the exhibits admitted into evidence. Tr. at 748-50.

[12] Only the portions of the depositions that were highlighted by the parties using a marker were substantively admitted. Tr. at 881-85.

[13] Hereafter referred to as "Compl. Br."

brief on November 3, 2017.[14] Complainant filed its reply brief on November 20, 2017.[15]

This decision is based on the evidence of record, the testimony of the witnesses at this hearing, and the arguments by the parties.[16]

I. FACTUAL BACKGROUND AND EVIDENCE

A. Stipulated Facts

The parties stipulated to the following facts at the hearing:

- Complainant, Robert Kreb, was employed as a Fixed Wing Pilot by Respondent Jackson Jet Center (hereinafter "JJC" or "Respondent"), to fly Life Flight Network (hereinafter "LFN"), Aircraft for air medical transport services from December 27th, 2013 until July 10, 2014.
- JJC, Jackson Food Stores, Inc., and Conyan Aviation collectively "The Entities" stipulated

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[14] Hereafter referred to as "Resp. Br."

[15] Hereafter referred to as "Compl. Reply Br."

[16] Although the Tribunal may not discuss every aspect of the evidence in the analysis of this case, it has carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence.")); *Combs v. Wilkie*, 2018 U.S. App. Vet. Claims LEXIS 680 (May 22, 2018). This Tribunal finds that any facts or opinions not addressed in this decision are irrelevant, immaterial, or repetitious, and are given no weight.

with Complainant on April 19th, 2017 to their joint employment of Complainant in the event that any of The Entities are found liable under 29 USC § 42121 (AIR 21). If any of The Entities are found liable for violations under AIR 21, The Entities agree that they are jointly and severally liable for any damages that may be awarded to Complainant.

- Under an agreement effective December 1, 2013, Conyan Aviation, d/b/a JJC, agreed to employ Pilots under its Part 135 Certificate for LFN's Fixed Wing Air Medical Transport Program until LFN obtained its Part 135 allowing LFN to employ Pilots directly.

- Complainant was assigned to LFN's base in Lewiston, Idaho that was not yet opened at the time of his hire. Due to some delays with the opening of the Lewiston Base, Complainant was not assigned his first shift until February 25, 2014. Complainant's first LFN flight assignment was on March 2nd, 2014.

- On March 6th, 2014, Complainant received a template copy of a Flight Risk Assessment Tool form, "FRAT," via e-mail from JJC Chief Pilot Ryan Pike. Prior to that date, JJC Pilots flying LFN missions did not complete a FRAT. Prior to the beginning of his July 9, 2014 shift, Complainant received an e-mail from Steve Bower, Director of Operations for JJC, with instructions to reposition Fixed Wing aircraft N890WA from the Lewiston Base LWS to the Dallesport Base, DLS, and then return with

Dallesport Pilot Royce Graham in the morning.

- In the early morning hours of July 10, 2014, LFN canceled the reposition request. On the afternoon of July 10, 2014, Mr. Pike communicated to Complainant that his employment was being terminated.

Tr. at 8-9.

B. Testimonial Evidence

The sworn testimony of the witnesses who appeared at the hearing is summarized below.[17]

Robert Kreb (pp. 450-671 and 769-878)

Complainant was born in Seattle in 1973, grew up in a military family and got to see the world, but he spent his summers in Seattle. He eventually returned to Washington State in 1991 to finish high school. He started to go to college at Central Washington University but dropped out, in part, to fly. While there he met his wife whose family lives near Seattle. He started

[17] In addition, the parties asked that the Tribunal consider as substantive evidence extracts of certain depositions; specifically those of Mr. Ronald Fergie (CX 97), Dominic Pomponio (CX 95), and BJ Miles (CX 98). In addition, although not specifically admitted during the hearing, the parties clearly intended to offer portions of Mr. Swakon's deposition and the Tribunal clearly intended to accept portions of it as requested by the parties. Tr. at 884. Therefore, Mr. Swakon's deposition will be identified as CX 99. As requested by the parties, the Tribunal has considered only those portions of the deposition that the parties have highlighted.

flying when he was in high school and lived next to an airport when his family lived in Louisiana and earned his private pilot's license in 1993 or 1994. Over the years Complainant has lost a couple of friends due to aviation accidents. Eventually he moved to Eugene, Oregon to continue his flying career, including doing a brief internship with Horizon Airlines using a Metroliner, a SA-227. As he progressed he decided that he wanted to pursue corporate air opportunities rather than fly the airlines. After about three years, he and his family moved to the Bay area where he was able to get a job with an FBO, picking up flights here and there. Towards the late 90s he was check-hauling,[18] being exposed to many different aircraft. Eventually he flew right seat in a Metro in an executive configuration and in a Merlin.[19] He and his wife wanted to start a family, so they returned to the San Juan area where he picked up a job flying a Cessna 172, 206, and 207 for a seasonal VFR Part 135 operation. The market improved so he joined Air Net flying as a check hauler. This operation was in Ohio and his family did not move there with him. He worked for them as a flouter for about 14 months flying a Cessna 310, Cessna 208, Piper Chieftain, and Beechcraft Baron 58. From there he moved to West Virginia, where his family joined him, and they stayed there 21/2 to 3 years. Eventually, Complainant managed four pilots. Around the Spring

[18] Check-hauling is term to reference the use of aircraft by banks to move checks quickly through commerce.

[19] It is unclear which "Merlin" he is referring to; however, the Tribunal infers that he is referring to the Swearingen SA227 type certificated aircraft.

of 2005, he started his own air carrier and obtained his own Part 135 air carrier certificate that operated out of Charleston. However, by 2012 the company experienced several difficulties, so Complainant stopped being a business owner and returned to being an employee of a company. Tr. at 450-86.

Complainant applied for a position with LFN in 2013. At that time he held a commercial instrument multi-engine certificate, but also held a single Airline Transport Pilot certificate with a Learjet type rating. He had about 11,000 flight hours by that time; 7,000 hours being in turbines and about 800-900 hours in jets. Tr. at 486-88.

Complainant focused on EMS because he liked the schedule and he found the work intriguing. Plus with all of the attention the FAA and NTSB was giving EMS and its safety, he thought it would be a good place to be. He thought that with his prior experience he could be a part of building something and join leadership or management as they develop safety programs. He liked the idea of having utilizing the medical crew during a flight for safety. He focused on LFN because he wanted more than a job – he wanted a home. And he thought that he might like to transition into rotorcraft. At the time he applied, LFN had a variety of locations in the Pacific Northwest. LFN's advertisement for Lewiston stated that it was opening a base there and needed four pilots. Complainant felt this was an opportunity to get his foot into the door. LFN had a relationship in Friday Harbor with EMS services out of the Islands and he thought that, if he had a relationship

with them, he could eventually get to work there. Tr. at 488-96.

After Complainant submitted his application he was contacted by a HR person from LFN asking if she could schedule a qualification interview with him. She was excited about his Pilatus time and his Turbine time. Ultimately he had a telephone interview with LFN's Director of Safety ("DOS") (Mr. Miles), Helicopter Director of Operations ("DOO") (Mr. Swakon), and Chief Pilot (Mr. Fergie) in November 2013. During this meeting, they disclosed that they did not currently hold the fixed-wing certificate as they were still working out the details. Mr. Miles mentioned that one of the methods medical crews could report concerns was through the Baldwin Reporting System. Tr. at 496-511.

At the time of his in-person interview in December 2013, Respondent was involved because of the delay in LFN obtaining its fixed-wing air carrier certificate. Respondent would provide a backup fixed-wing certificate if LFN's certificate was further delayed. At the interview at the LFN facility in Boise were LFN's Helicopter DOO and DOS, along with Mr. Bower from Respondent. A few days after this interview he was offered a job with a salary between $65,000 and $66,000. They did not discuss benefits at that time, but LFN had promoted a generous benefits package: 401k, a health care insurance program unmatched by the aviation industry, dental, short and long term disability, pet insurance, and family insurance coverage. Mr. Swakon described these benefits to him; however, when he started work for Respondent, the benefits were

different than what LFN had promised during the interview. The plan required Complainant to contribute to his own health insurance, and additional family coverage required an additional contribution of more than $800 per month. He initially did not accept the offer, but ultimately did. Tr. at 512-18.

After being hired, Complainant received some additional flight training in Orlando for 6 or 7 days. He received Respondent's employee handbook as part of his in-processing. After returning from the Orlando training, he was told that there was an issue with his commercial driver's license (CDL); however, his private license was not impacted. Once Respondent notified him there was an issue, he contacted the state back East and took care of the issue. Apparently, there was an outstanding ticket. He was not able to obtain a new CDL from Washington State but was able to get a private driver's license. During this time, he received no assignments from Respondent so it did not impact anything at work. Tr. at 518-25.

Complainant's work schedule was 7 days on, 7 days off, with 12 hour shifts. Because Respondent had issues with obtaining aircraft, he did not start flying until the end of January to the beginning of February 2014. They did receive base familiarization training for Lewiston. Mr. Bower came down from Boise and they did several approaches. Tr. at 526-27.

One of his duties working for LFN was refilling the medical sled portable oxygen tanks. At Lewiston, the

pilots were given access to LFN's HEMS[20] tool, which is a weather-based utility for helicopters. Thru this portal, Respondent's pilots working LFN flights out of Lewiston were able to look at LFN's documents like their employee handbook and GOM, and do such things as getting the Baldwin Safety Certification. They were encouraged by Respondent to utilize and follow LFN's policies and procedures. Mr. Miles, LFN's DOS, provided specific training and safety protocols for Respondent's pilots performing flights for LFN at Lewiston. The Flight Risk Assessment Tool (FRAT) is a tool to assist in good decision making, and had been introduced to the pilots in March 2014. Complainant stated that the only instruction provided on the FRAT is contained in JX 9, though he also received an e-mail about its use. The pilots did not receive any in-person discussion or orientation about the FRAT. Tr. at 530-35.

Mr. Miles addressed the FRAT in his training and he had several slides about the "Just Culture" policy that LFN employed. Feedback was an important component. CX 35 and CX 36 is a training and user guide in connection with Mr. Miles' training. Mr. Miles instructed the pilots to complete an induction process with the Baldwin System, which was their central collection for everything. Complainant was instructed to use this system if he had any issues in the field, such

[20] The Tribunal understands this acronym to stand for Helicopter Emergency Medical Services tool.

as issues with the FBO or a maintenance item. Tr. at 537-40.

Mr. Miles spend a lot of time talking about the limitations of the FRAT. For many conditions, a pilot is simply unable to assign a numerical value. During his training, Mr. Miles explained issues between management and pilots. Mishaps in air carriers can happen when there is a labor dispute because the pilots' attentions are not on the function of the job. Factors outside the job can also impact safety; e.g., troubles at home, a divorce, or a death in the family. Afterwards, Complainant approached Mr. Miles to talk about the lingering labor issues. Mr. Miles was concerned that the pilots were carrying this baggage into the aircraft; that they were unsafe with a lot of unresolved issues with LFN and Respondent. This conversation occurred toward the end of June 2014. Tr. at 541-47.

July 8, 2014 was the first day that Complainant worked during the week that he was fired. At about 1 p.m. Complainant received a call from Mr. Pike, Respondent's Chief Pilot, who told him they had a scheduling issue and asked him how soon he could start work. Complainant later learned that Respondent had scheduled a Portland pilot in both the Portland base and the Lewiston for the same shift and he did not show up that day shift. Complainant told Mr. Pike that he could start work around 4 or 5 p.m. to start his shift early. Complainant was a couple hours away from the base and started driving to work. About one-half way there he received a call from Craig Young, another Lewiston based pilot, who told him that he would cover

the last couple of hours of the shift and Complainant need not come in until 8 p.m. Next he received either an e-mail or text message from Mr. Swakon asking if he could meet. JX 13 is the e-mail setting up the conference call. Mr. Swakon indicated that he wanted to talk to them around 6 or 7 p.m. about the schedule and getting the Lewiston pilots on LFN's certificate, which it had recently acquired. Tr. at 557-63 and 570.

Complainant started his shift early, around 7 p.m. JX 8 is the pilot duty log he completed for July 8, 2014 which shows him signing in at 7:00 p.m. local time. He took a flight that night, a Part 135 flight transporting a patient to Seattle. He returned to Lewiston around 3 a.m. Upon arrival there is a post-flight routine they go through that takes about 30 minutes. After doing that he took a nap. Towards the end of his shift, Complainant talked to Mr. Pike, inquiring if there was relief or they needed him to stay on. Mr. Pike wanted him to stay to debrief the oncoming pilot, although Mr. Pike did not know who the pilot was going to be. By 9 p.m. he had not heard or seen anybody so he asked Mr. Pike for an update. Mr. Pike asked him to stay the full 14 hours. Tr. at 563-69.

JX 14 is an e-mail from Mr. Bower that Complainant awoke to the morning of July 9, 2014. Complainant had never received an assignment via e-mail from Respondent before, much less going to another base and covering that base shift without any information. It was a nonfunctional assignment, which meant that repositioning to The Dalles and then coming back to Lewiston at 7:30 p.m. was going to put him really close

to his 14-hour limitation, even if everything went perfectly. It was an hour or more on block time from The Dalles to Lewiston, then there are post-flight activities so it was going to be very close to 9 p.m. which was his limitation of 14 hours. Further, the pilot that he was picking up was commuting from Portland or Hillsboro to The Dalles, which is several hours away depending on the traffic. He had concerns about this pilot's ability to perform a 12-plus-hour duty day after this commute and the pilot's flight back to Lewiston with him.

Accordingly, Complainant wrote an e-mail (JX 15, at 1) listing a number of factors as to why he thought it was going to be a medium to high FRAT for him that night. He wrote this to draw attention to his concerns. The assignment into The Dalles had no detail or information for him about what accommodations or services he would receive there. From what he learned about the shift conflicts the previous night, he was concerned that it was going to be a couple of days of long nights and he wanted to ensure that The Dalles had adequate resting facilities in the event that he had an opportunity to rest between flights.

Complainant had never flown into the Gorge[21] before, although he had driven through the Gorge many

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[21] a/k/a The Dalles. This airport is called by several different names during this hearing. It is also referred to as "the Gorge", "Dallesport" or "The Columbia Gorge Regional" airport. What the parties are referring is the Columbia Gorge Regional/The Dalles Municipal Airport with airport identifier KDLS. The Tribunal took official notice of the FAA's Airport Facility Directory information for this airport located at http://aeronay.faa.gov/

times. He was also familiar with accidents that had occurred there because of the windy situation; the airport has multiple runways because of the constantly shifting winds. The area also has a dam with a very large hydraulic plant with a lot of towers in a very steep gorge. Though the airport's elevation is 300 feet, the airport has mountains around it, so the minimum en route altitude in that area was 8,000 to 13,000 feet. During nighttime operations you cannot see the mountain and the towers; you have got to be on your A-game. On that night he was assigned a different aircraft he had previously flown. His former aircraft (N660LF) had synthetic vision and avionics which mapped the terrain details in a day-time light display which aided in avoiding obstacles. The aircraft he was assigned to fly on July 9, 2014 (N890WA) did not have this equipment. He referenced synthetic vision in JX 15. Tr. at 572-80.

The Tribunal asked Complainant, if he was so concerned about terrain and obstacles and, given that the METAR reflects visibility plus 6 miles and skies clear, why he did not just shoot an instrument approach which factors those matters. Complainant indicated that is why he referenced instrument approach plates and it was his plan to shoot an 1FR approach if he could not see the terrain or obstacles. Tr. at 580-81.

He noted there is a "phenomenal history" of EMS Part 91 flights being the most hazardous maneuver for

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afd/29mar2018/nw 163 29MAR2018.pdf Tr. at 285. *See also* www.airnay.com/airport/kdls.

EMS. "And VFR conditions is[sic] the worst because you rely on visual cues as opposed to 1FR." His intention was to follow 1FR publications, but the lack of synthetic vision together with his lack of familiarization and training at the base was his concern. It was the policy of LFN and Respondent to give that familiarization training. This lack of training was another factor he considered. His reference in the e-mail to "heavy encroachment of rest periods yesterday" and "book ending a long duty period last night due to scheduling mix ups" was in reference to scheduling issues and his concern was he would be stuck in Dallesport without a backup plan, and he would run out of time and the aircraft would be out of position. He had concerns that there was a likelihood that his duty limits would be exceeded. It was his hope, without specifically saying it, that his e-mail would cause a discussion to ensue. He had concerns that he could not accomplish all the things the company wanted him to do within the 14 hour duty limitation. Tr. at 581-85.

In JX 14 Complainant proposed a mitigation suggestion – Tiffany, another pilot, would stay in Lewiston while he went to Dallesport because she had not started her duty day. Tiffany was living in Portland and he believed that Aurora was her base. This would give her plenty of time to do a repositioning flight, save him for full duty, and let another pilot do some sort of repositioning. It was one of three or four options he proposed. When making these suggestions he was aware of other pilots in Respondent's employ who had exceeded duty time or pushed the limits in the preceding

weeks. For example, he had been stuck in Montana during a conference in Billings where there was no hotel room available for him. And he was aware of other pilots running out of duty time. Tr. at 586-89.

So Complainant sent out an e-mail (JX 15, at 1) to Mr. Bower and courtesy copied Mr. Graham, the pilot he was bring back from The Dalles. He was hoping to engage the team to talk about options. Complainant believed that he replied to everybody Mr. Bower had originally included in his e-mail. Complainant received no response to his e-mail so he had no idea what the plan was. He did have a conversation with Mr. Pike shortly after he checked in with the COM Center at 7 p.m. Therefore, Complainant told Mr. Pike that he was going to go ahead and do the flight, although he continued to have some concerns about the flight. His expectation was that Tiffany would be on the ground any moment so he could have a chance to get to The Dalles before sunset. But the plane did not arrive until 10:20 p.m. Tiffany did her post-flight while Complainant did his preflight, and he started scoring his flight; waiting for Tiffany to finish up closing her flight in the aircraft he was about to use. It was also during this time that discussion of a reposition flight to Aurora arose between LFN maintenance and dispatch. The flight to Aurora required additional flight planning, especially since there are mountains and restricted military airspace between The Dalles and Aurora airports. Sometime between 10 p.m. and 11 p.m. he called the LFN COM Center verifying that he was still on to fly to

Aurora and then potentially Lewiston and Dallesport. Tr. at 591-604.

CX 70 is a transcript of a telephone call between Complainant and the COM Center that occurred around 10:15 p.m. where he says "this schedule has been discombobulated" and that he was at a medium to high risk now just from potential fatigue from interruptions and disruptions due to the rest period and he asked to have a conversation with the manager on duty. Dominic Pomponio was the manager on duty at that time. Complainant was contacting the COM Center because he was not getting any feedback from Respondent's personnel; he had already tried to reach Mr. Pike and Mr. Bower. He had communicated with Mr. Pike before the Aurora flight change and prior to that, the plan was to do the flight. Since that conversation, the plane had arrived significantly late and the additional Aurora leg was being proposed; so the flight was significantly different than the one previously assigned by Mr. Bower. Tr. at 605-08.

CX 71 is an audio recording between Complainant, Mr. Pomponio and Stacey for LFN COM Center. Complainant again said that it would be a medium to high risk flight because he was not familiar with the base and it encroached on a lot of mountains in a dark area. He was involving LFN because it did not appear that they had been involved thus far in the changes and Complainant had lost confidence in Respondent's management after the prior scheduling conflicts, and after being given a very troubling flight assignment without sufficient detail or explanation. Complainant proposed

alternatives to the proposed flight itinerary. Mr. Pomponio indicated that he wanted to make some telephone calls and then get back with Complainant. Mr. Pomponio called Complainant back and told him not to do anything unsafe and this made Complainant feel as though someone had his back. So Complainant felt that he needed to make a "game-time decision" and he had LFN's permission to do so. Tr. at 609-11.

Complainant filled out the FRAT after visiting with Tiffany and verifying there were no issues; about 10:30 p.m. or 10:45 p.m. JX 12 is the e-mail that he sent to Mr. Bower, Mr. Graham, Mr. Pike, and Mr. Swakon that contained the FRAT.[22] It was his last ditch effort to engage someone at Respondent about all of the factors that he was going to be facing that night. Tr. at 612-17.

As for the entries on the FRAT itself (JX 25), he marked 5 for "Pilot has less than one year previous air ambulance experience." The pilots were instructed on the FAR with the AMRM[23] to consider LFN pilots as "new employees" if they had worked less than one year with the company. He also marked "8" on line 8 to "medical crew member has less than one year air ambulance experience." The reason for this was he had met the Dallesport medical crew the night before on the Boeing Field (Seattle) flight and they had a new nurse. And it was his expectation that he would be flying one of those new crews. It was his belief that he

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[22] *See also* JX 25, which is an enlarged copy of the FRAT.

[23] This acronym was not explained to the Tribunal.

would be flying the Dallesport crew that had just started their week the previous night; that he would be flying both a new paramedic and nurse in training.

Complainant checked item 9 as well because it dovetails with item 8. Item 9 indicated that there was a new medical crew/pilot mix. He also checked "Pilot has no assistance from line service at Conyan." He does not exactly understand this line as Conyan is in Boise, not Dallesport or Lewiston. However, he regularly marked this item because it indicated that it reduced the risk when you had a ground crew to receive you. Under aircraft he marked "4" to the question "New, unfamiliar nav/radio equipment install in the past three months." He felt that not having the assistance of synthetic vision that was on the NG Pilatuses, while not a deal breaker, it was an additional hazard to consider. Complainant marked "3" to the query "Aircraft within 500 pounds of max takeoff weight". His expectation was he was going to Aurora where there was a self-serve and there was an on-call pilot at the FBO there. He thought that they would want him to tanker fuel to do all of the flights and be in a mission ready status so he would not have to wait on fuel in the middle of the night, and that would have brought the aircraft's fuel up to within 500 pounds of max takeoff weight. He also marked "Aircraft within 250 pounds of max landing weight". The aircrafts max takeoff weight is 10,500 pounds and max landing weight is 9,900 pounds and the aircraft only burns 500 pounds per hour. So if you fly for just over an hour, you are going to land at or within 250 pounds of your max landing weight. And

the flight between Lewiston and Dallesport was just an hour total block time. The flight time between Lewiston and Aurora is about one hour and ten to one hour and fifteen minutes. Complainant gave a "2" to the questions "Backup aircraft PS-12 [sic] being utilized". The Lewiston pilots did not have a backup aircraft, they were the backup, and no one had ever been criticized for using that value. Tr. at 617-25.

Complainant completed the right hand side of the FRAT (IX 25) following his internal assessment and based on Mr. Pomponio's relief and indication that LFN would not look adversely upon him if the reposition in the morning from The Dalles did not occur. He did not want to leave anything out because Mr. Miles admonished the pilots during their training that Mr. Miles felt that people were not considering all of the risks. If anything, he thought that he might get in trouble for leaving a risk factor off the form. The FRAT was an evaluation of not just one flight, but the cumulative effect of the whole shift, with the expectation of returning the next morning. Tr. at 625-27.

He entered a value for "Turned down by other operators for weather reasons". At the time he filed out the form, he did not have any reason to believe there had been a turn down for weather reasons, but that the weather could change. There was partial 1FR in the weather forecast and in the summer time the night gets cold and you will have 1FR conditions at night after the sun sets in the Pacific Northwest. It can create wind in the Gorge or fog in Troutdale. They could fly as far east as Montana or Salt Lake City and there was

lots of 1FR throughout the area. For item 7 he marked "5" to the query "Pilot has been on duty four hours or more". He marked that because if he went to Aurora, by the time he departed it was going to be four hours after he had shown up for shift. To the question "Wind greater than 30 at TO landing airport or gust factor 15 knots or more" he marked "5". At the time he sent the e-mail to Mr. Bower the winds were gusting at 35 knots and the winds do not always temper down at night. In fact, they had been blowing consistently 20 to 30 knots the prior 30 plus hours. The forecast for the winds was 10 to 20 knot but they were still blowing in excess of 20 knots at 10:00 p.m. He looked at the airport METAR report for this, but not the TAF. Tr. at 627-33.

CX 90 contains the weather history for Dallesport. It was 0300 Zulu time, July 10, 2014 when he was looking at the weather for flying that night. Tr. at 633.

The Tribunal took official notice of the METAR of The Dalles airport on July 10, 2014, 0253 Zulu. The automated weather was winds from 310 degrees, 15 knots gusting to 25 knots, 10 statute miles clear, altimeter 29.75." Tr. at 636.

On JX 25, Complainant had also marked a "4" for Moderate turbulence in forecast". In the summertime there is always turbulence over the mountains because of the wind changes between night and day. He believed that he saw in a report that the area had forecast for mountain wave turbulence. He marked a "4" for "Night flight commencing between 0100 hours to 0500". He did this because he was leaving at 11:00 p.m.

with an hour or more flight to Aurora and then he was either going to The Dalles or back to Lewiston and then another subsequent flight to The Dalles, so he would be flying within those hours. The last value he annotated was "21 wind shear plus/minus 10 or greater forecasted or reported." Whenever wind stops blowing, it is considered a shear. Plus, in his experience, you always encounter shear as you approach the Columbia Gorge. Tr. at 639-41.

Complainant completed his FRAT and submitted it to LFN at their designated e-mail, waited about 10 minutes, and was ready to depart. He then called Mr. Pike to verify that he received the actual FRAT. He told Mr. Pike that it was a 60, indicating a medium risk level, so it was up to them to mitigate. But he was more concerned about running out of flight time and being forced to reposition the aircraft at the end of the day anyway. Mr. Pike relayed that, if Complainant ran out of time or he could not finish his duty day back in Lewiston, to stop wherever he was located and they would get him a hotel. Mr. Pike also said that he could not see the FRAT Complainant had sent as he did not have access to his e-mail. Once Mr. Pike empowered him to go get a hotel or quit when he got too tired, he felt everyone was in accord so he was relieved and ready to go. Therefore, Complainant gathered the helicopter pilot that was going with him and they went to the airport. As they were walking to the plane, the helicopter pilot got a call from dispatch and they told him to stand down. Complainant was then confused as to whether he still was supposed to go to Lewiston so he

called LFN dispatch, who told him that they were cancelling the flight. CX 73 is a transcript of that call. CX 74 is a transcript of a call where he verified that he was available in Lewiston for flights on the night of July 9, morning of July 10. Nothing else happened the rest of the night. Tr. at 641-55.

Around 7:00 a.m. on July 10, 2014, Complainant received an e-mail (JX 19) from Mr. Bower. JX 20 was his response clarifying what had happened the evening of July 9, 2014, as it was clear that there was some significant miscommunication between LFN and Respondent personnel. Complainant responded because the e-mail inferred that he had cancelled the trip. He was insulted and dismayed by the message he received because he was facing questions about his Flight Risk Assessment when Respondent's policy was to not question or antagonize a pilot's no-go decision. At the end of the e-mail, Complainant offered some solutions. He wrote his email around 8:20 a.m. and he wanted to make sure that he was available to help remedy matters that had arisen prior to his assignment that week. Tr. at 655-57.

Prior to receiving the call terminating his employment, Complainant did not talk to Mr. Bower or Mr. Pike about the values he had assigned the flight on the FRAT. He received a call from Mr. Pike around 1:00 p.m. who told him that, as a result of his shift last night, they got together and talked about his Flight Risk Assessment. They did not agree with it and effective immediately, his services were no longer necessary. Mr. Pike said that LFN was part of their

discussion. At that time, Mr. Pike made no mention of Complainant's e-mail about wages or the issue with Complainant's driver's license, nor did he say anything about falsifying company documents. Tr. at 657-60.

Following this call, Complainant drove back to the San Juan Islands. He felt flabbergasted. When talking to Mr. Pike, he expressed concern for the precedence of terminating somebody over a disputed Flight Risk Assessment. Complainant spent a week or two mourning and then started applying for jobs, principally with EMS and operations in the Pacific Northwest. LFN has a network of vendors between Seattle and Portland so the chance of flying EMS was pretty low. He was willing to fly freight, but a lot of those jobs would restart his career and the pay was low. Tr. at 660-63.

One of the jobs for which Complainant applied was a Corporate Air Center position, which had a regular route between Bellingham[24] and Seattle, four to five days per week piloting a jet. Their Chief Pilot (Roger Coon) was interested in someone with his skills who could pilot weekend trips in the jet as needed. Sometime in March 2015 he conducted a flight for Corporate Air with passengers aboard. He was supposed to just go along and sit in the right seat, but after doing two flights in the morning, the Chief Pilot let Complainant fly to demonstrate that he could take over these flights for the Chief Pilot. Once they landed at Boeing Field, Complainant and the Chief Pilot got some coffee.

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[24] Bellingham is South of the San Juan Islands but north of Seattle.

Apparently one of the passengers, who was supposed to "qualify" Complainant, gave the thumbs up.

After getting their coffee, Complainant and the Chief Pilot went back to the FBO, went in to a conference room and opened up all of the books that the Chief Pilot had brought with him and started some indoctrination training. The company flew Part 91 so the Chief Pilot wanted to get him qualified as a Part 91 pilot under the company's GOM. They spent three or four hours doing this.

After lunch, they came back to the FBO and received a call that the passengers wanted to leave early; so they began making preparations. Complainant was in the aircraft preparing it for the upcoming flight when he saw somebody walk by the plane and look in at him kind of real hard. Complainant did not recognize him, but he waved at him anyway. This person walked around the plane, found the Chief Pilot and started talking with him. Complainant later learned that this person was Mr. Werner, and a friend of Mr. Werner was flying a plane parked next to the one Complainant was in. After Complainant was doing the preflight planning and loading the flight plan in the GPS, he noticed this individual, Mr. Werner, was animated while talking with the Chief Pilot; it just looked abnormal. It was clear that the Chief Pilot knew Mr. Werner. During this conversation, Mr. Werner pointed directly at Complainant. About that time one of the passengers started coming up so the Chief Pilot patted Mr. Werner on the shoulder and then started to approach the plane. After the Chief Pilot got into the plane, he

identified the person he was talking to as Mr. Werner, and according to the Chief Pilot, Mr. Werner is a fixture at Clay Lacy Aviation, which is where Corporate Air Center has made a home for its jets for a number of years. Tr. at 663-70, 672-73.

When they returned back to Corporate Air Center, after dropping off the passengers in Bellingham, they looked at the schedule over the next couple of weeks and he wanted to get some feedback to confirm that he wanted to put him on the schedule. He put Complainant on a couple of flights with a customer of theirs in a Cessna 340 they managed, if that trip conflicted with another scheduled flight. The Chief Pilot told Complainant that he would get back with him after conferring with the customer. A few weeks later he received a voice mail letting me know that Corporate Air Center was going to go in another direction. He was shocked and, when he called the Chief Pilot back and spoke to him, it was clear that the conversation that occurred between the Chief Pilot and Mr. Werner had caused the job to vaporize. Tr. at 670-73.

Complainant finally got an offer of employment from Air Methods in April 2015 but he did not start working for them until June 2015. The job was flying a Pilatus out of Farmington, New Mexico. The base pay for that job was $58,000 and $62,000 with overtime potential and benefits. He is currently the Director of Safety for an ambulance jet company in Albuquerque, New Mexico, and his salary is $75,000. He did move his family down to New Mexico, but his extended family remains in Washington State. This incident impacted

his view about aviation, an industry he loves. It has impacted his family and their finances, such that they have had to max out a couple of credit cards and pay a lot of interest. Tr. at 673-77.

On cross-examination, Complainant agreed that he understood that he was an employee of Respondent. RX 7, at 1 is an e-mail from Mr. Werner to Complainant that Complainant thought was threatening. When asked if he had any written evidence of Respondent promising him any benefits that LFN did not, he referenced an e-mail following a phone conversation with Mr. Bower on or about December 13. He agreed that Mr. Pike and Mr. Bower were his supervisors at Respondent. The only flight assignment that he ever received from Respondent was the assignment of July 9, 2014; the rest came from LFN dispatch. On July 9, 2014, Respondent, in an e-mail from Mr. Bower, assigned him to go to Dallesport, serve a shift, and then return to Lewiston the following morning at the end of that shift. Tr. at 769-774.

Complainant signed for Respondent's Employee Handbook (IX 1). There is a list of company behavior standards and number 13 is "No falsification of company records and/or documents." Tr. at 775-77.

Complainant received an e-mail (JX 9) from Mr. Pike on March 6, 2014 on how to use the FRAT form. Complainant understood that the items on left side of the form were to be completed when he started his shift, but the items on the right side of the form "must be filled out only after you've been assigned a flight."

For his flight prior to July 9, 2014, it was his practice to fill out the right-side of the FRAT form only when he had a request. Respondent's flight logs reflect that Complainant did not fly in February 2014; the first time he flew was March 2, 2014. And whenever Complainant flew he would enter it in the company logs (RX 6). For each flight actually taken, he was required to fill out an individual FRAT. All of Complainant's FRATs for March and April 2014 are contained in the Respondent's Exhibits. The FRATs that are missing are for the dates May 12, June 3, 4, 6, 27, and 29, 2014.[25] The FRATs show that Complainant flew N890WA in June and early July 2014, including on July 8, 2014. On his FRAT for July 8, 2014, on the left-hand side, item 4 ("New/unfamiliar nav; radio equipment installed within the last three months) is not checked. For his FRATs from March through July 2014 he would only fill out the right-hand side of the FRAT form when he had a flight request. Further, Complainant would fill out a FRAT for each individual flight assignment. Tr. at 778-815.

Complainant maintained that his initial assignment was to fly to Dallesport that night and return in the morning. However, he received an amendment to fly the aircraft to Aurora with potential flights after the Aurora flight before he went to Dallesport. He was to remain in Aurora while a helicopter pilot conducted

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[25] The parties stipulated that the Respondent produced to Complainant all of his FRATs from April and May 2014, except for the one of May 12. However, the record also showed that Complainant did not have a flight request for May 12. Tr. at 802-04.

his preflight activities to either reposition the helicopter back to Lewiston or he was going to return to Lewiston with the helicopter pilot if that pilot did not have sufficient duty time remaining. And this was prior to Mr. Bower giving him an assignment to put the aircraft at Dallesport for a portion of his shift and then take a different pilot, Mr. Graham, back with him to Lewiston. The FRAT he filled out on July 9, 2014 represented the flight assignment by Mr. Bower to return to Lewiston the next morning and included the Aurora internal trips. Complainant acknowledged that he had no medical crews for those assignments. When asked why he put a score for medical crew on his FRAT, Complainant said he considered the helicopter pilot not being familiar with the airplane being a potential co-pilot so he considered him a flight crew member/medical crew member as he thought the helicopter pilot might be a little bit of a distraction. Complainant contended that his FRAT on July 9, 2014 did not include what he might receive in terms of flight assignments from The Dalles. When asked if he misrepresented to Mr. Bower that night that it was going to be a medium to high FRAT that night, he denied this assertion, stating he did not need to complete a FRAT to give that assessment. However, he acknowledged that at the time of that conversation, he did not know about the proposed change of flight assignment to include Aurora; it was just to reposition the aircraft to Dallesport empty and return the next morning. Tr. at 816-43.

Complainant agreed that his shift on July 8, 2014 started at 1900 and he recorded his off-duty time at

0900. And he acknowledged that, prior to his July 9, 2014 shift, he had had 10 hours of rest. On July 9, 2014, he actually was ready and available for an assignment at 1900 hours per Mr. Pike's instruction. When looking at his July 8, 2014 FRAT (JX 24), even though he had been working more than 4 hours, Complainant did not feel it was a risk element and did not check that box on that trip's FRAT. Tr. at 844-47.

Complainant acknowledged that he was unfamiliar with the Dallesport airport, but that he had "probably not" flown into each and every airport prior to a flight request. He agreed that part of the job of a fixed wing ambulance pilot was to fly into unfamiliar airports. He also acknowledged that, despite annotating item #4 on the FRAT ("New unfamiliar nav/radio equipment installed with the past three months"), the equipment in the aircraft was the same as existed on July 8, when he did not take credit for the same risk. On the morning of July 10, 2014, when it was apparent that Complainant was the subject of concern due to Respondent's and LFN's miscommunication, Complainant wanted to ensure that people knew that he was available to conduct a repositioning flight. That occurred towards the end of his shift, about an hour prior to his shift ending. Tr. at 848-58.

Concerning the conversation he observed on the Boeing Field tarmac between Mr. Coon and Mr. Werner on March 12, 2015, Complainant agreed that he could not hear the substance of their discussion, but observed their interaction through the aircraft's cockpit window, including "very animated body language." He

agreed that Mr. Werner uses his hands when talking; "[Me talks with everything." Mr. Coon never told Complainant what he and Mr. Werner talked about that day. Tr. at 859-61.

Complainant has not seen any doctors for the emotional distress he claims as a result of his termination of employment by Respondent. He has not been prescribed any medications for emotional issues, and he holds a first-class medical certificate with no limitations. Tr. at 869-70.

On redirect, Complainant thought the circumstances of the night of July 9, 2014 required him to report the factors as he did in his FRAT (JX 25). He selected "New medical crew/Pilot mix" because there were going to be people on his plane that he was not familiar with and they were not familiar with him. It was his belief that the expectations set by Mr. Pike when he left his assignment on July 8thto show up at 7 p.m., be available for an undefined assignment to fly the plane from Tiffany's return, and fly the subsequent flights – would far exceed the 13 hours set by JJC as an internal duty limitation and would definitely approach, if not exceed, the 14-hour FAA mandated limitation before he would be able to complete the mission. Tr. at 871-76

Steven Bower (pp. 207-232 and 313-449)

Mr. Bower has been flying since 1976. His first professional job as a pilot was as a flight instructor. He earned his CFI in about December 1987. In

approximately 2005, he earned his multi-engine rating and airline transport pilot certificate. From 1987 for about 15 years he flew just part-time instructing during the evenings and weekends. In 2004 he was laid off from his job so he began to try to fly full-time. In 2005 he started working for Conyan Aviation as a part-time contract charter pilot. Back then Conyan was doing fixed-wing flights for LFN. In June 2006 he was hired full-time by Western Aircraft to be a full-time charter pilot and he could no longer work for Conyan because they were competitors. He worked there until around 2010. After that he flew for Western Aircraft part-time but this then allowed him to work other employers, including Conyan. In late June 2013 Respondent bought Conyan. Respondent thereafter was doing business as Conyan Aviation, but they also had its own entity. Mr. Werner asked if he would be interested in the Director of Operations (DOO) position.[26] He has known Mr. Werner for over 20 years and he considers him a close friend. In that position, he manages the pilots and reports to Respondent's management: Jeff Jackson and Wayne Werner. As the DOO, he had almost daily contact with Mr. Jackson because he was on-site in Boise. Mr. Bower's normal work day was 8:30 – 9:00 a.m. to 5:30 – 6:00 p.m., Monday thru Friday. However, both he and Mr. Pike served on call at times and both would occasionally provide pilot services. This included conducting LFN flights. Tr. at 207-21.

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[26] For a regulatory description of the qualifications necessary to become a DOO, see 14 C.F.R. § 119.71.

It was up to the pilots to make the go/no-go decision. They had the option to mitigate as an alternative strategy. Tr. at 226

CX 5 is LFN's Policies and Procedures dated June 2016. Tr. at 229-230. CX 6 contains LFN's Just Culture policies, which encourages individuals to report mistakes in order to fix system issues. That was consistent with Respondent's aims. Although he had not seen LFN's General Operating Manual ("GOM"), it was Respondent's policy for pilots-in-command to report to base with enough time to sign in andperform required pre-flight duties. Further, a pilot was to notify the LFN Communications Center[27] whenever the pilot might violate any rule due to being dispatched on a flight. Ultimately, it is the pilot that is responsible for the safety of those in his airplane and the flight itself. Pilots were required to perform a 360 degree pre-flight walk around prior to entering the cockpit and the pilots were responsible for notifying LFN's Communications Center if there were any issues that would take an aircraft out of service. Tr. at 315-31.

CX 9 shows that Complainant was expected to follow not only Conyan[28] policies and procedures when flying LFN flights, but he was to follow LFN's policies and procedures provided they did not contradict Conyan's. Pilots were expected to become familiar with

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[27] Mr. Bower initially referenced reporting this to Respondent's Chief Pilot, but later clarified his answer.

[28] As Respondent acquired Conyan, the Tribunal infers that these policies continued with Respondent.

LFN's policies and procedures. The terms of the contract between Conyan and LFN extended to Respondent's base in Lewiston. Tr. at 333-40; *see* RX 4.

Mr. Bowers recalls being one of the individuals that interviewed Complainant for the Lewiston pilot position. The Lewiston base was designed to have four pilots, but it never did. When he interviewed Complainant, he formed a favorable impression of Complainant and his experience. After Respondent hired Complainant, the human resource department needed to have his driver's license number. At that time, they learned there was an issue with Complainant's driver's license, which was a deal buster because they could not have a pilot that could not get to the airport quickly. However, with some difficulty, Complainant was able to get a driver's license before he showed up for work. The driver's license issue did not delay his ability to take flights. Tr. at 342-45.

Prior to Complainant's firing, Mr. Bowers had seen Complainant less than ten times in person. Up to that point, he had no concerns about Complainant as a pilot. And he had almost no concerns about Complainant's honesty prior to the July 9, 2014 flight. However, Mr. Bower's stated that Complainant had tested him quite often. Complainant e-mailed him often with issues and complaints about conditions or promises made and not kept for the pilots based at Lewiston. Mr. Bowers recalls Complainant complaining a lot about pay and insurance issues. Other than the incident with Mr. Young on the tarmac, he did not give Complainant

feedback about getting along with others or sending e-mails. Tr. at 345-50.

EMS[29] pilots had specific duties. For example, they filled oxygen tanks. Mr. Bower did not know what facilities The Dalles airport had to refill oxygen, access rest areas, get a drink of water, go to the bathroom, or even how to re-fuel the aircraft. Mr. Bower had only landed at The Dalles on one occasion and had only visited the Lewiston Base twice. He agreed that a pilot being familiar with that base increases safety margins. Tr. at 365-71.

LFN had helicopter operations and was pursuing a Part 135 certificate, but he did not know if that included both fixed and rotary wing aircraft. The word on the street was they were going to get a certificate and place all of their subcontracting entities under that certificate, including the bases at Lewiston and The Dalles. Tr. at 377-80.

JX 9 reflects the only written training Complainant received on use of the Flight Risk Assessment. Mr. Bower did not recall personally training Complainant on it, nor did he know of anyone else who personally trained Complainant or the Lewiston pilots on how to complete the Flight Risk Assessment. The FRATs were decision making tools for the pilots, not management. For Respondent the question was: is the pilot going on the flight or not. The pilot has the discretion to make the go/no-go decision. Tr. at 382-84.

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[29] Emergency Medevac Services.

On July 9, 2014, he sent Complainant an assignment to reposition a flight to The Dalles. Complainant was to wait for Mr. Royce Graham to arrive, and then take Mr. Graham back to Lewiston. The copy of the e-mail making this assignment to Complainant is at JX 14. Mr. Bowers did not know why LFN wanted the aircraft at The Dalles instead of Lewiston. LFN wanted the plane back in Lewiston on July 10, 2014 to keep the Lewiston base in service. Mr. Bower's sending the assignment via e-mail was not common for flight assignments as they usually came from the COMS Center. Mr. Bower e-mailed JX 14 around 5:00 p.m. just before Mr. Bower left work for the day. Mr. Bower did not check his e-mail that night because he did not have access to it. Consequently, he did not get Complainant's response to the e-mail until the next day. JX 15 is Complainant's response to JX 14. He also did not look at JX 16 until the morning of July 10, 2014.

At around 8:00 a.m., July 10, 2014, Mr. Bower had the impression that Complainant had made a no-go decision. JX 19 is an e-mail Mr. Bower's wrote Complainant at 8:30 a.m. on July 10, 2014, where he states that he disagreed with some of risk factors Complainant entered on the form. Tr. at 384-91.

Complainant's incorrect FRAT entries were a strong influence on the decision to terminate his employment, but not the only reason. Mr. Werner had a conversation with LFN and he was told that they would not use Complainant anymore, which strongly influenced the decision. Mr. Pike fired Complainant. In making the decision to terminate Complainant's

employment, the e-mails at JX 15 and JX 16 were considered. CX 84 includes the e-mail string between Mr. Pike, Human Resources, and himself on how to word the termination of employment action. They discussed discipline versus termination, ultimately and unanimously concluding on termination of employment. Tr. at 392-98. The decision to terminate Complainant's employment was a team decision. Mr. Bower stated that Complainant was not fired for raising safety issues. Tr. at 421.

Complainant was assigned to fly the Pilatus PC-12 during his employment, which is a day or night, 1FR, VFR, and known icing conditions aircraft.[30] Mr. Bower supervised the pilots flying fixed-wing LFN missions from Boise and Lewiston, and briefly Aurora and The Dalles. Mr. Bower considers The Dalles a fairly normal airport. A reposition flight is a routine flight. His last day of work for Respondent was in October 2014. Tr. at 398-405.

Mr. Bower is familiar with the FRAT form Complainant used on the evening of July 9, 2014. IX 9 is a copy of that form. JX 16 is the FRAT form completed by Complainant for the July 9, 2014 flight. The first

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[30] IFR means instrument flight rules while VFR means visual flight rules. In general, when flying VFR one cannot fly through clouds and the pilot is responsible for keeping a safe distance from the clouds (visual meteorological conditions) and the pilot is responsible for seeing and avoiding other aircraft. *See generally*, 14 C.F.R. § 91.155. [FR refers to rules for conducting flight below VFR weather minimums. *See* 14 C.F.R. § 91.167 – 91.193. *See generally*, AIRPLANE FLYING HANDBOOK (2016) and INSTRUMENT FLYING HANDBOOK (2017).

time he saw Complainant's FRAT form for the July 9, 2014 flight was in that email on the morning of July 10, 2014. At the time he sent his response to Complainant's email (JX 16), Mr. Bower had no idea that LFN was upset. The first time that he had seen the TAF[31] report (JX 20-3) was in conjunction with JX 20 on July 10, 2014. Mr. Bower received the email at JX 20 after he had sent the JX 19 email. Tr. at 405-12.

After reviewing Complainant's FRAT (JX 25) on the morning of July 10, 2014, Mr. Bower had issues with lines 7 and 8, which referred to the aircraft as quite heavy. He did not believe the aircraft was as heavy as Complainant represented because it was only a repositioning flight. Complainant did not have a patient on board and only needed enough fuel to get to The Dalles and back to Lewiston.[32] However, he acknowledged that he had no evidence that the aircraft was not as heavy as Complainant represented on the form. On the right-hand side of the form, Mr. Bower also took issue with line 6, because it is not true that the trip was turned down by another operator for weather reasons; it was just a reposition flight. Line 8 on the right-hand side is also wrong because

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[31] Terminal Aerodrome Forecasts ("TAF") are weather reports at an airport that are valid for 24 or 30 hours and amended as required. They are generally issued every six hours. *See* AERONAUTICAL INFORMATION MANUAL: OFFICIAL GUIDE TO BASIC FLIGHT INFORMATION AND ATC PROCEDURES (Oct. 12, 2017), Chap 7, page 7-1-1 (hereafter referred to as the "AIM").

[32] Mr. Bowers later testified that, given the flight mission, the aircraft would be about 700 pounds under its maximum gross weight. Tr. at 418-19.

Complainant had not flown two or more hours during the shift; that was going to be his first flight. Mr. Bower disagreed with Complainant's representation on the form that the winds were greater than 30 knots at the takeoff or landing airport, or had a gust factor of 15 knots or more. The TAF showed milder wind conditions at The Dalles during that period, the same document Complainant would rely upon. Similarly, the form references moderate turbulence and wind shear but that also is reflected on the TAF, or they would be in METARs[33] or PlREPs.[34] Tr. at 413-20.

Mr. Bower understood that the pilots employed to fly for LFN at Lewiston would be terminated by Respondent once LFN obtained its Part 135 air carrier certificate and would then be hired by LFN. However, after LFN obtained its certificate, it did not retain any of the Lewiston based pilots. There were two pilots there at that time, other than Complainant. Respondent terminated those pilots' employment on August 11,

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[33] A METAR is a Meteorological Aerodrome Report, also called an aviation routine weather report. These are weather reports generated by weather equipment on the surface of an airport that are updated at least hourly. *See* AIM, page 4-3-26 and 7-1-60

[34] Pilot Report, or Pilot Weather Report. These are reports pilots make during a given flight and include such information as visibility, turbulence, icing conditions, and tops of cloud layers. *See* AIM, *supra*, at page 7-1-41.

When asked by the Tribunal, Mr. Bower said that he did not investigate as to whether or not there were any PIREPs about reported turbulence or wind shear. Tr. at 420. The only information that he relied upon was the TAF that the Complainant provided to him as justification for his decision. Tr. at 445.

2014 and closed the Lewiston base. Neither of those two pilots were offered further employment with Respondent because it did not have any openings. Tr. at 421-23.

When he was Respondent's DOO, Mr. Bower encouraged teamwork and professionalism; he wanted each pilot to succeed. When he had issues with pilots, he would address those individually with the pilot. If a pilot had a question about an assignment, they could contact the COM center for clarification. Tr. at 425-27.

On redirect, Mr. Bower's thought that LFN might still have a helicopter in Lewiston but was not sure. He was not aware whether LFN now had a hangar at Lewiston, or whether they were actively seeking fixed wing pilots. Tr. at 427-29.

CX 16 is a copy of an e-mail, dated July 9, 2014, Mr. Bower sent to the Lewiston-based pilots. He tells a Lewiston-based pilot that LFN would be providing pilots with their benefits and overtime compensation, something the pilots (including Complainant) had been complaining about for many months. The Lewiston pilots felt that, compared to the other LFN pilots, it was not fair that they were not getting the same rate. Tr. at 430-32.

Mr. Bower reiterated that Complainant was terminated for three reasons: he misrepresented the risk of the night of July 9, 2014; LFN did not want him working there anymore; and Respondent's general feeling that he was hard to manage. – Complainant whined much more often than the other pilots – by e-mail or

text, and about compensation, overtime, and benefits. Tr. at 435-36.

JX 7 is the personnel action form that was drafted in connection with Complainant's termination of employment, which sets forth the reasons why Complainant was terminated. Mr. Bower believed that Mr. Pike articulated those reasons to Complainant as the basis for his termination. Mr. Bower acknowledged that the personnel action form did not say anything about LFN, but noted that he did not write that document. IX 7 was prepared by Mr. Pike and a person from human resources. Mr. Bowers agreed that CX 84, at 2 describes the conversation Mr. Pike had with Complainant, and does not make reference to LFN not wanting to work with Complainant as a rationale provided to Complainant as a reason for his termination of employment. Tr. at 437-40.

JX 21 contains an e-mail from Mr. Werner where he strongly recommended terminating Complainant's employment. As part of that e-mail chain, a LFN person asked him and Mr. Werner to have a conference call that morning. Tr. at 442-43.

Ryan Pike (pp. 241-314 and 679-743
(via video-teleconference from Tampa, FL)

Mr. Pike started flying in high school in 1999 in Boise, became a flight instructor for a few years and then obtained a position as a charter pilot with Conyan Aviation which later became Respondent. He flew there for a few years as a line pilot, check airman, and

eventually became the Chief Pilot. He has about 4,800 hours total flight time and holds an Airline Transport Pilot, Certified Flight Instructor, and Instrument and Multi-engine Instructor certificates. He left Respondent in August 2014 for a Chief Pilot position in Southern California. After that he moved to the Denver area for a position and ultimately became that company's DOO. He left that position and currently holds a full-time flight position as a Captain for a company in Connecticut. Tr. at 265-69.

Mr. Pike was Respondent's Chief Pilot from August 2013 to August 2014. During that time he was Complainant's immediate boss. He was based in Boise and Complainant was based in Lewiston, so he had very limited personal contact with Complainant. Outside of telephone calls and e-mails, he did not know Complainant well. Tr. at 241-44.

On July 9, 2014, Complainant had been assigned to reposition an aircraft for LFN from Lewiston to The Dalles. Complainant was to pick up a pilot around 7:30 a.m. on July 10, 2014 and fly him back to Lewiston. This was Complainant's only assignment. Through no fault of Complainant, the aircraft he was to use for that flight arrived five hours late. Complainant contacted Mr. Pike to review his FRAT, a typical course of action because Mr. Pike was his boss. During this review, Complainant raised the issue of pilot fatigue and suggested he could get a hotel; however, Mr. Pike never looked into the availability of a hotel room. It is appropriate for a pilot to go through the potential issues that might affect the safety of the flight, including the

weather. It was apparent to Mr. Pike during the telephone conversation that Complainant did not like the circumstances of the flight; Complainant felt unsafe doing so. Mr. Pike found out later that Complainant communicated with LFN and told them he was willing to do the flight, but they did not want him to do it anymore. Tr. at 244-51.

Mr. Pike acknowledged that he never looked at the weather reports for The Dalles to confirm what the weather was there on July 10, prior to firing the Complainant. Mr. Pike also agreed that one of the reasons he fired Complainant was insubordination. After informing Mr. Pike that he was not going to fly that mission, Complainant told LFN that he would. Mr. Pike agreed that another reason for Complainant's termination was his falsification of his employment application. However, Mr. Pike conceded that he never investigated or asked Complainant why he checked the box "No" to the question "Has your driver's license ever been suspended or revoked or ever been convicted of any felony?" Tr. at 247, 251-61.

On cross-examination, Mr. Pike acknowledged that he was Complainant's direct supervisor from the date Complainant started until the date his employment was terminated. The job of a fixed-wing air ambulance pilot requires the pilot to have experience in instrument conditions and a general ability to make safe decisions quickly. They can be asked to fly in bad weather and to unfamiliar areas or unfamiliar airports. He did not expect the pilot to make a decision based on the patient's condition because that is

unknown; they simply need to make a quick go or no-go decision. He was not aware of any requirement in Respondent's manual or operations specifications for a FRAT form to be completed for fixed-wing aircraft. Nor were there any policies or procedures at Respondent that required FRATs for fixed-wing aircraft to be kept for any amount of time. The requirement to complete a FRAT began in March 2014 because LFN required it for their flights. The FRAT form was not used by Respondent in 2014 for its charter flights. JX 9, page 2 is the blank template for a FRAT that Mr. Pike sent to Respondent's pilots who were performing flights for LFN, and was to be completed by them for those flights. JX 10 is an e-mail he sent to the pilots, including Complainant, asking that the pilots verify that they read, understood, and would comply with the instructions on completing a FRAT. The instructions provide that the left of the form can be filled out when a pilot's shift begins, but the right side must be filled out only when they had been assigned a specific flight. Tr. at 267-78.

Mr. Pike did not review every FRAT filed by the pilots. He would review them only when there was an elevated score and the pilot wished to do the trip or the pilot wanted to discuss how to mitigate the identified risk factors. Receiving a call from a pilot to mitigate a risk assessment was not uncommon. They would discuss options to mitigate the risk such as using an alternate airport or alternative route to avoid weather. As for the phone call with Complainant, Mr. Pike recalled that the conversation was more drawn out than an average risk assessment. At the conclusion of that

call, in Mr. Pike's mind, he did not believe that Complainant would make that flight. Mr. Pike's understanding was that flight was a simple reposition flight to The Dalles with the possibility of having trip assignments in and out of The Dalles, and to cover that base for the night. Mr. Pike was not familiar with that airport, other than in a general sense, and that was an established base where some crew members had been working for some time. Tr. at 27885.

While working for Respondent, Mr. Pike's typically worked 8 a.m. to 5 p.m., but fielded phone call and e-mails after hours as required. At some point he reviewed the e-mails Complainant sent July 9 or July 10, 2014. It was Mr. Pike's impression that Complainant had made the decision not to accept a trip before the aircraft had even arrived in Lewiston, Idaho. At the time that he had the mitigation telephone call with Complainant, Mr. Pike did not have the FRAT form. He believed that the first time that he reviewed the July 9, 2014 FRAT form (JX 25) was the next morning. Mr. Pike took issue with items on JX 25. When he reviewed that form on July 10, 2014, he noticed that certain line items had been misconstrued. For example, on the left-hand side of the FRAT form, at item 8, there would have been no medical crew members aboard the repositioning flight. Mr. Pike also had concerns about Complainant marking item 4 – for new equipment installed on the aircraft – when there had not been, and Complainant's reference to the aircraft being within 250 pound of maximum landing weight. Tr. at 285-93.

The right-hand side of the FRAT form (JX 25) was only to be filled out upon a specific trip assignment. Item 6 was incorrect because no other pilot had turned down the assignment, nor was Mr. Pike aware of the flight being turned down by any other operator. The next line item Mr. Pike had issues with concerned Complainant's representation of how long he had been on duty at the time of assignment. Although the form is grammatically incorrect because it used the word "for" rather than "four", for all intents and purposes Complainant had just begun his shift. Complainant indicates on JX 25 that he had flown two or more hours during his current shift, when Complainant had not flown yet that day. Even if he had flown, it is only a 45 to 50 minute flight from Lewiston to The Dalles. Complainant noted wind greater than 30 knots, yet the weather that night was not forecasted to be in that range nor was it in that range during the time period of the proposed flight. One would determine this by referring to the TAF, and Mr. Pike has seen the TAF report for the July 9, 2014 flight in question. JX 20, page 3 is the TAF report and Mr. Pike likely reviewed it the morning of July 10, 2014. IX 20 indicates that the winds were 17 knots gusting to 23 knots, with good visibility. Mr. Pike opined that, in light of JX 20, Complainant's entry for wind conditions on JX 25 was false.[35] On JX 25, Complainant represented a forecast for wind shear, but to Mr. Pike's knowledge there were no reports of wind shear. Tr. at 293-301.

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[35] *See also* Tr. at 307-09.

JX 15 is an e-mail that Mr. Pike saw the evening of July 9, 2014, where Complainant expressed concern about the logistics of the trip and the risk factors. He found Complainant's email to be presumptuous, because it was not reasonable to assume that it was going to be a busy night at The Dalles. There is no way to predict what flight assignments may come out of a particular base. Complainant described The Dalles as a hostile nighttime operational environment, but no pilot would place The Dalles on a list of dangerous airports to operate into or out of. His comment about heavy encroachment of rest periods is inaccurate because if one looked at Complainant's flight logs there was nothing that pushed the 10-hour rest request. And Complainant exaggerated the work load at The Dalles in general; each base received its fair share of busy times and quiet times. Mr. Pike felt it was obvious that Complainant's risk assessment was based on assumptions about what may or may not occur that night which were then translated over to the FRAT score. Tr. at 303-06.

Mr. Pike first reviewed the e-mail at JX 20, page 3, on the morning of July 10, 2014. Complainant's representations about the wind conditions were not supported by the weather forecast he provided to Respondent. Mr. Pike opined that Complainant did not adequately assign points for the line item; he should not have taken any points for the line item related to wind. It appeared that Complainant was covering his bases, since Mr. Pike perceived the night prior that he just did not want to do the flight. Tr. at 307-12.

Mr. Pike provided Complainant with five days of training at the very beginning of his employment, which covered company-specific items, policies and procedures, a basic review of Federal Aviation Regulations, and basic airmen knowledge. He could not recall if he provided Complainant any documents like the Respondent's GOM. He did recall that a portion of Respondent's GOM covered the duties for a pilot in command and chief pilot.[36] Mr. Pike would have discussed those duties with Complainant during his training. Complainant was expected to abide by Respondent's GOM policies and procedures. Tr. at 680-92.

Mr. Pike recalled the mitigation telephone call he received from Complainant on July 9, 2014. He reviewed Complainant's FRAT with him and would have gone through and mitigated with him, but he likely did not have a copy of Complainant's completed FRAT during the telephone call. He had no specific memory other than Complainant's general concern for logistics. Tr. at 692-93.

On July 10, 2014, he reviewed e-mails received from Complainant. He recalls opening the e-mail from Complainant, dated July 9, 2014 at 6:29 p.m. (JX 15) sometime in the morning. After reviewing the e-mail, he recalled discussing synthetic vision and a general discussion about the Columbia Gorge airport itself. Tr. at 693-95.

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[36] *See* RX 83, bates stamp BC 00363.

JX 20 is an e-mail from Complainant sent July 10, 2014 at 9:19 a.m. Mr. Pike saw this email that morning and believed that Complainant was trying to cover his tracks a little bit because he knew Respondent was probably discussing his actions. The e-mail struck Mr. Pike as odd. Complainant suggested repositioning N890WA to Dallesport, which was kind of useless because his shift had ended by that point. Complainant also attached a TAF to his e-mail. Mr. Pike disagreed with Complainant's interpretation of the TAF in the context of Complainant's entries on the FRAT. Tr. at 695-98.

Mr. Pike again asserted that Complainant's employment was terminated for multiple reasons. Complainant wrote long e-mails on weekly bases that were not easy to read, expressing his opinions that someone was not doing something. These e-mails became very tiresome to deal with from a management perspective. His altercation with another pilot on the Lewiston ramp in April 2014 also had a bearing on the decision, in addition to the falsification of his employment application, the altercation with Mr. Young, and the July 9 incident. Tr. at 698-99.

Respondent's specific concern about the July 9, 2014 incident was about how much time it took for Complainant to come to a conclusion as to whether or not the trip would go. It was obvious that the factors written on the FRAT (JX 20-2) were, to a certain extent, falsified to inflate that score to make the trip look riskier than it was. To Mr. Pike, it showed poor decision making and he expects (and the regulations require)

each captain to be the ultimate and final decision maker. And if a pilot cannot demonstrate the appropriate skill level and ability to make smart decisions, they cannot perform as a pilot in command. Mr. Pike asserted that virtually everything on the right-hand side of that form was an embellishment of the facts. Complainant had not flown at night yet. Complainant had not been on duty a long time. The winds were not forecasted to be excessive. And it would not be appropriate to fill out a FRAT report based on anticipated assignments throughout his shift. Mr. Pike is not aware of any pilots employed by Respondent who approach a FRAT that way. Tr. at 699-703.

On July 10, 2014, Mr. Pike discussed the concerns about Complainant's actions the night prior with Mr. Bower. Mr. Pike recalled that he may have had some conversation with Mr. Werner, but the vast majority of his discussions were with Mr. Bower. They discussed Complainant's difficulty in reaching a go/no-go decision and the FRAT report. It was indicated to them by Mr. Werner's e-mail that LFN did not wish to use Complainant anymore as a pilot in command with their service. They discussed a reprimand, at which point they brought in Respondent's Human Resources to discuss how to appropriately write up the issue, but ultimately decided to terminate his employment. They elevated it to termination because of a "three-strikes and you are out" concept, and also because there was no position for him at Respondent since LFN did not want to use him. Mr. Pike did not recall if he made the decision to terminate Complainant's employment, or Mr. Bower did,

or whether it was a joint decision. However, he knew it was Mr. Werner's suggestion they terminate Complainant's employment. Tr. at 703-06.

Mr. Pike made the actual call to Complainant, which was a very unpleasant conversation. He believes that the reasons he gave Complainant over the phone for his termination were spelled out in the paperwork they filled out at Respondent with HR (JX 7). Mr. Pike agreed with everything in that letter except the issue with the request from LFN to reposition the flight; he is not sure if that was correct. Tr. at 707-10.

On re-direct, Mr. Pike acknowledged that the termination letter does not mention Complainant's abrasiveness as a basis for his termination. And he recalled writing to LFN to confirm in writing that they had nothing to do with Complainant's termination of employment. At that time, he did not know that Complainant had been assigned by LFN to go from Aurora to The Dalles. He was not involved in the discussions between Complainant and the COM center. It was Mr. Pike's impression that Complainant would not do the flight on July 9, 2014, but Complainant never told him that he would not do the assignment that night. Further, he did not know that Complainant actually had communication with LFN that evening regarding his actual flight assignment, or that it was the COM center that cancelled the assignment. At the time Mr. Pike fired Complainant, he was not aware of the communications he had with LFN the evening of July 9, 2014, nor did he make any effort to investigate that before he fired Complainant. Tr. at 710-17.

As for Complainant's FRAT, Mr. Pike opined that there was no reason to wait for the winds to die down because they were already at a reasonable speed and direction for Complainant's arrival. However, he acknowledged that he had never flown in to The Dalles. He did know that The Dalles and its river were known to be windy, and winds could come up at any time. There were no forecasted adverse weather conditions that night, but Mr. Pike acknowledged that he did not know what the actual weather conditions that night were. It was very uncommon for the actual weather to deviate drastically from the TAF. On JX 15, Mr. Pike agreed with Complainant's entry that he was unfamiliar with The Dalles base he was flying to. Mr. Pike agreed that there was no reason for Complainant to falsify a FRAT to avoid doing a flight if he, in fact, was going to do the flight. Tr. at 721-28.

On re-cross, Mr. Pike acknowledged that, after hours, with Mr. Bower being gone, any revisions to a flight assignment would go through the COM Center. Tr. at 732.

In response to the Tribunal's questions, Mr. Pike stated that the COM Center relayed the flights to be performed to Respondent's pilots. It is reasonable for a pilot to presume that proper coordination has occurred prior to them receiving a mission for any particular flight. The practice was the pilot would receive a request from the LFN COM center, and operational control was delegated to the pilot to accept or decline that trip. So the DOO or Chief Pilot would not have been aware of the flight until the next morning. It would be

the pilot's decision under his operational control to decide to go full fuel for a given flight. The pilot would be limited by the takeoff and landing weight limitations, but it is the pilot's decision. Synthetic vision was not required equipment on Respondent's aircraft. The absence of synthetic vision is not unusual for Part 135 operations. According to the reported winds, the wind was blowing straight down runway 31 at The Dalles on July 9, 2014.[37] And runway 31/13 is the longer of the two runways. Other than the proximity to higher terrain, the nearby dam, and powerlines, there is nothing unusual about The Dalles airport. In Part 135 operations, it is an everyday occurrence to fly where there is high terrain in the Western United States.[38] Tr. at 735-43.

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[37] The Tribunal took official notice from the Pilatus PC-12 Type Certificate Data Sheet that its demonstrated cross-wind component is 25 knots with 15 degrees of flaps, and 30 knots with no flaps. Tr. at 745.

[38] Following Mr. Pike's testimony, the parties asked that the Tribunal take official notice of the instrument approach charts, the [FR minimums, and alternate airport minimums, minimum takeoff and departure procedures for Dallesport (DLS) and Aurora (UAO) airports, the 2009 Risk Management Handbook by the FAA, the NTSB Safety Alert Controlled Flight into Terrain and Visual Conditions, Nighttime Visual Flight Operations are Resulting in Avoidable Accidents, SA-103 (Rev. Dec. 2015), and NTSB Safety Alert No. SA-023 Rev. 2013, Pilot's Manage Risk to Ensure Safety, Good Decision Making and Risk Management Practices Can Help Prevent Accidents; Advisory Circular 12092A, Safety Management Systems for Aviation Service Providers; Advisory Circular 61-134, General Aviation Controlled Flight into Terrain Awareness; Advisory Circular 135-15, Emergency Medical Services Airplane EMSA; Advisory Circular 60-20, Aeronautical Decision Making; Advisory Circular 00-64, Air Medical

Wayne Werner (pp. 55-204)

Mr. Werner has been a pilot for 54 years, has approximately 16,000 hours total flight time, holds an Airline Transport Pilot (ATP) certificate with ratings in Learjet, Citation, and Westwind jet aircraft, and is a Gold Seal Flight Instructor.[39] He flew professionally for 25 years and then went into management and sales. He currently works for Jet Stream Aviation. Before working for Jet Stream he worked two years for Respondent as the President of the Charter and Maintenance Department; May 2013 to June 1, 2015. His duties included supervising the Lewiston, Idaho base. However, he cannot say that he has informed himself on the FAA regulations that pertain to air medical transportation and is vaguely familiar with recommendations made by the National Transportation Safety Board ("NTSB") regarding air medical transportation. He is aware of the requirements of a pilot for

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Resource Management; Advisory Circular 120-51E, Crew Resource Management Training; Aviation Special Investigation, Emergency Medical Services, Executive Summary dated January 25th, 2006 regarding Emergency Medical Services, Aviation Operations; NTSB Identification SEA 07 FA 051. This is a report that had been modified on January 6th, 2008. Tr. at 751-54. The parties also offered as substantive evidence the deposition transcript of Ryan Swakon. CX 94. *See* Tr. at 747-51.

[39] Upon the Tribunal's questioning later, he stated that he held a Certified Flight Instructor – Instrument and Multiengine Instructor certificates, a Learjet 20 series and CE-500 type rating, but does not hold a mechanic's certificate. He does not have prior experience with a Part 121 air carrier, did not have any freight hauling time, and it had been about 20 years since he last flew as a line pilot for a charter company. His recent flight instruction was in a Cessna 152 and 172. Tr. at 200-05.

pre-flight planning and the requirement to familiarize oneself with all available information, including the weather, personal and family stressors, and duty time.[40] Tr. at 55-65.

Mr. Werner has trained pilots on how to fill out pre-flight risk assessments; the last time being two weeks prior to his testimony. He was providing part-time flight instruction for a company in Seattle. Before every flight – but not every day – the pilots are required to fill out a FRAT[41] form. Part of his instruction when he flies with someone is how to fill out that form. Tr. at 65-66.

When responding to safety concerns raised by pilots to management, Mr. Werner opined that management should evaluate the concern and make a decision on how to proceed. If a flight is at issue, everyone gets their heads together to decide whether the flight can be conducted safely, whether the flight should be grounded, or see if some things can be done to modify the flight or airplane to conduct it safely. Each circumstance is different. Tr. at 67-69.

The Jacksons, Jeff and his father John, own a good-sized Fixed Base Operations (FBO)[42] at Boise,

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[40] *See* 14 C.F.R. § 91.103.

[41] *See* Tr. at 10.

[42] The FAA defines an FBO as "[a] commercial business granted the right by the airport sponsor to operate on an airport and provide aeronautical services such as fueling, hangaring, tie-down and parking, aircraft rental, aircraft maintenance, flight instruction, etc." AC 150/5190-7, Minimum Standards for Commercial Aeronautical Activities (Aug. 28, 2006), at App 1, para. 1.1(i).

Idaho. They bought two FBOs and merged them into the Respondent. The FBO occupies the entire northwest side of the airport. Mr. Werner has known Jeff Jackson probably 15 years and his father John probably 20 years. He has spent time with members of the Jackson family socially. Tr. at 70-75.

At the time Mr. Werner joined Respondent, it had already purchased Conyan Aviation in the fall of 2012. One of the individuals that stayed on with Respondent after the acquisition was Ryan Pike. Mr. Pike was a line pilot for Conyan Aviation and was promoted to Chief Pilot after the acquisition; just prior to Mr. Werner joining Respondent. Tr. at 75-76.

The Jacksons asked Mr. Werner if he would be interested in helping them reorganize the business. Mr. Werner now lives in Seattle, and he was very interested because he likes the challenge of a startup operation. He gave them a 12-month commitment and commuted from Seattle to Boise. Mr. Werner stayed with Respondent for 18 months, working in Boise ten days and then coming back to Seattle for four days. Tr. at 76-77.

Respondent purchased Conyan Aviation for charter and maintenance work. All of the customers from Conyan Aviation were merged into this new portion of the business. At the time Mr. Werner arrived, the air carrier certificate remained in the name of Conyan Aviation. Tr. at 77-79.

Conyan Aviation had a long-term contract with St. Al's Hospital for fixed winged LFN operations. Mr.

Werner was not involved with that contract, but he was pretty sure that in the winter of 2013 Jeff Jackson negotiated a new long-term contract with LFN for the Boise base. He has seen this contract and believes that it expires in the Spring of 2018. In essence, Respondent, as the purchaser of Conyan Aviation, was grandfathered in that contract. This contract had Conyan Aviation providing aircraft, pilots, and a facility at Boise. The facility included offices for nurses, a hangar, and facilities for pilots that were on call seven days a week, 24 hours a day. Tr. at 79-81.

When he arrived at Respondent it was a 12-hour base, but shortly thereafter it expanded to a 24-hour base which would have a minimum of four pilots dedicated to Life Flight. These pilots were not allowed to take charter flight assignments when they were on the Life Flight schedule. The facilities that the pilots enjoyed at the Boise base include an office, restroom, bedroom, and they could use the kitchenette in the adjoining LFN helicopter section. The fixed wing section had a Pilatus aircraft for LFN missions, with a Piper Cheyenne III as a backup. The Pilatus is the same type of aircraft used by the Lewiston flight crews. Tr. at 81-84.

As the President of Charter Operations, Mr. Werner's duties included making sure that the pilots were performing their duties and meeting client needs under the contract with LFN. In May of 2013, he was involved in hiring pilots for the Boise base. He was also involved in the formation of the contract for the Lewiston base, which included support to the Dallesport

base as he recalled. Discussions with LFN for that contract began around the end of 2013, start of 2014. As background, LFN had a goal to get rid of their contract pilots and operate their flights with in-house pilots. LFN had been trying to get their Part 135 certificate for years but had not by the end of 2013, and it was going to run out of a contract that was servicing some of its bases. Those bases included Portland and Hillsboro, and LFN wanted to open bases in Lewiston and The Dalles. LFN had brand new Pilatus aircraft waiting for the certificate so they could operate. Because LFN's contract was going to run out, Jeff Jackson and he thought that there may be an opportunity for them, so Mr. Jackson, Mr. Werner, and Mr. Steve Bower,[43] went to meet LFN's chief operating officer to discuss the possibility of picking up those contracts. They left that meeting with an amendment to their contract where Respondent picked up those bases for three or four months, as LFN thought that for sure they would have their Part 135 certificate by then. Tr. at 85-89.

Respondent's personnel went back to Boise following this meeting and started putting things in place, adding aircraft to their certificate and advertising for pilots. They brought in a group of pilots to Boise where Respondent and LFN personnel jointly interviewed the pilots and starting hiring them. At that time, they were just interviewing and hiring pilots for the Lewiston base only, the first base they were going to start up.

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[43] Respondent's Director of Operations.

Interviews for The Dalles base occurred a few months later. Tr. at 89-90.

The expectation from the contract between Respondent and LFN was that Respondent had total operational control of the pilots and it would dictate all of the circumstances of the flights. The hospital network would call Respondent's pilots, who would have the authority to either accept or reject a trip based on all of the factors; the pilot-in-command is always the final authority. Dispatch itself was housed within LFN, and Mr. Werner assumes the flight requests came from the hospital. He did not know where the dispatch orders came from but "[c]ommon sense [told him] it would be from a medical team." When pilots came online at the beginning of their shift, he believed that they called the communication center to let them know. The LFN dispatch was often called the COM Center or Communication Center. There was not a separate COM center that JJC had for LFN operations. If a pilot was flying as a LFN pilot under Respondent's banner, they would be talking with LFN's communication center. Tr. at 91-97

Mr. Bower and Mr. Pike normally worked from 8 a.m. to 5 p.m. during the weekdays but they were on call in the evenings. In addition, Mr. Pike also flew charter trips, which Mr. Bower did not do much of. Mr. Bower was in the office most of the time and was more or less a Pilatus expert; this was one of the main reasons that Mr. Werner hired him. Tr. at 97-98. Although he was not involved in the interview process, Mr. Werner believed that Complainant was hired to work at

the Lewiston base. When he first met Complainant his impression was he was a nice person, but possibly high maintenance. Complainant talked a lot and tried to impress everybody with how much he knew. Tr. at 99-101.

Mr. Werner was involved in Respondent's termination of Complainant's employment. He was aware that 14 C.F.R. § 91.103 required air ambulance providers who offer helicopter medivac services to have a risk assessment program. He agreed that the pilot-in-command has full control and authority over operation of the aircraft without limitation. It is best safety practices to allow pilots to make their risk assessments without fear of reprisal or retaliation. Respondent's pilots were told that it was their discretion to make go and no-go decisions, provided that those decisions were safe and soundly made. Tr. at 102-03.

Mr. Werner first heard about issues during the night of July 9, 2014 the following morning. He had not actually seen the e-mail between Mr. Bower, Complainant, and Mr. Pike when he received that phone call. Nor had he reviewed the FRAT Complainant had filled out. During that telephone call, he learned that Complainant had falsified a FRAT to not move the plane. Mr. Werner did not personally investigate the condition that existed on the night of July 9, 2014, call Complainant to talk about those conditions, or look at any of the weather reports Complainant described in his safety reports. Tr. at 103-04.

Mr. Werner found Complainant a little annoying. Complainant would write e-mails about issues and

they would all laugh at them. It seemed that Complainant would study a dictionary to come up with flamboyant words, and his e-mails were very out of character for a normal communication. At one point Mr. Werner told Complainant that any further communications on various issues were to come to him and not Mr. Bower. Complainant was definitely stressing Mr. Bower. CX 41[44] is an example of an offensive e-mail from Complainant. Mr. Werner found it long-winded and flamboyant, and thought it could have been condensed to two sentences. Complainant would sent long e-mails and have long conversations with Mr. Bower. They had ongoing conversations about pay in April 2014 so Mr. Werner told him to talk to LFN; but Complainant kept talking to Mr. Werner and Mr. Bower about it. In virtually every conversation that Mr. Werner had with Complainant, the theme was that Complainant was not treated fairly and that LFN had made some promises. Mr. Werner told Complainant to address the promises made by LFN with LFN. Tr. at 105-13.

CX 42 is an e-mail from Complainant on April 16, 2014, which Mr. Bower forwarded to Mr. Werner. Mr. Werner's response was: "Is this guy nuts?". In response to this e-mail, he sent CX 41 to Complainant about taking his issues up with LFN. Early on with the LFN pilots, Mr. Werner and Mr. Bower brought in Respondent's HR people to explain what Respondent provided. The rest of the people that were hired

[44] This is an e-mail from Complainant to Mr. Werner on April 17, 2017 at 1:56 p.m.

seemed to understand that; though Mr. Werner felt Complainant never could. Tr. at 114-18.

As best Mr. Werner could recall, LFN obtained the air carrier certificate around June 2014. CX 43 is an e-mail between Mr. Werner and other members of Respondent's management team. His reference to Complainant as "certifiably nuts" was a figure of speech; Complainant just would not let go of the pay issue and Mr. Werner found that irritating. To his knowledge, Complainant was not counseled nor did Complainant receive any written reprimands about his email communications. When asked if he had any prior concerns about Complainant making misrepresentations prior to July 9, 2014, he said that he had some doubts about Complainant's trustworthiness from day one. When pressed, Mr. Werner could only cite to an issue with Complainant not having a valid driver's license. Tr. at 118-33.

On July 10, 2014, based on the information he obtained from Mr. Bower and Mr. Pike, Mr. Werner recommended that Complainant's employment be terminated. His recommendation was based on Complainant's manager's view that Complainant had falsified a FRAT, which is a safety report. Tr. at 134-35.

CX 87 is an e-mail Mr. Werner sent to Mr. Bower, Mr. Luttz, and Mr. Pike. He admitted that he wrote the following:

> I want to find out who the pilot who[sic] said that to LFN people that the brakes are worn out. This pilot may be a candidate for an exit

> interview. I'm tired of this. Somebody needs to get a handle on these babies.

Mr. Werner maintained that there was not really a safety concern, but it was an idiosyncrasy of the Pilatus aircraft. However, he acknowledged that he was probably a little angry when he wrote that e-mail. Tr. at 136-40.

Mr. Werner agreed that there were potentially dozens of factors that a pilot had to consider when making a pre-flight assessment. Tr. at 140. He also agreed that a pilot should take the time that he feels is necessary to think through all the reasonable factors before deciding whether a flight could be safely performed – and he should do it within a reasonable time period. Depending on the circumstances, it may or may be appropriate to pressure a pilot to give a quick answer because the customer needs to know. Tr. at 150-52.

Mr. Werner acknowledged that he did not do anything to independently verify the veracity of the factors alleged by Mr. Pike that Complainant falsified on his FRAT form. He recalled both Mr. Pike and Mr. Bower were in agreement that they suspected Complainant had falsified information on the FRAT.[45] However, when pressed, Mr. Werner could not recall what specifically was allegedly falsified on the FRAT. Tr. at 143-48.

Mr. Werner was not aware that one of the reasons Mr. Pike chose to recommend Complainant's

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[45] *See also* Tr. at 167-68.

termination of employment was he would not give him a quick answer as to his risk assessment on The Dallesport reposition flight. Nor was he aware that on the morning of July 10, 2014, Mr. Bower sent Complainant an e-mail telling him that he respected Complainant's risk assessment. Mr. Werner recalled that he was at his home when Mr. Ryan and Mr. Bower called him about a problem with Complainant, and they talked about the fact that they suspected that Complainant had doctored a FRAT in order to not fly. Tr. at 150-56.

In the Spring of 2015, Mr. Werner saw Mr. Roger Coon, Corporate Air Center's Chief Pilot, at Boeing Field. Mr. Werner has known Mr. Coon for five or six years. When he walked into the Boeing facility that day, Mr. Coons was there and he asked how he was doing. Mr. Werner did not recall seeing Complainant there that day and he denied talking to Mr. Coon that day about Complainant. Tr. at 156-60.

When confronted with his prior testimony during the OSHA investigation,[46] Mr. Werner agreed that he did not need to be involved in Complainant's termination of employment action and that it was Mr. Pike that terminated Complainant. Tr. at 168-69.

On re-direct Mr. Werner was shown the LFN contract[47] at RX 1. LFN had negotiated this contract with Respondent in Boise prior to Mr. Werner coming to work for Respondent. Respondent's pilots for the LFN

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[46] *See* CX 91 for ID; Tr. at 167-68.

[47] There were multiple amendments to this contract. *See* RX 1 – RX 5; Tr. at 174-79.

contracts were not employed indefinitely. After LFN obtained its Part 135 certificate, it was Mr. Werner's assumption that the pilot would negotiate with LFN as to whether or not they would continue to have a job with LFN. Tr. at 173-80. JX 11 contains notes from a June 17, 2014 pilot meeting where the pilots were informed that LFN had obtained its Part 135 certificate.

An incident occurred between Mr. Young (another pilot for Respondent) and Complainant on the ramp in front of LFN's offices in Lewiston. Someone had to break up the confrontation between these two pilots before it became physical. Mr. Jeff Jackson and Mr. Werner went to Lewiston the next day and addressed the pilot's conduct with each of them. Both pilots were reprimanded. JX 6[48] is Complainant's reprimand. Tr. at 181-87.

Concerning the questioning about his conversation with Mr. Coon, Mr. Werner denied talking to anybody at Corporate Air Center about Complainant, including Mr. Coon. He also denied speaking to any other air carrier about Complainant. Tr. at 189-90.

On re-cross Mr. Werner was shown CX 84, where he asked Mr. Pike to give a statement regarding Complainant's termination of employment. He asserted

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[48] JX 6 references an attachment. The Tribunal inquired about this and the parties informed the Tribunal that the attachment was a copy of an e-mail at RX 9-1 and CX 1. Tr. at 185. RX 7 is an e-mail Mr. Werner sent to Complainant that he was directed to talk to Mr. Werner only about administrative matters.

that this was only good business – documenting anything out of the ordinary. Tr. at 197-200.

C. Facts in Dispute

1. Respondent's Statement of Facts

In its brief, Respondent asserts that Complainant's misrepresentations on the FRAT form was the final straw in his difficult and short employment with Respondent. A few months prior Complainant had been reprimanded for unprofessional conduct involving an argument with another pilot in front of one of Respondent's customers. Further, during his employment, Complainant repeatedly raised questions regarding promises allegedly made by LFN that were not within Respondent's control. Resp. Br. at 1-2.

On July 9, 2014, Complainant was given the assignment to reposition an aircraft from Lewiston, Idaho to Dallesport, Oregon, and then return the next morning with the relief pilot. Respondent's pilots are required to complete a FRAT for each shift. Until the night of July 9, Complainant had demonstrated that he knew how to correctly complete a FRAT form. On the evening of July 9, 2014, Complainant deviated from his practice on how to complete the FRAT and in doing so he misrepresented the risks associated with that night. Complainant now attempts to hide behind the argument that he was going above and beyond what he was asked to do in accessing risk that evening. Resp. Br. at 2.

In an effort to justify his FRAT scores, Complainant's testimony shows that his risk scores were based on non-existent factors or conditions. In considering the misrepresentations on the FRAT form, his altercation with a co-worker, LFN's refusal to have him fly for them and difficulty management had with Complainant, Respondent terminated his employment. Resp. Br. at 3.

Respondent argues that Complainant's misrepresentations on the July 9 FRAT form do not qualify as a protected activity because the scores he entered on the FRAT were not subjectively and objectively reasonable. Complainant argues that four FAA regulations support his protected activity, but there is no evidence that Complainant's supervisors even questioned Complainant related to issues of duty time, potential fatigue, or his claimed lack of familiarity with the Dallesport airport. Further, even if Tribunal was to consider the "safety" arguments from the FAA regulations as necessary to resolve the matter, Complainant still fails to meet his burden because he was not asked to do anything that violated or could likely violate any air safety regulation, order, or standard. And there is no proof that supports Complainant's speculation that Mr. Werner or any other of Respondent's employees provided any input. Resp. Br. at 3-4.

2. Complainant's Statement of Facts[49]

Complainant asserts that he was looking for a "home" when he applied to work for LFN for a fixed wing EMS pilot position in November 2013; a place that would support his commitment to safety. He was also excited about the promise of growth and expansion and promotion possibilities. At his initial interview he was told that LFN lacked a certificate but its receipt was imminent. Consequently, Respondent would have to step in and cover LFN's EMS flights needs using Respondent's certificate. A few days following a second interview, Mr. Bower offered Complainant a position at about $65,000 per year, plus full benefits for his wife and children, and additional pay for additional time worked, according to LFN's pay policies. Complainant accepted the offered, thereafter commuting from Friday Harbor, Washington to Lewiston, Idaho for shifts of seven days on, seven days off.

Complainant was employed by Respondent[50] from December 27, 2013[51] until July 10, 2014[52]. On March 6, 2014, Respondent's Chief Pilot, Mr. Pike, sent out a

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[49] *See* Compl. Br. at 4-17.

[50] In Complainant's brief, he asserts that he was employed by both JJC and LFN. Compl. Br. at 5. However, prior to the hearing the Complainant and LFN settled their dispute and the Tribunal approved their settlement agreement on June 15, 2017. As a result of that settlement, on August 15, 2017, the Tribunal issued an Order Dismissing Respondent LFN and Amending Caption.

[51] Complainant's brief references the year 2014; however, this is obvious a typographical error. Compl. Br. at 5.

[52] Complainant's brief references the year 2017; however, this also is an obvious typographical error. *Id.*

form via e-mail called a "Flight Risk Assessment Tool". The only training provided about how to use this form was contained in that e-mail. There did not appear to be any problem with Complainant understanding how to use the form until the morning of July 10, 2014. Hearing testimony evidenced that both parties agreed that the risk assessment tool was a mean of taking a big-picture perspective of all potential safety factors of an assignment, a "tool to assist in good decision making." Compl. Br. at 6.

Complainant typically worked the night shift. Throughout his employment with Respondent, LFN operations were understaffed by at least one pilot, resulting in pilots routinely getting stuck in remote locations and reaching the "absolute limit of their duty time." *Id.* It was no different during the week of July 8, 2014. On the night of July 8-9, 2014, Complainant had a particularly long day. Ordinarily, LFN night pilots were scheduled to work from 8 p.m. to 8 a.m., 12-hour shifts. However, due to pilot shortages coverage was proving difficult. On July 8, 2014, Mr. Pike called Complainant to ask if he could come in early because of coverage issues. Hours later, on July 8, 2014, Mr. Swakon, the Director of Operations for LFN, invited the Lewiston pilots to a conference call, where he informed them that they were not going to be full-fledged LFN pilots. This was later confirmed by Mr. Bower in an e-mail.

Complainant started his shift early on the evening of July 8, 2014, beginning at 7 p.m. He flew an EMS flight to Boeing Field that night, and ended his shift the next morning at 9 a.m. Upon clocking out, Mr. Pike

told Complainant to get his 10 hours of rest, report to work early at 7 p.m. and be prepared for anything for the evening shift. During Complainant's 10-hour rest period, Mr. Bower e-mailed Complainant about "an atypical and unorthodox shift assignmentemail," and directed Complainant to reposition the aircraft to the Dallesport base once Ms. Schuler returned the aircraft to Lewiston. He was to then to return to Lewiston with Mr. Graham, the daytime relief pilot, at approximately 7:30 a.m. It was clear to Complainant that this assignment was in addition to any EMS flights assigned to him that night out of the Dallesport base; assignments would come from LFN dispatch. *Id.* at 7-8.

Complainant wrote back to Mr. Bower via e-mail, cc'ing Mr. Pike, Mr. Swakon, and Mr. Graham, expressing his safety concerns and discomfort with the assignment as given. JX 15. Among his concerns were fatigue, possible encroachment on duty time limitations, and the likelihood of exceeding his 12-hour shift after having just come off of a 14-hour day, "putting him in a 'coffin corner'.[53]" He also expressed concerns about not

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[53] The "Coffin Corner" is a term used in aviation to describe operations at high altitudes where low indicated airspeeds yield high true airspeeds at high angles of attack. The coffin corner exists in the upper portion of the maneuvering envelop for a given gross weight and G-force where the difference between the stall and the maximum airspeed narrows. *See* FAA-H-8083, AIRPLANE FLYING HANDBOOK (2016), chap 15, at 15-10, *available at* https://www.faa.gov/regulationspolicies/handbooks_manuals/aviation/airplane_handbook/media/airplane_flying_handbook.pdf; Advisory Circular 61-107B, Aircraft Operations at Altitudes Above 25,000 Feet Mean Sea Level or Mach Numbers Greater Than .75 (Mar.

receiving training about the Dallesport Base facilities, and about not knowing where he would rest. He estimated that if everything went exactly as planned, Complainant would be working up to 131/2 hours, when nothing that week had gone as planned. No manager responded to his e-mail. Comp. Br. at 8.

On July 9, 2014, Complainant showed up to work at 7 p.m., but Ms. Schuler had not returned to Lewiston with the aircraft he was to use that evening. Despite the delay, Mr. Pike told Complainant to proceed as planned; however, the plane did not arrive until 10:20 p.m. While waiting for the aircraft, Complainant had been instructed that he may also need to go to Aurora, Oregon with one of the helicopter pilots, possibly ride back with the helicopter pilot, then go to Dallesport, and then return to Lewiston the next morning. Around 10 p.m., and prior to Ms. Schuler's arrival with the aircraft, Complainant called the LFN Communication Center about his safety concerns as he wanted to ensure that they knew of the risks. The Communication Center confirmed that Complainant needed to fly to Aurora as well. Complainant again raised his concerns about possible fatigue and interruptions in his rest period. Complainant also discussed his concerns with the Communication Center Administrator On Call, Mr. Pomponio. After making a telephone call to LFN, Mr. Pomponio called Complainant back and told him not to

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29, 2013), at 3 and 42, *available at* https://www.faa.gov/documentlibrary/media/advisory_circular/ac_61-107b.pdf.

do anything unsafe; Complainant felt heard by LFN. Compl. Br. at 8-9.

Complainant filled out a FRAT to send to Mr. Bower, Mr. Graham, Mr. Swakon and Mr. Pike, with a score of 60 points. This number equates to a medium risk, not a mandatory no-go. Complainant testified extensively at the hearing about his reasons for filling out the form as he did that night. Complainant then called Mr. Pike and they discussed base accommodations, but Mr. Pike did not review the specific factors on the FRAT. Once Mr. Pike gave Complainant permission to decline the return trip and to get hotel accommodations in The Dalles if it became necessary, Complainant felt confident that Respondent agreed with LFN's assessment. Complainant then met up with the helicopter pilot and headed out to the plane to fly from Lewiston to Aurora. While heading to the aircraft, Complainant received a telephone call on the LFN duty phone and was told by the Communications Center to stand down and not go to Aurora or The Dalles. After receiving this directive, Complainant confirmed that he was ready to take any dispatch calls, calling the Communications Center again at 1 a.m. to confirm that he remained willing to take assignments; none came. Compl. Br. at 9-11.

On the morning of July 10, 2014, Mr. Bower responded to Complainant's e-mail from the night prior. Complainant realized that there had been a serious miscommunication about the events and wrote back to Mr. Bower making clear that the stand-down decision was not his own and offered to do a reposition flight

while he still had some duty time left. Complainant did not hear back from his supervisors after sending this e-mail until he was fired. Following the sending of his e-mail, Complainant went on rest per Mr. Bower's instructions. Compl. Br. at 11.

Around 1 p.m., July 10, 2014, while Complainant was on rest, Mr. Pike called him and told Complainant that he was being fired because of the FRAT he completed the night prior. Respondent and LFN then drafted a personnel action form stating that they fired Complainant because he submitted "company documentation to indicate that the repositioning was unsafe," referring to the FRAT, and because he relayed a repositioning request that had not occurred (DC 7). Compl. Br. at 11. At that time nothing was mentioned of Respondent's later proffered reasons for termination, including Complainant's difficulty getting along with others or an issue with his driver's license. Complainant asserts that the hearing testimony revealed no evidence that Complainant relayed a repositioning request. According to Complainant, every one of the putative decision makers testified that Complainant's safety reports the night of July 9, 2014 were the primary reason for Complainant's termination of employment. Complainant testified that, during the call with Mr. Pike, he expressed concern over the message that his termination would send to other pilots regarding risk assessments. Compl. Br. at 11-12.

Complainant asserts that it is clear from the hearing testimony that Respondent performed very little investigation into the events of July 9, 2104 before they

made the decision to fire Complainant. Mr. Pike testified that he had no knowledge of the additional flights to Aurora, nor what was contained in the dispatch records, nor that Complainant remained able and willing to conduct flights after risk mitigation. Further, Mr. Pike did not tell Complainant during the risk mitigation phone call on the night of July 9, 2014 that he found any of the safety elements to be false or that he took any particular issue with the entries at the time of the events. Mr. Pike testified that by not giving an immediate yes or no answer Complainant was being insubordinate and Complainant's failure to make an immediate go/no-go assessment was grounds to termination his employment. Compl. Br. at 12-13.

Although in June 2014 LFN had obtained its Part 135 certificate, it was clear to Respondent's pilots that the pilots were to follow the training and protocol of Conyan Aviation and the protocols, training and safety management system of LFN throughout their employment. In support of this Complainant cites to the facts that Complainant and the other Lewiston pilots wore LFN uniforms and identifying badges; Respondent's management and its pilots were all to follow LFN standards of conduct; Complainant (and the other Lewiston pilots) only flew LFNowned aircraft on LFN flights; prior to Mr. Bower's July 9, 2014 e-mail, Complainant had only ever received flight assignments from LFN dispatch; Mr. Miles, LFN's Director of Safety, was the person that provided training on use of the FRAT; Respondent's managers described the FRAT as a LFN requirement; the day before Complainant was

fired, Respondent congratulated the Lewiston pilots on their progress towards becoming full-fledged LFN employees; and one of the reasons Mr. Bowers and Mr. Pike fired Complainant was LFN's demand that he be removed from the contract, a fact LFN disputes. The only thing standing in the way of LFN describing itself as Complainant's employer was a federal regulation prohibiting it from employing a pilot without a Part 135 certificate. Compl. Br. at 13-15.

Following Complainant's firing, Respondent's retaliation continued. After months of looking for work, Complainant finally began to see progress in obtaining employment with Corporate Air Center, a company that conducts Part 91 operations based out of Burlington, Washington. After Complainant had applied for a position and conversed with the company for a few weeks, Corporate Air's Chief Pilot, Mr. Coon, had Complainant fly with him with passengers from Bellingham to Boeing Field on a test flight in March 2015. After the passengers disembarked at Boeing Field, Mr. Coon began indoctrination training with Complainant. As they prepared the aircraft for the return flight that afternoon, a man with a baseball cap and sunglasses walked along the plane and looked up at Complainant who was in the cockpit. Complainant later learned that person was Mr. Werner. Mr. Werner then spoke with Mr. Coon outside of the aircraft point and gesturing in Complainant's direction. At the hearing, Mr. Werner admitted that he saw Mr. Coon at Boeing Field that day and that he had known him for many years. Complainant knew that Mr. Werner could exert strong

influence over his prospective employment with Mr. Coon and Corporate Air. Two weeks after these flights, Complainant received a voice mail telling him that Corporate Air was "going to go in another direction." Compl. Br. at 15-16.

Mr. Werner "vehemently demanded" that Respondent fire Complainant in July 2014. Mr. Werner found Complainant annoying, of questionable character, described him as "certifiably nuts", and admitted that his demand for termination was motived by anger. Compl. Br. at 16.

As for financial and emotional impact of Complainant's termination of employment, Complainant lost his salary and medical benefits for himself and his family. He was "in mourning" after his termination. It took Complainant nearly an entire year to find replacement employment. His loss of his job caused him a great deal of self-doubt and disappointed about the career he loves. Complainant testified that Respondent's action affected his family and his kids saw that he was a "changed man." Despite what he has endured, he was resolved not to quit aviation as he cannot remember ever wanting to do anything else. Because of the difficulty in finding employment in the Pacific Northwest, he took a position with Air Methods in New Mexico in June 2015, moving his wife and children there, far from their immediate family in Friday Harbor and Olympia, Washington. Comp. Br. at 16-17.

D. Summary of the Documentary Evidence

In support of his case, Complainant presents the following evidence, as summarized below:

Exhibit	**Description**
1	Compilation of e-mails (11 pages)
2	FRAT form (1page)
3	E-mail from Ryan Pike (2 pages)
4	Response to interrogatories and request for production (13 pages)
6	Safety Management System Manual, 11/11/2013 (23 pages)
8	Employee Policies Handbook (113 pages)
9	Duties and responsibilities
13	Agreement for the provisions of aviation services (17 pages)
14	Amended No. 3 to the agreement 42 for provision of aviation services between Life Flight Network, LLC and Conyan Aviation, Inc. (13 pages)
15	E-mail, 7/10/2014, Subject: Rob Kreb (2 pages)
16	E-mail, 7/9/2014, Subject: Lewiston Schedule (1 page)
17	E-mail, 7/9/2014, Subject: Base change for tonight (3 pages)
18	Letter, dated 1/16/2015 (59 pages)
23	E-mail,7/18/2014, Subject: Rob (1 page)

24	E-mail, 7/1/2017, Subject: Fourteen Hours (1 page)
26	E-mail, 4/28/2014, Subject: Revisiting old receipts (3 pages)
28	E-mail, 3/15/2014, Subject: FX Pilot Position/Bases (1 page)
30	E-mail, 3/14/2015, Subject: Rob Kreb (1 page)
31	E-mail, 7/10/2014, Subject: Last Night (1 page)
32	E-mail, 7/10/2014, Subject: Last Night (3 pages)
35	Baldwin General User's Guide (14 pages)
36	Baldwin Safety Reporting System (13 pages)
40	E-mail chain most recently dated 7/18/2014; Subject: Statement about Rob Kreb (2 pages)
41	E-mail chain most recently dated 4/28/2014; Subject: Revising Old Receipts (3 pages)
42	E-mail chain most recently dated 4/16/2014; Subject: Revising Old Receipts (3 pages)
43	E-mail chain most recently dated 6/9/2014; Subject: Jacksons/LFN/Aero Air (2 pages)
44	E-mail chain most recently dated 6/19/14; Subject: LFN FW Newer Hires' Pay-Benefits (2 pages)

54	E-mail string ending from Wayne Werner to Rob Kreb dated 3/17/2017; Subject FYI (3 pages)
56	E-mail string ending from Steve Bower to Rob Kreb dated 4/3/2014; Subject: SIDS Phraseology (2 pages)
57	E-mail string ending from Steve Bower to Rob Kreb dated 4/12/2014; Subject Resolve (2 pages)
58	E-mail from Ryan Pike to Craig Young, Rob Kreb, Daniel Jackson dated 6/9/2017; Subject: New schedule (1 page)
61	Respondent Jackson Jet Center, LLC's Objections, Answers and Responses to Complainant's First Set of Interrogatories and Request for Production (11 pages)
62	Respondent Jackson Jet Center, LLC's Supplemental Objections, Answers and Responses to Complainant's First Set of Interrogatories and Request for Production (15 pages)
63	E-mail string ending from Ryan Pike to Rob Kreb dated 3/6/2017; Subject: Life Flight Risk Assessments (1 page)
64	E-mail string ending from Lori Vanzant to Steve Bower, Rob Kreb, Craig Young dated 4/17/2014; Subject: Flight Manifest processing (1 page)
68	Transcript of Audio File (4 pages)
69	Transcript of Audio File (3 pages)

70	Transcript of Audio File (6 pages)
71	Transcript of Audio File (7 pages)
72	Transcript of Audio File (3 pages)
73	Transcript of Audio File (5 pages)
74	Transcript of Audio File (4 pages)
78	Respondent's Expert Witness Disclosures (6 pages)
84-1	E-mail dated 7/18/2014 from Wayne Warner to Kevin Hofeld, Jack Jackson; Subject: FW: Statement about Rob Kreb (1page)
84-2	E-mail dated 7/18/2014; Subject: FW: Statement about Rob Kreb-Attachment: Termination of Rob Kreb (1 page)
85	E-mail dated 7/9/2014 from Rob Kreb to Rob Kreb, Steve Bower; Subject: Re: base change and FRAT form attached (6 pages)
87	E-mail dated 7/2/14 from Wayne Werner to Steve Bower, Steve Lutz, Ryan Pike; Subject RE: Voice mail (3 pages)
89	E-mail dated 1/31/2017; Subject Job Posting (4 pages)
91	Wayne Werner Interview-Transcribed Copy dated (8 pages)
95	Transcript-Deposition of Dominic Pomponio taken on 4/11/2017
96	Transcript-Deposition of Waldon Wayne Werner taken on 4/7/2017

97	Transcript-Deposition of Ronald C. Fergie taken 4/12/2017
98	Transcript-Deposition of Barry James "BJ" Miles, Jr. taken on 4/3/2017
99[54]	Transcript Deposition of Ryan Swakon, taken on 4/4/17

In support of its position, Respondent presents the following evidence, as summarized below:

Exhibit	**Description**
1	Agreement for the Provision of Aviation Services dated 2/1/2013 (17 pages)
2	Amended Number One to Agreement for the Provision of Aviation Services dated 8/1/2013 (3 pages)
3	Amended Number Two to Agreement for the Provision of Aviation Services dated 8/1/2013 (1 page)
4	Amended Number Three to Agreement for the Provision of Aviation Services dated 12/1/2013 (13 pages)
5	Amended Number Four to Agreement for the Provision of Aviation Services dated 4/1/2014 (1 page)
6	2014 Pilot Duty Logs (12 pages)

[54] Although not formally admitted at the hearing, the transcript is clear that certain portions of this deposition were offered and accepted by the Tribunal.

7	E-mail dated 4/17/2014from Wayne Werner to Rob Kreb; Subject: Revisiting old receipts (2 pages)
8	E-mail dated 4/17/2014from Wayne Werner to Rob Kreb; Subject: Revisiting old receipts (3 pages)
9	E-mail dated 4/28/2014 from Steve Bower to Wayne Werner; Subject: Dude Seriously? (2 pages)
10	FRAT (1 page) dated 2/17/2014
11	FRAT (1 page) dated 3/9/2014
12	FRAT (1 page) dated 3/10/2014
13	FRAT (1 page) dated 3/11/2014
14	FRAT (1 page) dated 3/12/2014
15	FRAT (1 page) dated 3/13/2014
16	FRAT (1 page) dated 3/14/2014
17	FRAT (1 page) dated 3/15/2014
18	FRAT (1 page) dated 3/16/2014
19	FRAT (1 page) dated 3/17/2014
20	FRAT (1 page) dated 3/23/2014
21	FRAT (1 page) dated 3/24/2014
22	Flight Manifest (1 page) dated 3/24/2014
23	FRAT (1 page) dated 3/25/2014
24	FRAT (2 pages) dated 3/26/2014
25	Flight Manifest (1 page) dated 3/26/2014
26	FRAT (1 page) dated 3/29/2014

27	FRAT (1 page) dated 3/30/2014
28	Flight Manifest (1 page) dated 3/30/2014
29	FRAT (1 page) dated 3/31/2014
30	FRAT (1 page) dated 4/8/2014
31	FRAT (1 page) dated 4/9/2014
32	Flight Manifest (1 page) dated 4/9/2014
33	FRAT (1 page) dated 4/10/2014
34	FRAT (2 pages) dated 4/12/2014
35	Flight Manifest (2 pages) dated 4/12/2014
36	Flight Manifest (2 pages) dated 4/12/2014
37	FRAT (1 page) dated 4/13/2014
38	FRAT (1 page) dated 4/14/2014
39	FRAT (1 page) dated 4/15/2014
40	FRAT (1 page) dated 4/16/2014
41	FRAT (1 page) dated 4/22/2014
42	Flight Manifest (1 page) dated 4/22/2014
43	FRAT (2 pages) dated 4/23/2014
44	Flight Manifest (2 pages) dated 4/23/2014
45	FRAT (2 pages) dated 4/24/2014
46	Flight Manifest (2 pages) dated 4/24/2014
47	FRAT (2 pages) dated 4/25/2014
48	Flight Manifest (1 page) dated 4/25/2014
49	Flight Manifest (1 page) dated 4/25/2014
50	FRAT (1 page) dated 4/26/2014

51	FRAT (1 page) dated 4/27/2014
52	Flight Manifest (1 page) dated 4/27/2014
53	FRAT (1 page) dated 4/28/2014
54	FRAT (1 page) dated 4/29/2014
55	FRAT (1 page) dated 4/30/2014
56	FRAT (1 page) dated 5/6/2014
57	Flight Manifest (1 page) dated 5/6/2014
58	FRAT (1 page) dated 5/7//2014
59	FRAT (1 page) dated 5/8/2014
60	Flight Manifest (1 page) dated 5/8/2014
61	FRAT (1 page) dated 5/9/2014
62	Flight Manifest (1 page) dated 5/9/2014
63	FRAT (1 page) dated 5/13/2014
64	FRAT (1 page) dated 5/14/2014
65	FRAT (1 page) dated 5/20/2014
66	FRAT (1 page) dated 5/21/2014
67	FRAT (1 page) dated 5/22/2014
68	FRAT (1 page) dated 5/24/2014
69	FRAT (1 page) dated 5/24/2014
70	Flight Manifest (1 page) dated 5/24/2014
71	FRAT (1 page) dated 5/25/2014
72	FRAT (1 page) dated 5/26/2014
73	Flight Manifest (1 page) dated 5/26/2014
74	Flight Manifest (1 page) dated 6/3/2014

75	Flight Manifest (1 page) dated 6/4/2014
76	Flight Manifest (1 page) dated 6/5/2014 or 6/6/2014 date is not legible
77	FRAT (1 page) dated 6/24/2014
78	Flight Manifest (1 page) dated 6/24/2014
79	FRAT (1 page) dated 6/25/2014
80	Flight Manifest (1 page) dated 6/25/2014
81	Flight Manifest (1 page) dated6/27/2014
82	Flight Manifest (1 page) dated 6/29/2014
83	Conyan Aviation d/b/a Jackson Jet Center General Operations Manual (64pages)
84	Transcript-Deposition of Robert Kreb taken on 4/6/2017

The parties also present the following joint exhibits:

Exhibit	**Description**
JX 1	Respondent's Employee Handbook
JX 2	Complainant's acknowledgement of receipt, dated Jan. 6, 2014, of Respondent's Employee Handbook.
JX 3	LFN Pilot Schedule matrix March – December 2014
JX 4	Respondent/LFN Lewiston Schedule March – December 2014 (rev. 3-18/2014)
JX 5	Respondent/LFN Lewiston Schedule March – December 2014 (rev. 4-02-2014)

JX 6	Respondent personnel action form to Complainant, dated May 1, 2014 re: 4/28 incident with another employee at the workplace in front of customers.
JX 7	Respondent personnel action form, dated 7/10/2014, about falsifying company document to indicate the 7/9 repositioning was unsafe.
JX 8	Complainant's July 2014 pilot duty log showing 2.3 hours flown under Part 135 on July 8.
JX 9	E-mail from Mr. Pike, dated Mar. 6, 2014, to All Life Flight Pilots, re: Life Flight Risk Assessment, directing it to be completed for every shift the pilot is assigned where left hand side would be filled out at the beginning of every shift, but right hand side was to be filled out only after assigned a flight.
JX 10	E-mail from Mr. Pike, dated March 6, 2014, asking all pilots to acknowledge receipt of his earlier e-mail about use of the risk assessment tool.
JX 11	E-mail from Mr. Bower to numerous persons, including Complainant, dated June 19, 2014, summarizing current issues and problems at Respondent. This e-mail includes two comments: • Mr. Pike addressed duty time limitations for LFN pilots noting that the pilots are scheduled for 12 hr shifts but are to work up to, but

	not over 14 hours. If close to timing out, offer the comms center options instead of just declining the mission based on duty time. • a statement by Mr. Werner that LFN received is Part 135 certificate on June 17, 2014.
JX 12	E-mail from Mr. Bower to pilots, including Complainant, dated July 1, 2014,
JX 13	RE: Fourteen hours. The e-mail attempts to further clarify the duty limitations. E-mail from Mr. Swakon to Complainant, dated July 7, 2014, RE: AMRM meeting/HR Correlation and Complainant's e-mail to Mr. Swakon, dated June 26, 2014 with same subject line. Complainant's e-mail raises pay and benefits issues.
JX 14	E-mail from Mr. Bower to Complainant, dated July 9, 2014 at 5:03 PM, RE: Base change for tonight.
JX 15	E-mail from Complainant to Mr. Bower, cc'd to Mr. Pike, Mr. Swakon and Mr. Graham, dated July, 9, 2014 at 6:29 PM indicating reposition would be a medium to high FRAT.
JX 16	E-mail from Complainant to himself, cc'ing Mr. Bower, Mr. Graham, Mr. Pike and Mr. Swakon, dated July 9, 2014 at 11:50 PM, with his completed and signed FRAT.
JX 17	E-mail from Mr. Swakon to Mr. Miles, cc'ing Mr. Griffiths, dated July 9, 2014 at 10:48 PM, asking how Mr. Miles wanted to

	handle Complainant's e-mail about the Base Change for tonight.
JX 18	E-mail from Mr. Swakon to Mr. Griffith and Mr. Miles, cc'ing Mr. Pomponio, dated July 9, 2014 at 11:04 PM addressing Complainant's "Base Change tonight" e-mail earlier that evening.
JX 19	E-mail from Mr. Bower to Complainant, cc'ing Mr. Pike, Mr. Swakon, dated July 10, 2014 at 8:31 AM, RE: Last night. Mr. Bower notes that he does not agree with Complainant's risk assessment decision but recognizing the PIC has go/no-go decision authority.
JX 20	E-mail from Complainant to Mr. Bower, cc'ing Mr. Pike and Mr. Swakon, dated July 10, 2014 at 9:19 AM, responding to JX 19 and attaching his completed FRAT for the night prior.
JX 21	E-mail from Mr. Werner to Mr. Swakon, cc'ing Mr. Bower, Mr. Pike and Mr. Jeff Jackson, dated July 10, 2014 at 1:06 PM, RE: Complainant, and Mr. Werner strongly recommends terminating Complainant's employment.
JX 22	E-mail from Mr. Werner and Mr. Pike, dated July 10, 2014, both around 1 PM, RE: Complainant, and notes the intent to terminate Complainant's employment.
JX 23	Complainant's signed and completed FRAT, dated 7/8/2014

JX 24	Jackson Jet Center Flight Manifest for N890WA, dated July 8, 2014, where Complainant was the pilot reflecting 2.3 hrs of flight time from Lewiston to Boeing field and return.
JX 25	Complainant's signed and completed FRAT, dated 7/9/2014

II. ISSUES

- Was the complaint timely filed
- Is Complainant and/or Respondent covered under the Act?
- Did the Complainant engage in protected activity?
- Did the Respondent take an unfavorable personnel action against Complainant?
- Was the protected activity a contributing factor in the unfavorable personnel action?
- In the absence of the protected activity, would the Respondent have taken the same adverse action?

A. Complainant's Position

Respondent fired Complainant for making what they themselves describe as a safety report, simply because they allege they disagreed with them. Complainant testified at length as to each and every factor and gave reasoned, sound and credible support for each,

reasons Respondent's management did not even bother to hear or even investigate before firing him. Complainant's safety reports were an inconvenience to Respondent. Complainant notes with some irony that Respondent says their own error in the process of firing Complainant were merely honest mistakes, but any mistakes of fact in Complainant's safety reports were grounds for his termination of employment, and demonstrate dishonesty. Compl. Br. at 18-19.

Complainant proved each of the four elements necessary to support his claim by a preponderance of evidence. The first two elements, whether the parties are subject to the Act and Respondent's adverse employment action are undisputed. Respondent admits that the contributing factor, indeed the decisive factor, in its decision to fire Complainant was the safety risk assessment he submitted, and the e-mails surrounding that risk assessment. Within that assessment, Complainant stated concerns for potential or actual violations of the Federal Aviation Regulations, including duty time violations (citing 14 C.F.R. § 135.267(c)); concern for fitness for duty throughout the night's assignment (citing 14 C.F.R. § 91.13)[55]; rushed and unsound preflight decision making (citing 14 C.F.R. § 91.103)[56]; and lack of familiarity with the Dallesport base facilities (citing 14 C.F.R. § 135.329). This risk assessment tool is a decision making tool who use is recommended by the NTSB for all EMS operators, be it helicopter or

[55] Complainant also referenced AC 117-3.

[56] Complainant also referenced AC 135-15, at 13; NTSB Recommendation A-06-12-15; FAA-H-8083-2, at 3-2 and 4-2-44.

fixed wing operations. Complainant asserts that the FAA 2009 Risk Management Handbook echos the factors articulating in 14 C.F.R. § 135.617, which applies to helicopter operations, and extends this pre-flight risk analysis to all pilots. Compl. Br. at 19-25.

Complainant was acting within the expectations of LFN's program and reasonably believed that he was required to report all of the factors enumerated in the statute and per federal aviation guidance that might affect safe performance of his duties, regardless of whether they were on the template risk assessment form. Compl. Br. at 24.

Mr. Pike testified that one of the reasons he fired Complainant because he would not make a quick go/no-go decision, and that he was allegedly waffling in his commitment to take the flight. But, as Mr. Bower and Mr. Werner pointed out, it takes some time for a pilot to assess the safety of a scenario and it is entirely reasonable for a pilot to wait to see how things develop. Further, both the certificate holder and the pilot shared a joint duty of engaging in safe conduct of the operations and Complainant reasonably sought input, for which he was fired. Compl. Br. at 24.

Complainant was not familiar with the Dallesport base facilities as noted in his e-mails and telephone call to LFN dispatch, and this increased risk. As an EMS pilot he was required to perform specific duties that required him to be familiar with the base, such as where to pick up medical staff and to filling oxygen. If arriving in the middle of the night, he did not know

where to refill the oxygen bottles, the pass code to access the bathroom or the fuel, or how to contact a person who would help him with such things; so he sought his employer's help and they scoffed at his request. However facilities training is an FAA requirement and Complainant sought at least some introduction to what he would expect when flying EMS flights out of a foreign base. Compl. Br. at 24-25.

Complainant argues that LFN was a joint employer of Complainant and that it was reasonable for Complainant to expect that the FAA required him to complete the full safety risk assessment, taking into consideration all the factors, including those in 14 C.F.R. § 135.617, despite the fact that he was not a helicopter pilot. This is so because the statute requires operators to have such a system in place, he was told to follow the system, and LFN was a joint employer of Complainant. Compl. Br. at 25-26.

Complainant acknowledges that the case law is not conclusive as to whether the "economic realities" test is the appropriate standard in AlR21 cases. However, he argues it should be in light of the remedial purpose and broad coverage reflected in 29 C.F.R. § 1979.101. Regardless, the employment relationship between LFN and Complainant satisfies the nonexclusive "economic realities" factors defined in *Torres-Lopez v. May*, 11 F.3d 633, 638 (9th Cir. 1997).[57] He

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[57] According to Complainant, those factors are:

A. The nature and degree of control of the workers;

B. The degree of supervision, direct or indirect, of the work;

maintains that nearly every single one of those factors counsel a finding of an employment relationship between Complainant and LFN: LFN hired Complainant; established his rate of pay, established protocol and performance stands; was in regular communication regarding performance of Complainant's duties; expected to be Complainant's permanent employer; only flew LFN own aircraft in furtherance of LFN; was required to wear LFN's uniform; and just one day prior to his termination of employment was told he was

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C. The power to determine the pay rates or the methods of payment of the workers;

D. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;

E. Preparation of payroll and payment of wages;

F. Whether the work was a specialty job on a production line;

G. Whether responsibility between the labor contractor and putative employer passe [sic] with "material changes "(sic);

H. Whether the putative employers' equipment and premises are used;

I. Whether the putative employees had a business organization that could shift from one worksite to another;

J. Whether the work required initiative, judgment, or foresight;

K. Whether the employee had an "opportunity for profit or loss depending upon managerial skill";

L. Whether there was permanence in the working relationship; and

M. Whether the services rendered was integral part of the alleged employer's business. Compl. Br. at 26.

about to be put on LFN's pay system. Compl. Br. at 25-27.

Complainant notes that an actual violation of the regulations is not required so long as he had a reasonable belief that the conduct amounted to a violation that was likely to occur. *Sylvester v. Parexel Intl*, ARB No. 07-123, ALT Nos. 2007-SOX-039, -042, slip op. at 14-15 (May 25, 2011). And to hold that a whistleblower must wait for a violation to occur to be protected from retaliation would be counter to the purpose of the statute designed to protect human lives from safety missteps and to protect those who air to avoid those missteps. Compl. Br. at 28.

Because Complainant has proved that Respondents knew of his protected activity and fired him, in part, because of that protected activity, he is entitled to all compensation. Complainant seeks $80,000 in economic losses, loss of medical coverage, moving costs for having to move from Washington State to New Mexico to find work, and $160,000 in emotional damages. Complainant argues the emotional damages request is within the typical range for successful whistleblower plaintiffs.[58] Complainant described in detail the reputational harm and emotional damage his termination

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[58] Complainant cited to *Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.2d 102, 110 (1st Cir. 2006)($50,000); *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (June 30, 2009)($100,000); and *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, slip op. at 33 (Feb. 9, 2001), *aff'd sub. nom., Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916 (11th Cir., Sept 30, 2002)(unpub.)($250,000).

of employment caused him, and that the requests sum is reasonable in light of the callous and retaliatory response by Respondent to Complainant's good faith complaints. Compl. Br. at 28-29.

Complainant does not allege a separate AIR 21 violation by the blacklisting claim. Rather, the evidence was offered as support citing to *Ford v. Northwest Airlines, Inc.*, 2002-AIR-21 (ALJ Oct. 18, 2002).[59] Here, Complainant presented evidence that Mr. Werner's encounter with Mr. Coon was in close proximity with Mr. Coon's recession of the offer of employment and no reasonable alternative explanation exists other than blacklisting. Further, Mr. Werner's testimony lacked credibility on this point. Compl. Br. at 29-30.

In his reply brief, Complainant notes that Respondent does not deny that it fired him for reporting potential flight risks. Instead, they second-guessed his judgment and picked apart every single safety factor as unproven or contingent. Yet if Complainant had the authority to make a go/no-go decision and the risk assessment was not of great concern for Respondent, why did they fire him for it? Complainant maintains the inescapable answer is because Complainant is a whistleblower. Complainant also notes that Respondent does not dispute in its brief that it had no prior issues with

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[59] The Tribunal has reviewed this case and does not find it persuasive in support of this proposition. In *Ford*, the AU Granted Respondent's Motion to Dismiss the case in part and ordered that it be remanded to OSHA because OSHA did not investigate the blacklisting alleged concluding that those acts were time barred. *Id.*, slip op., at 8.

Complainant's honesty or competence as a pilot before firing him. Nor did they investigate the matter or even speak with Complainant about the factors in his FRAT before firing him. Respondent acknowledges that Complainant might have run into duty time issues and that the assignment Complainant on July 9, 2014 was unorthodox and atypical. Further, Respondent fails to identify any motive for Complainant to fabricate a safety issue to avoid flying. Complainant maintains that Respondent's witnesses lack credibility and a willingness to concoct whatever "facts" are necessary to avoid liability. Reply Br. at 1

Complainant makes several rebuttal arguments. He maintains that Respondent's recitation of the facts is not supported by the record, it misrepresented the employment relationship between Respondent's pilots and LFN, and Respondent provided pretextual reasons for Complainant's termination of employment. Reply Br. at 2-3. Complainant argues that the evidence contradicts Respondent's version of the events of July 9, 2014 and that his safety communications to his employer were protected activities. Reply Br. at 3-7. And that it strains credulity for Respondent to now contend that, even if Complainant's communications were a protected activity, he was fired for some other reason. Reply Br. at 9-10. Finally, Respondent's damages should not be limited the self-serving testimony of Respondent's management. Reply Br. at 11-12.

B. Respondent's Position

Respondent asserts that Complainant's misrepresentations prior to July 9, 2014 and on that date were not protected activity. The culminating event leading to Complainant's termination of employment was the July 9, 2014 FRAT form. Complainant's misrepresentations on that form do not involve a violation of a regulation, order or standard relating to air carrier safety. Furthermore, he did not have a good faith basis for scores he entered on this form. Resp. Br. at 10.

Prior to even beginning his shift or filling out the FRAT, Complainant informed Mr. Bower by e-mail that the reposition assignment would be "a Medium to High FRAT for me tonight." JX 15. But the only assignment Complainant had at that time from Mr. Bower was to reposition the aircraft to Dallesport and return the following morning. Further, at the time he sent this e-mail, Complainant did not know that the incoming aircraft would be delayed or that he would not be able to perform the reposition when he first came on shift, as instructed by Mr. Bower. Therefore, Complainant cannot show that he had a reasonable basis to represent that his FRAT score would be medium to high before his shift. At the hearing, Complainant claimed that he did not need to complete the FRAT to know the repositioning flight would be a high risk flight. However, the evidence at the hearing showed Complainant's risk evaluation was based on speculation and without considering any of the specific factors on the FRAT. For example, Complainant had weather data available to him, and rather than relying on actual data, he

speculated regarding a "[h]ostile nighttime operational environment." Resp. Br. at 11.

To justify his representations regarding risk, Complainant wanted his supervisors to believe the issues outlined in his e-mail in response to Mr. Bower's reposition assignment, he elevated his FRAT scores. Complainant did not even attempt to explain if he was assigning some numerical values to the issues that he raised. And even when he eventually completed his FRAT, its total score was 60, which falls on the lower end of medium, not a medium to high score he relayed. Resp. Br. at 11-12.

Complainant provided shifting testimony about his FRAT including when he completed the form. None of his explanations was for the only assignment he had been given by Mr. Bower. Complainant's testimony that the FRAT was what he believed he faced throughout his entire shift differs from his contemporaneous representations to Mr. Bower on July 9. *Compare* Tr. at 834 with JX 16-1. Complainant also testified that his FRAT represented the flight assignment to and from Dallesport, as well as the flight to Aurora. But that explanation does not help explain the scores that he entered which pertain only to patient transports or weather turndowns. Those factors would only be considered or scores entered in the event that Complainant had received a patient transport request during his shift, which he did not. Resp. Br. at 12.

Complainant's e-mail response to Mr. Bower on July 10 is also noteworthy for when he tried to defend

his FRAT score he only referenced and attached a TAF report for Dallesport. Clearly he was only considering the Dallesport reposition requests when trying to convince his supervisors that his FRAT calculations were genuine. This also shows that the alleged flight revision to Aurora was just a post hoc explanation that is not supported by the evidence. Even if one was to remove the issue of Complainant's credibility related to the FRAT factors, Complainant did not complete the form as he had been instructed to do, and had done before July 9. Resp. Br. at 13.

Complainant's explanation regarding why he entered a score on his FRAT for the category of new medical crew/pilot mix illustrates his lack of credibility and the unreasonableness of his actions. Complainant testified that he entered a score because he met a medical crew at Boeing Field that he did not know and believed that he could be working with him out of Dallesport. Under this version of events, Complainant claimed he intended his FRAT to include his entire shift, which included potential and unknown flight assignments that he could receive while at Dallesport. Complainant later changed his testimony and took the position that his FRAT did not include potential flights out of Dallesport. He then claimed that the helicopter pilot he was taking to Aurora would have qualified as crew member/medical crew member. *Compare* Tr. at 626-27 *with* Tr. at 829-31. The explanation was absurd and contrary to any reasonable interpretation of the FRAT. Resp. Br. at 13-14.

Complaint provided an incoherent reason as to why he entered a score for the FRAT form factor "new/unfamiliar NAV/radio equipment installed with past 3 months." Complainant could only offer that it was an "additional hazard to consider." The problem with this explanation is he flew the same aircraft during a mission in the dark the night prior yet no risk score for this factor was entered. Complainant also admitted that he did not have any reason to believe any flights had been turned down for weather reasons, yet he entered a score on the FRAT for this factor. Complainant's explanation was that, even though he expected the weather to be good, he still believed that there would be a turn down or another base would be busy with an assignment. Given the favorable weather conditions, Complainant did not have a reasonable basis to believe other crews would turn down a flight for weather reasons. Resp. Br. at 14-15.

In his e-mail to Mr. Bower (JX 20), Complainant attached a TAF. At the hearing, Complainant testified that he looked at the Dallesport METAR report. Neither report supports a FRAT entry of winds greater than 30 knots or a wind gust factor of 15 knots or more at Dallesport. Further, there were no reports of wind shear. The evidence showed nothing particularly difficult about the conditions at Dallesport on the evening of July 9 to morning of July 10, 2014. Complainant's purported issues with wind and weather are not supported by the evidence nor do they give him a reasonably objective basis to report them as scores on the FRAT. Finally, he entered a score on the FRAT for

departing after midnight. However, even if Complainant believed that he had a revision of his assignment to take the helicopter pilot to Aurora,[60] he admitted that they were boarding the aircraft prior to midnight when he received a call to stand down. Resp. Br. at 15-17.

Complainant did not engage in protected activity with raising other issues besides the July 10, 2014 incident. Complainant had been hired to fly single pilot medical transport missions. He knew that he might be asked to fly in unfavorable conditions or fly in to unfamiliar areas and airports, and it was common in the Western United States to fly into airports with high terrain in the vicinity. Complainant was never asked or forced to make a hasty or rushed decision, but Respondent did expect a decision to be made in a reasonable time and raise reasonable issues. As a Part 135 air carrier, Respondent's pilots were permitted to work a 14-hour duty day if it is immediately preceded by and followed by a rest period of at least 10 consecutive hours. The evidence showed that Complainant was not asked to do anything that would infringe on his rest period or exceed his 14-hour duty time limit. In fact, for Complainant's July 9 shift, he did not have any assignment. Additionally, Complainant's arguments about other pilots running out of duty time and thus

[60] And if this was the case, and as Respondent also notes (Resp. Br. at 13), it is curious that Complainant did not provide a copy of Aurora's TAF along with The Dalles TAF when he wrote his e-mail to Mr. Bower. The Tribunal notes that TAFs are generated for the Aurora, Oregon airport (UAO).

his concern that he would time out are greatly inflated. According to his duty logs, Complainant only had one 14-hour duty day in June 2014, despite his testimony that he was working longer shifts. *See* RX 6-6. Resp. Br. at 17-20.

Complainant's citation to certain Federal Aviation Regulations is misplaced. If Complainant had concerns about his fitness to fly it was his duty to make a no-go decision. On July 8, 2014, Complainant had two flights totaling 2.3 hours of flight time and this could not be a reasonable basis for fatigue the following day. Complainant testified that he received correspondence from Mr. Bower and LFN personnel during his rest period, but those e-mails were sent during normal business hours and there is no evidence that Complainant was required to read or respond to them during his rest period. Respondent notes that Complainant stayed in Lewiston on July 8, 2014, so there was no commute time for Respondent the following day. Further, at the time he accepted the position, he knew the job was in Lewiston so any claims of fatigue for commuting from Washington to Idaho are disingenuous. Resp. Br. at 21-23.

Complainant misinterprets the requirements of 14 C.F.R. § 135.29; there is no requirement for training and familiarization for each potential airport he would fly to or from. Complainant did not have a permanent reassignment to Dallesport that required additional training. As Complainant admitted, his job regularly required him to fly into unfamiliar airports. Tr. at 849. In this context, Complainant was speculating about a

"hostile nighttime operational environment". Further, if Complainant had any concerns about obstacles in and around the airport, he could have made an 1FR approach. Finally, Complainant's concern about flying an aircraft without synthetic vision is unreasonable and illustrates his motive to mention anything that could raise his purported risk. Complainant had operated the same aircraft on multiple other missions at night without ever raising this concern before, was operating an aircraft that can handle difficult weather, yet adverse weather was not present that night. In short, Complainant has failed to show that any FAA violations happened or were likely to happen.[61] Resp. Br. at 2326.

Additionally, Complainant did not establish that his "safety concerns" were a contributing factor to the termination of his employment. There is no evidence that his personnel action was pretextual. He was never told that a ground for his termination related to his alleged representation that LFN had requested reposition of the aircraft that morning. Nor is there evidence that Mr. Bower, Mr. Pike, or Mr. Werner ever discussed that factor among themselves as a reason for Complainant's termination. The evidence does show that LFN had informed Respondent that it did not want to use Complainant anymore. Complainant misrepresents the evidence regarding his termination being due to him wanting to engage in risk mitigation.

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[61] For the issue of whether a violation was likely to happen, Respondent relied upon *Sylvester v. Parexel Intl*, ARB No. 07-123, AU Case Nos. 2007-SOX-039 and -042 (May 25, 2011).

Instead, the evidence shows Mr. Pike engaged in a mitigation call with Complainant and it was Mr. Pike's recollection that Complainant's concern related to accommodations at The Dalles. It was management's conclusion that Complainant had falsified the FRAT on multiple entries that drove their decision as well as Complainant being a difficult employee. Resp. Br. at 26-28.

Respondent denies that Complainant was a joint employee with LFN. Complainant was required to follow Respondent's protocols and procedures. Complainant's arguments that LFN hired him, established his rate of pay, and established protocol and performance standards misrepresents the evidence. It was Respondent that hired him, sent him to training in Florida, provided his indoctrination training, provided him with an employee handbook, made the flight schedules for him and required him to follow its GOM. Respondent had operational control and as such dictated all the circumstances of flight. It is accurate that Respondent wore LFN shirts but that is because the contract between Respondent and LFN state pilots were to follow LFN's rules and policies "concerning conduct and appearance." RX 1-4. Respondent's pilots were not provided LFN employee handbooks or LFN's GOM. The evidence is LFN was a customer of Respondent and that LFN was preparing for the transition of the pilots from Respondent's employ to LFN upon LFN's receipt of its own Part 135 air carrier certificate. Resp. Br. at 29-31.

The evidence presented did not support Complainant's blacklisting claim. His entire claim is based on an encounter that he allegedly witnesses between Mr. Werner and Corporate Air's Chief Pilot at Boeing Field in the Spring of 2015. Mr. Werner testified that he did not see Complainant that day and Complainant did not know what the two men talked about. At best, Complainant's assertion is speculation. Resp. Br. at 31-32.

Finally, Respondent's deny any liability in this matter. The evidence showed that even if Complainant's employment would not have been terminated on July 10, 2014, it would have ended on August 11, 2014. Therefore, if any damages are awarded, they should be capped as of August 11, 2014. Respondent argues Complainant's request for a year of economic damages and emotional distress damages is unreasonable. Resp. Br. at 33-34.

III. CONCLUSIONS OF LAW

To prevail on his whistleblower complaint under AIR 21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) he engaged in activity protected; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). If

Complainant establishes this *prima facie* case, the burden shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. *Mizusawa v. United States Dept of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

A. Credibility

In deciding the issues presented, this Tribunal considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, this Tribunal has taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. *See Frady v. Tennessee Valley Authority*, Case No. 1992ERA-19 at 4 (Sec'y Oct. 23, 1995).

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-A1R-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the

extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR038, slip op. at 4 (ARB Jan. 31, 2006).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." BLACK'S LAW DICTIONARY 440 (4th ed. 1951). As the court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

Indiana Metal Products v. NLRB, 442 F.2d 46, 52 (7th Cir. 1971).

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024 (Jan 31, 2007); *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14, n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, this Tribunal has observed the behavior, bearing, manner, demeanor, and appearance of witnesses. These observations and impressions also form part of the record evidence. In

short, to the extent credibility determinations must be weighed for the resolution of issues, this Tribunal based its credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

In general, the Tribunal finds the testimony of the witnesses equally credible with three exceptions. The Tribunal gives less weight to the testimony of Mr. Werner. The Tribunal found that Mr. Werner's answers were, at times, less than straight forward. He had an edge about him when asked about his actions. Further, it is clear that he had issues with Complainant's "complaining" about wage and benefit issues. This tends to show a bias against Complainant, but it also does not show his motive for recommending Complainant's termination of employment for Complainant's actions on July 9-10, 2014 were safety related. Mr. Werner's explanations about the reasons for Complainant's termination were at times, pre-textual[62] and, in the absence of other testimony, the Tribunal would have concerns about Respondent's reasons for terminating Complainant's employment.

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[62] For example, Respondent's contention about Complainant's lack of honesty concerning his driver's license suspension discovered after he was hired borders on frivolous. The Tribunal found Complainant's explanation of the circumstances surrounding the miscommunications pertaining to the suspension of his driver's license very credible, and unrebutted. The Tribunal fords Respondent's assertion that it played any role in the decision to terminate his employment wholly unconvincing.

On the other hand, the Tribunal found the testimony of Mr. Bower highly credible and gives it great weight. His testimony was clear, reasoned and he presented himself with a balance of sureness in some areas and caution in others. The Tribunal found this balance and his apparent reflection during his questioning to be compelling.

Finally, the Tribunal found the testimony of the Complainant to be less than credible on the issue of the FRAT and his reasoning for completing the form in the manner that he did, and will explain its reasons for so concluding in the discussion below.

B. Timeliness of the complaint

Since Respondent's initial position statement to this Tribunal, dated September 9, 2016, it has not contested the timeliness of Complainant's complaints or the timeliness of Complainant's appeal. Accordingly, this Tribunal finds Complainant's original and amended complaint to be timely filed.

C. Complainant's *Prima Facie* Case

1. Covered Employer

The whistleblower provision of AIR 21 is set forth in 49 U.S.C. § 42121(a). In relevant part, it provides that "[n]o air carrier or contractor or subcontractor of an air carrier may discharge . . . or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment

because the employee . . . " filed a proceeding relevant to a violation of federal law. "Air carrier"[63] is defined in 49 U.S.C. § 40102(a) as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." "Air transportation," is in turn defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5).

To be subject to the Act the employer must be either an air carrier or a contractor or subcontractor of an air carrier. 49 U.S.C. § 42121(a). Here, Respondent is an air carrier because it holds a Part 135 air carrier certificate. It acquired its Part 135 certificate after purchasing Conyan Aviation back in 2012. Tr. at 75-79, 214. It is because Respondent was a holder of an air carrier certificate that LFN entered into a contract with Respondent to provide its fixed wing services. LFN did not acquire its own air carrier certificate until around June 2014. Tr. at 180, 525, 560. The Tribunal notes that neither party has argued that Respondent is not a covered employer. Accordingly, this Tribunal finds that Respondent is a covered employer.

2. Protected employee

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in

[63] Respondent does not argue that it is not a citizen of the United States, and the evidence of record establishes that Respondent is a "citizen of the United States" as the Act defines that phrase.

certain activities that are related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors from "discharg[ing]" 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. The governing regulations define the term "employee" as:

> an 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. (emphasis added).

There can be no question[64] that Respondent, acting as a pilot under Respondent's air carrier certificate, is a covered employee as defined by the Act

Accordingly, the Tribunal finds that Respondent is an air carrier and that Complainant was an employee protected by the Act. Thus, Complainant has established this element of his complaint.

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[64] Further, neither party during the hearing or in post-hearing briefs doubted that Complainant was an employee as defined by the Act.

3. Protected Activity

Under the Act, no air carrier, or contractor or subcontractor of an air carrier, may discriminate against an employee because the employee:

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a)(1)-(4).

The Board has explained, "As a matter law, an employee engages in protected activity any time [h]e provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and

objectively reasonable." *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C. § 42121(a)) (emphasizing that "an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement") (emphasis in original)). Thus, the "complainant must prove that he reasonably believed in the existence of a violation," which entails both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). To prove subjective belief, a complainant must show that he "held the belief in good faith." *Id.* To determine whether a complainant's subjective belief is objectively reasonable, an ALJ must assess his belief "taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.* (internal quotation marks omitted) (evaluating the reasonableness of a pilot's belief in light of his training and experience).

Though the complainant "need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety)." *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009).

Discussion of Protected Activity

In his brief, Complainant asserts that his July 9, 2014 safety risk assessment (FRAT) and related emails articulated numerous concerns for potential or

actual violations of Federal aviation standards. Specifically, he references 14 C.F.R. § 135.267(c) (14-hour duty rule), 14 C.F.R. § 91.13 (careless or reckless operation), 14 C.F.R. § 91.103 (preflight action), and 14 C.F.R. § 135.329 (crewmember training requirements) as examples of such FAA standards. For the reasons that follow, the Tribunal finds that Complainant's purported beliefs in the existence of actual or potential FAA violations were either not held in good faith, not objectively reasonable, or both.[65]

a. A General Overview of Falsification Allegations in Aviation

Given Respondent's contention that Complainant falsified or made misrepresentations on his FRAT, a discussion of falsification in the aviation community is warranted.[66]

In aviation, the integrity of certificate holders[67] (*i.e.*, pilot, mechanic) is the keystone to safety. As a

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[65] For ease of discussion, this Decision and Order discusses both subjective and objective components together with the specific safety concerns expressed by Complainant.

[66] To be clear, this discussion of truthfulness does not indicate that the Tribunal questions the moral character of the Complainant. Rather, it is intended to highlight the acute attention that the aviation community pays to the forthrightness expected of pilots in commercial aviation – particularly those that hold an ATP. This is well-understood within the aviation community, and it is certainly known by someone that holds an ATP.

[67] The FAA requires the following individuals to hold certificates issued by the FAA: pilots, mechanics, air traffic control

result, if a certificate holder misrepresents or falsifies[68] a required document, it is considered a very serious offense. Such falsifications can result in the revocation of all of the airman's certificates. Truthfulness goes to the heart of the integrity of the aviation system so much so that moral character is specific trait a pilot must possess to obtain an airline transport pilot certificate. *See* 14 C.F.R. § 61.153(c). An ATP certificate is the only aviation certificate that contains this requirement.

The FAA imposes severe punishment once it is determined that a certificate holder has not completed a "required document" truthfully. When an untrue statement has been proven, not only does the FAA revoke the certificate used in making the untrue statement, it seeks to revoke all certificates that person holds.[69] The NTSB has repeatedly held that a single instance of falsification is grounds for revocation of all certificates held by a particular individual. *See Administrator v. Dillmon*, NTSB EA-5413, 2008 NTSB LEXIS 92 (Oct.

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operators, dispatchers, repairmen, and parachute riggers. *See* 14 C.F.R. Parts 61 – 65.

[68] Intentional falsification is a "knowing misrepresentation of a material fact." *Cassis v. Helms*, 737 F.2d 545, 546 (6th Cir. 1984). The NTSB has held that intentional falsification is sufficiently damaging as to pose a substantial threat to aviation safety and to demonstrate lack of qualifications on the part of the person who falsified . . . the application or record." *Administrator v. Berry*, 6 N.T.S.B. 185 (1988). Furthermore, a "[d]eliberate falsification, even in relatively small matters, can undermine the effectiveness of the system, with adverse effects on airline safety." *Twomey v. NT.S.B.*, 821 F.2d 63, 68 (1st Cir. 1987).

[69] FAA Order 2150.3B, w/ chg 12, Compliance and Enforcement, App. B, at B-13 (Feb. 2, 2017).

28, 2008), *Administrator v. Culliton*, NTSB Order No. EA-5178 (2005).

While this Tribunal questions whether a FRAT is a "required document" for purposes of the FAA taking any type of certificate action, it was a required document for purposes of Complainant's employment. *See* Tr. at 274, 377, 535, 782, 792. Further, Respondent's employee handbook provides that Respondent expects from its employees a high degree of personal integrity, honesty, and competence, and that the falsification of company records and/or documents can result in dismissal from the company.[70] JX 1 at 19-20; *see also* JX 7.

Given the expectation within the aviation community for candor when conducting operations, a lack of candor when completing a company-required form related to flight operations would seriously erode the credibility of the offending airman. And should an employer have reason to question the candor of one of its ATP pilots, this would be legitimate grounds to terminate their employment. Having generally explained the importance of submitting accurate information within the aviation community and the standard demanded of persons that hold an ATP, the Tribunal now turns to Complainant's reported safety concerns.

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[70] Complainant acknowledged receipt of the employee handbook. JX 2.

b. Complainant's Reported Safety Concerns to Respondent on July 9

The events leading up to Complainant's termination are generally not in dispute. Complainant started his shift on July 8, 2014 at 7:00 p.m. JX 8. He flew a patient from Lewistown to Seattle, and arrived back at Lewistown at around 3:00 a.m. A post-flight routine lasted about 30 minutes, then Complainant took a nap. By 8:00 a.m., no other pilots had arrived to relieve Complainant. Mr. Pike instructed Complainant to remain on duty until 9:00 a.m. – his full 14 hours – to maintain base coverage and so he could brief the next pilot. Tr. at 563-70.

After leaving duty at 9:00 a.m. on July 9, Complainant ate some breakfast and went to sleep. In light of his "pretty good" nap, Complainant "didn't want to sleep too much." He recalled waking up at about noon and responding to a few emails from Mr. Pike and Mr. Bower. Complainant subsequently went back to sleep and woke to Mr. Bower's 5:03 p.m. assignment email. Tr. at 570-73. Mr. Bower indicated that Complainant was to perform a repositioning flight to DLS, cover the night shift there, and then fly back with another pilot the next morning. JX 14. After receiving his assignment, Complainant replied with a number of concerns at 6:29 p.m. JX 15. He asserted that the assignment would be a "medium to high FRAT" for him, citing a

number of factors in support of this view.[71] Of note, this representation occurs at a time when Complainant was only aware of the reposition flight to The Dalles. Complainant also suggested a few changes to LFN pilots' schedules that he believed would mitigate his flight risk. These suggestions included having another pilot perform his assigned repositioning flights to and from DLS.[72] *See* JX 15; Tr. at 586-87.

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[71] In this email, Complainant listed:

- Unfamiliar/unknown/limited FW base accommodations in DLS
- Hostile nighttime operational environment (Columbia gorge)
- No synthetic vision installed on N890WA to increase safety margins
- Heavy encroachment of rest periods yesterday/today book-ending a long duty period last night due to scheduling mix-ups
- Anticipation of typically heavy LFN demand from DLS and repositioning flights risk increasing fatigue and possible grounding from flight/duty rest requirements under recently clarified restrictions to Part 91 flight completion within duty periods by JJC.

JX 15.

[72] Complainant wrote:

> I understand LFN's preference for FW coverage in DLS while 660LF is out of service. If DLS cannot be adequately served by 890WA from LWS, could we instead mitigate my higher risk by allowing Tiffany to repo 91 to DLS and the scheduled PM FW DLS to cover their own base with 890WA and Royce repo 890WC to cover LWSS when 660LF is returned to service Thurs/Fri?

JX 15.

In this initial email, Complainant stated "I feel intentionally scheduling me for flights to abridge another duty day guaranteed to exceed another 12hr shift where DLS is known to be frequently flying overnight is laying a threshold into a coffin corner or at minimum (higher) potential LFN service and coverage disruption for my relocation to DLS following my first night's shift exceedences." JX 15. He also concluded his email by asserting that he was "not yet able to be compensated under LFN payroll considerations for the extenuations while DLS pilots are and more familiar to the operating environment or less likely to have been exposed to the rest challenges I have with recent challenges."[73] JX 15. At some point, following this email, Complainant had a short conversation with Mr. Pike, who told Complainant that "we want to go as planned." Tr. at 593.

Complainant arrived for duty at Lewistown at 7:00 p.m. on July 9, 2014 to relieve Tiffany – another LFN pilot – who did not arrive until 10:20 p.m. Tr. at 592-95. Prior to her arrival, at about 10:00 p.m., Complainant had been redirected by LFN to fly to Aurora, so he began prepping for that flight. Tr. at 593-94. At that point, Complainant thought he would delay at Aurora before either heading to The Dalles or back to Lewistown. Tr. at 596-97.

Shortly after 10:00 p.m., Complainant called dispatch to get some feedback from LFN on his safety

[73] This ending statement lends support to Respondent's argument that the issue with the flight had more to do with Complainant's compensation for his time past his scheduled 12-hour shift than with a flight safety issue.

concerns. He had not heard back from Respondent – Mr. Pike or Mr. Bower – since his short chat with Mr. Pike, and that occurred before his schedule had changed to fly to Aurora. Tr. at 606. Through dispatch, Complainant had a conversation with Mr. Pomponio. He reiterated his concerns that he would be a medium to high risk because he was not familiar with the Dalles base and he would be encroaching on mountains in the dark. CX 71 at 3-4. He also expressed frustration that Respondent was not considering his alternative suggestions – having another pilot cover these flights – and at "being cornered into this uncomfortable situation." CX 71 at 4-5. Complainant stated that he expected to be the only aircraft up that night and that he might bump into fatigue or run out of flight time, which could "have the aircraft possibly grounded into someplace extremely inconvenient for Life Flight later tonight." CX 71 at 5. Mr. Pomponio told Complainant that he would make a few calls and get back to him. CX 71 at 5.

After meeting with Tiffany, Complainant filled out his FRAT at about 10:45 p.m., and emailed it to Mr. Bower and Mr. Pike at 11:50 p.m.[74] JX 16; Tr. at 612-17. The FRAT indicated Complainant's risk assessment in a number of categories for his assigned flights

[74] In March 2014, Employer's Chief Pilot sent its pilots an e-mail informing them of the requirement to complete FRATs. His instructions stated the left side of the form was to be filled out at the start of a pilot's shift, but the right hand side was to be completed only after the pilot had been assigned a flight. CX 59, at 60. Complainant understood these instructions. Tr. at 624, 779-82.

that night.[75] His "Risk Assessment Total" was 60, which according to Respondent's metrics fell within a "medium" level of risk (56-79). Complainant stated in that email that this FRAT assessment:

> did not account for significant considerations I outlined late this afternoon. If I were to fairly calculate an assessment with those points not provided in this Risk Assessment Tool, I would likely approach scores of 80+ requiring mitigation to lower scores or declining the assignment/request in total.

JX 16. He also repeated his scheduling concerns. Respondent expected him to work a 13-plushour duty shift following 11 hours of inadequate rest, when he had just completed a 14-hour shift following another disrupted rest period.

After waiting about 10 minutes for Respondent to respond, Complainant called Mr. Pike to verify that he had received his FRAT. Mr. Pike had not received the FRAT, but relayed to Complainant that he could get a hotel if he ran out of duty time or became too tired. Feeling relieved, Complainant prepared to depart the airport, only to receive a call from dispatch telling him to stand down. LFN had cancelled the flight, and despite Complainant informing them that he was ready and available to fly additional flights that night, none came. Tr. at 641-55. The next morning, Respondent terminated Complainant's employment.

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[75] These specific categories are discussed below in connection with potential FAA violations.

As explained above, Complainant argues that his emails, phone calls, and FRAT articulated numerous concerns for potential or actual violations of Federal aviation standards. To evaluate the validity of the safety concerns that Complainant communicated to Respondent, the undersigned must assess them by "taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experiences as [Complainant]." *See Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). Here, the reasonableness of Complainant's beliefs must be assessed from the perspective of a pilot possessing Complainant's education and experience: an ATP certificate holder (the Ph.D equivalent in aviation) conducting operations for an on-demand air carrier; specifically emergency medical services. A pilot with Complainant's credentials would be fully capable of understanding the meaning of the questions posed in the FRAT, and he would know where to find objective facts and resources to conduct an evaluation of a given operation.[76]

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[76] The level of knowledge and training required to hold an ATP is high. Not only must the ATP-candidate possess a minimum of 1,500 hours of flight time (14 C.F.R. § 61.159), but they must also pass a written knowledge test (14 C.F.R. § 61.155(c)) and pass a flight test following specified practical test standards (14 C.F.R. § 61.157(e)). *See generally*, Airline Transport Pilot and Aircraft Type Rating Practical Test Standards for Airplane (July 2008).

i. Alleged Violations of 14 C.F.R. § 135.267(c) (14-hour duty rule)

In general, pilots that conduct Part 135 operations are limited by regulation to 14 hours of duty time, so long as at least 10 consecutive hours of rest precede the shift. 14 C.F.R. § 135.267(c). Complainant asserts in his brief that he reported the "real risk of bumping up to the end of his duty time before he could safely return the plane to Lewiston," and argues that "[h]is belief that his employers were creating a duty-time violation problem was well founded." Comp.'s Br. at 21-22. Complainant's argument is unavailing.[77]

In phone calls to LFN dispatch and Mr. Pike, Complainant did communicate his concern that he would run out of duty time to complete his anticipated flights.[78] *See* CX 71 at 5; Tr. at 587. However, at the time Complainant reported this concern, he was not scheduled for more than 14 hours. Tr. at 305-06. Complainant testified that he received 10 consecutive hours of rest prior to his shift on July 9, 2014, and 14 C.F.R. § 135.267(c) therefore permitted Respondent to

[77] The Tribunal is aware that in commercial aviation operations, there is an inherent tension between the air carrier's desire to maximize the available hours for its flight crews and rest a flight crew desires and needs.

[78] Complainant's emails do not relate this concern directly; rather, Complainant seems to express frustration that Respondent has scheduled him for these flights instead of other available pilots who he felt were fresher. *See* JX 15; JX 16.

utilize Complainant for up to 14 duty hours.[79] *See* JX 16.[80]

A 14-hour limitation is just that: 14 hours. Absent some sort of agreement otherwise, it is not a violation of any FAA standard for an employer it to try to eke out every minute legally permitted. It may have been prudent for Complainant to raise potential duty time issues with Respondent based on past problems that left him (and Respondent's airplanes) stranded at other airports. But the existence of possible contingencies that could result in duty time problems does not convert Complainant's reported concerns into protected activity. Indeed, to hold otherwise would convert every report of a potential future FAA violation into protected activity, no matter how remote the odds of such a violation arising.

But more importantly, no reasonable person in Complainant's shoes would assume Respondent had violated or was about to violate 14 C.F.R. § 135.267(c). Respondent provided its pilots with a number of options for dealing with unexpected assignments that

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[79] This regulatory maximum holds despite the fact that Respondent generally attempted to schedule its pilots to 12 hour shifts, and "plan[ned] on a maximum of 13 hours, 30 minutes, because things always tend to take a little longer than we expect." JX 12.

[80] Complainant states in this email that he had received 11 hours of rest, not 10. Complainant testified to going off duty at 9:00 a.m. on July 9, and coming back to duty at 7:00 p.m. (*see* Tr. at 570-73, 592-95), yet later clarified that while he was ready for duty at 7:00 p.m. on July 9, he did not report that he started his shift until 8:00 p.m. Tr. at 845.

could exceed duty time limits, one of which included declining the flight. *See* JX 12. Mr. Pike understood the crew rest requirement and also understood that Complainant would complete his mission within the 14-hour limitation. *See* Tr. at 305-06. Moreover, When Complainant talked to Mr. Pike about his duty time concerns, Mr. Pike reassured him that he could stop his shift and find a hotel to rest if he was delayed at another airport.[81] Tr. at 641-55. Complainant therefore had no reason to be concerned that Respondent's scheduled would result in a violation of his duty time limitations.[82] At most, he prudently apprised Respondent of the possibility of being stranded at another airport due to commonly experienced delays. But reporting prudential concerns over the smooth operation of Respondent's business is not the basis for a finding of protected activity under AIR 21. Accordingly, Complainant has not demonstrated protected activity

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[81] Complainant acknowledged this in his own testimony:

> Mr. Pike "essentially said, 'Yes. We'll do whatever. You don't have to worry about that return flight in the morning. We'll get you a hotel or we'll find you accommodations wherever you need. Wherever you're at, whenever you run out of time, or if you just flat feel it's too much, if you've flown too much, we'll call it a day wherever you're at.' "

Tr. at 643.

[82] Indeed, Complainant appeared to be primarily concerned that his flight schedule would exceed Respondent's internal duty limitations, though he also felt it would "definitely approach if not exceed" the 14-hour regulatory limit. Tr. at 876.

by reporting possible contingencies that could result in violations of 14 C.F.R. § 135.267(c).

ii. Alleged Violations of 14 C.F.R. § 91.13 (careless or reckless operation)

Section 91.13(a) prohibits any person from "operating an aircraft in a careless or reckless manner so as to endanger the life or property of another." Complainant argues that a violation of this regulation was implicated in his reporting of possible fatigue due to having an interrupted rest period following a 14-hour shift.[83] Compl. Br. at 21-22; CX 70. This argument fails.

First, Complainant again relies on speculation as to what may have happened if he became increasingly fatigued during his night shift on July 9, but fails to identify how Respondent's flight assignment ran afoul of this regulation in light of his condition. As noted above, protected activity simply does not include an employee's reporting of possible contingencies that might cause situations in which FAA standards will hinder the smooth operation of an operator's flight schedule. And at most, this is all that Complainant's

[83] The Advisory Circular Complainant cites – FAA Advisory Circular 117-3, Fitness for Duty (Oct. 11, 2012) – does not apply to Part 135 operations. This Circular only applies to operations conducted under Part 117, which in turn addresses Part 121 operations under Part 91. *See* 14 C.F.R. § 117.1. In short, it does not apply to operations conducted by Respondent. Therefore, at best, that circular provides some persuasive authority for Complainant's position.

report of potential future fatigue implicated. Complainant never asserted that he was too fatigued to fly the next flight assigned to him; his concerns always related to the possibility that fatigue would impact later flights during his shift. Respondent did not pressure him to fly in the face of crippling fatigue; rather, Mr. Pike clearly indicated that Complainant could stop his duty time and rest if fatigue became an issue. Again, if Complainant reasonably anticipated being impaired due to future fatigue such that he may not have been able to complete an assigned flight, it would be prudent to raise that with his employer. But such a notification does not constitute protected activity because no FAA violation is implicated. Complainant had no reason to believe that Respondent would not comply with the regulations if his fatigue rendered him unable to fly safely during the course of his shift.

Second, the record indicates that Complainant was ready and able to fly on the night of July 9, 2014. Though he did work a 14-hour shift just prior to his 10-hour rest period on July 9, Complainant testified that he was able to take a "pretty good" nap towards the end of that shift. Complainant even stated that he "didn't want to sleep too much" during his 10-hour rest in light of that nap. Tr. at 570-73. The company is required to provide a pilot a rest opportunity period, but it is the pilot's responsibility to actually sleep during the rest opportunity. Though the Tribunal credits Complainant's assertion that he awoke during the middle of his 10-hour rest period and responded to a few work emails, it appears that Complainant was well rested

for his July 9-10 night shift. Complainant agreed that he was ready and available for an assignment at 7:00 p.m. Tr. at 844, 862. Moreover, after going on duty at 7:00 p.m. that evening, communicating multiple times with Respondent and LFN about his flight schedule, and eventually having his assigned flights cancelled, Complainant reported that he was available, ready to fly, and "low risk out of Lewistown." CX 74.

But more importantly, Complainant's argument ignores his own obligations under the regulations. A professional pilot is always required to affirm their fitness for duty. As the pilotin-command, he has the final authority for the operations of the aircraft, and that responsibility extends on whether he is fit to fly.[84] 14 C.F.R. § 91.3. If he felt that he was not fit to fly, Complainant had every right – indeed, the obligation – to remove himself from flight duty status. He did not. By not removing himself from flight status and testifying that he was fit to fly on the evening of July 9, 2014, Complainant is hard pressed to credibly argue that he had a good faith, objectively reasonable concern about a lack of fitness for duty due to fatigue.[85]

For these reasons, Complainant has failed to show that he held a good faith, objectively reasonable belief

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[84] If Complainant believed that his fatigue rose to the level of a medical deficiency, he was prohibited from operating the aircraft. *See* 14 C.F.R. §61.53. As neither party made this argument, the Tribunal assumes this was not the case.

[85] Complainant himself acknowledged during his testimony that he was fit for duty that evening. Tr. at 862.

that his flight assignment from Respondent would have violated 14 C.F.R. § 91.13.

iii. Alleged Violations of 14 C.F.R. § 91.103 (preflight action)[86]

Section 91.103 requires a pilot in command to become familiar with all available information concerning a flight before commencing it.[87] Complainant notes that his actions on July 9 comported with this regulation (and LFN's policies) by seeking input from LFN and Respondent and by aiming to make a reasoned and

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[86] Complainant also asserted that he was required to comply with 14 C.F.R. § 135.617. Compl. Br. at 23. This is not correct. This regulation applies to *helicopter* air ambulance operations, not fixed wing operations. This section is located within 14 C.F.R. Part 135, Subpart L which is entitled "Helicopter Air Ambulance Equipment, Operations, and Training Requirements." Notwithstanding this, Complainant's point about it being an NTSB recommendation to use a flight risk assessment tool is well-taken. Compl. Br. at 23.

[87] This information includes the basic layout of the airport, the runway headings, runway slope, the airport's elevation and such things as any surrounding hazards such as elevated terrain or towers. The FAA and the aviation industry provide a myriad of tools to pilots to accomplish this task. As discussed above, there are weather references. There is also readily available the Airport/Facilities Directory ("A/F D"). This document provides a large amount of data for the pilot. For example, the A/F D for the The Dalles informs the pilot of the runway length and headings, the frequencies to be used for communication and for the approaches, that fuel is available at the airport, and the telephone number for the airport manager. For an example of the A/F D, *see* http://aeronay.faa.gov/afd/29mar2018/nw_163_29MAR2018.pdf. Of note, Complainant admitted that he had airport data available to him on the iPad provided to him by Respondent. Tr. at 865.

careful decision. He asserts that he was fired for his compliance with § 91.103. Compl. Br. at 24-25.

This Tribunal perceives no basis for concluding that Complainant's reports on July 9, 2014implicated violations of 14 C.F.R. § 91.103. There is no evidence that Respondent rushed Complainant's Go/No Go decision that night, nor did any personnel push him to fly before he could familiarize himself with all available information concerning the flight.[88] To the contrary, Respondent required that Complainant use the FRAT as a tool to facilitate that analysis. This form lists 45 variables the pilot is to consider in addition to those set forth in the regulations.[89] The detail of this form indicates Respondent's promotion of detailed pre-flight planning. Additionally, Complainant testified that after speaking with Mr. Pomponio, who told Complainant to do the best he could and not do anything unsafe, he felt that he had LFN's permission to turn down the return flight about which he had concerns. Tr. at 610-11. Moreover, when questioned about his concerns regarding unfamiliar flightpaths around mountains, Complainant stated that he had briefed himself on the 1FR approaches. Tr. at 581-82. Rather than indicating that he had not become familiar with the assigned flights, he stated that the additional work of flying

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[88] Respondent required that Complainant use the FRAT as a tool to facilitate that analysis. This form lists 45 variables the pilot is to consider in addition to those set forth in the regulations.

[89] If Complainant had any concern about the accuracy or thoroughness of this form he was free to suggest improvements to it. There is no evidence in the record to suggest that he did.

"hard 1FR operations" would have increased his fatigue. Tr. at 582.

Thus, Complainant's reports do not constitute protected activity under 14 C.F.R. § 91.103. Complainant never reported a need for additional time to become familiar with all available flight information, nor did Respondent push him to fly before he could do so. Further, it appears that Complainant did apprise himself of all relevant flight information, and was primarily concerned about the additional fatigue that flying 1FR would engender. Even if this Tribunal would construe Complainant's reports as broadly indicating a need for more time to familiarize himself with the flights, Complainant has failed to show that he had a good faith, objectively reasonable belief that taking these flights would have resulted in a violation of 14 C.F.R. § 91.103.

iv. Alleged Violations of 14 C.F.R. § 135.329 (crewmember training requirements)

Section 135.329 lays out various training requirements applicable to certificate holders, including basic indoctrination for new crewmembers, initial and transitional ground training, emergency training, and crew resource management training. Complainant notes that as an EMS pilot, he was required to perform specific duties at each base, such as filling oxygen and picking up medical staff. He also needed to know the location of fuel, rest facilities, and bathrooms. Complainant argues that facilities training is an FAA

requirement and asserted that he should have been given at least some information about the base to which he was assigned to fly.

Once again, this Tribunal finds that Complainant has failed to connect his reports to actual or imminent violations of the regulation cited. Complainant fails to identify a single case or FAA interpretation that extends § 135.329 to require detailed facilities training for every possible airport where Respondent might operate. Respondent is an on-demand Part 135 – not Part 121 – operator, so it does not have a fixed list of destination airports. On-demand flights will occasionally involve flying into unfamiliar airports, and, as noted above, pilots are expected to familiarize themselves of all available information regarding their flights.[90]

Put simply, the rudimentary base information that Complainant purportedly lacked does not fall within the regulatory training requirements. Claimant's lack of familiarity with this base information required some initiative from Complainant to obtain, but does not indicate that Respondent failed its regulatory duty to train Complainant under 14 C.F.R. § 135.329.[91]

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[90] Notably, however, § 91.103 requires pilots to become familiar only with airport information related to the flight itself, such as runway length and takeoff and landing distances. Nothing in this section compels pilots to familiarize themselves with non-flight base information such as the location of bathrooms or where to pick up passengers.

[91] The Tribunal notes that Complainant is an ATP and has been well versed in how to access even the most basic forms of this information. Moreover, the airport manager's phone number

Accordingly, this section does not assist Complainant in proving that his July 9 reports constituted protected activity.

v. Other Expressed Safety Concerns

Complainant's communications with Respondent also indicated safety concerns that do not fit neatly within the four regulations set forth above. These concerns were primarily listed in Complainant's July 9 FRAT, though he also included additional safety concerns in his emails and phone calls. For the reasons indicated below, the Tribunal fords that these concerns were objectively unreasonable, not held in good faith, or not related to FAA aviation standards.

1) New/unfamiliar Nav/radio Equipment

On the evening of July 9, 2014, Complainant was scheduled to operate aircraft N890WA, an aircraft that he had previously flown. *See* CX 34 at 9; RX 74. He recorded on his FRAT that "New/unfamiliar Nav/radio equipment installed within past 3 months" was a risk factor for this flight. JX 25. However, when asked, Complainant acknowledged that this aircraft had the same equipment installed as it had the night prior when he flew the aircraft to Boeing field. Tr. at 854. And in completing his FRAT for this July 8 flight,

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was listed, so there was a point of contact if Complainant had questions not readily available to him by the A/F D.

Complainant did not indicate that new equipment increased the risk of that flight.[92] *See* JX 23.

When asked about this discrepancy, Complainant explained that he included this on his July 9 FRAT because aircraft N890WA did not have synthetic vision, which he felt would have helped navigate the terrain surrounding The Dalles airport. This explanation is not credible. The records reflect that Complainant was scheduled to fly or actually flew N890WA ten times[93] prior to the July 9, 2014 proposed flight. None of the FRATs for those flights reflects that Complainant thought a lack of synthetic vision was a safety risk. Given there was no new equipment installed in the aircraft, this Tribunal finds it incredible that a lack of synthetic vision equipment was the reason for making the entry for this question.[94] Complainant's lack of credibility on this issue causes the undersigned to question Complainant's candor before this Tribunal and view the remainder of his testimony with suspicion.

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[92] Complainant had also flown aircraft N890WA on May 20, 21, 22, 24, 25, and 26 of 2014, and did not indicate that this factor increased the risk of those flights. *See* CX 34, at 8, 9, 91-92, 94, 98-99.

[93] *See* CX 34 at 8, 9, 91-92, 94, 98-99; RX 77, RX 79; JX 23.

[94] As noted by LFN's Director of Safety, having synthetic vision might increase safety, but not having it does not indicate a higher risk. It is uncommon to have synthetic vision in a fixed-wing aircraft. CX 98, at 46. Complainant also admitted that he could have flown [FR without synthetic vision into The Dalles. Tr. at 581-82.

Moreover, this unexplained contradiction tends to indicate that Complainant exaggerated the safety concerns reflected in his July 9, 2014 FRAT. This Tribunal need not divine the reasons for such exaggeration. Exaggerated threat scores imply that Complainant lacked a good faith belief in the attestations on his FRAT and undermine the credibility of Complainant's reported safety concerns on July 9, 2014.

2) Turned Down by Other Operators for Weather Reasons

There is no evidence in the record that any operator had turned down any of the proposed flights that Respondent assigned or may have assigned to Complainant on July 9. At the time he filled out this FRAT, his only assignments for the evening were repositioning flights for Respondent, and Complainant acknowledged that no other operator had refused to conduct the flight. Tr. at 627-32. When asked for his rationale for indicating that this was a risk factor, Complainant indicated that it was common during the summer for other operators to turn down flights in this area due to weather or equipment issues. At best, Complainant had speculated that another operator might eventually turn down as assignment that he would receive. Tr. at 627-32 and 871-72. Therefore, Complainant's entry for this category appears baseless.

3) Pilot Has Been on Duty Fo[u]r Hours or More

Complainant also indicated that he had been on duty for four hours or more when he completed his FRAT. *See* JX 25. He explained at the hearing that by the time his flight for Aurora departed, he would have been on duty for at least four hours. The Tribunal finds this explanation credible, but notes that no FAA standard is implicated by notation of this risk factor. As explained above, the regulations permit a pilot to work up to 14 hours following 10 hours of rest. Accordingly, Complainant's reporting of this fact is not protected activity.

4) Pilot Has Flown Two or More Hours During Current Shift

At the time that Complainant had completed his July 9 FRAT, he had not flown that night,[95] but assessed risk for his flight that night under the category

[95] Mr. Pike testified that, even if Complainant had accepted the assignment to reposition the aircraft, it was only a 45- to 50-minute flight each way from Lewiston to Boise to The Dalles and back to Lewistown. Tr. at 295. Further, when Complainant completed this FRAT, he was not even assigned a flight more than two hours to complete during his shift. Tr. at 296-97. The fact that this was going to be Complainant's first flight of the shift was also noted by Mr. Bower. Tr. at 422. Complainant provided no explanation for his entry except he speculated that he might fly more than two hours during his shift that night. Tr. at 584. In response to the question, "Is there any way to predict what flight assignments may come out of a particular base?", Mr. Pike answered "Absolutely no way whatsoever." Tr. at 304. Mr. Bower was of a similar opinion. Tr. at 404.

"Pilot has flown 2 or more hours during current shift." JX 25; Tr. at 294, 417, 422. Complainant provided no explanation for entering a risk value under this category. At best, Complainant indicated that this FRAT was intended to cover multiple flights during his shift as a whole, which may have totaled more than two hours of flight time. Tr. at 855.

However, this Tribunal does not understand why Complainant would have used a single FRAT for multiple flights. Previously, when Complainant conducted more than one mission, he completed a separate FRAT for each one. Tr. at 792. Complainant clearly understood that a FRAT "was required for each trip request and assignment."[96] Tr. at 797. At the time Complainant completed this FRAT, Complainant thought he would fly to Aurora, delaying there before either heading to The Dalles or back to Lewistown. Tr. at 593-97. Like other risk factors noted above, Complainant's assessment of this category deviated from his usual pattern, which indicates some type of alternative motive. Moreover, Complainant's explanation for this category is simply irrational in light of the FRAT's language, which asks whether a pilot has "flown" two or more hours during the current shift – not whether the pilot will fly at total of more than two hours at some point during the shift.

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[96] Even on the helicopter side of LFN's flight operations, it was known that a pilot might send multiple risk assessments throughout their shift as conditions change and a helicopter pilot was required to do it for every leg of a flight. *See* CX 97, at 44-46 (deposition of Ronald C. Fergie).

Since Complainant did not offer a credible explanation for this entry, the Tribunal fords that he did not have a good faith, objectively reasonable belief that this category added any marginal risk to his assigned flights.

5) Wind Greater Than 30 knots at TO/Landing Airport or Gust Factor 15 knots or More

Complainant testified that at the time he completed the FRAT the winds were gusting at 35 knots and "had been blowing consistently 20 to 30 knots the previous 30-something hours." Tr. at 630-31. He said the forecast was calling for 10 to 20 knot winds, but they were still in excess of 20 knots at 10 p.m. *Id.* Complainant testified that the TAF referenced was the one for 0300 Zulu time. Tr. at 640; *see also* JX 20 at 3. Based on Complainant's explanation, the Tribunal finds Complainant's assignment of additional risk due to "wind greater than 30 kts" on the July 9 FRAT to be dubious.

First, there is a significant difference between 20-knot and 30-knot winds. "Takeoffs and landings in certain crosswind conditions are inadvisable or even dangerous."[97] The Pilatus PC-12 Type Certificate Data Sheet provides that its maximum demonstrated crosswind component is 25 knots with 15 degrees of flaps, and 30 knots with no flaps.[98] Tr. at 745. This means

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[97] AIRPLANE FLYING HANDBOOK, *supra*, at 8-17.

[98] "Before an airplane is type certificated by the Federal Aviation Administration (FAA), it must be flight tested and meet

that the manufacturer has not provided flight performance data for a direct crosswind of greater than 30 knots, and the FAA advises that pilots "avoid operations in which conditions that exceed the capability of the airplane."[99] However, the Pilatus PC-12 manufacturer did provide information in the aircraft flight manuals for operations with sub-30-knot crosswinds that Claimant reported that night.

Second, the objective evidence does not support Claimant's FRAT assertions. The TAF for this time period at The Dalles states that the winds were at 320 degrees at 17 knots gusting to 23 knots, with visibility of six plus statute miles. JX 20, at 3; Tr. at 733. The Tribunal also took official notice of the winds reflected on the Dalles airport METAR on July 10 at 0253 Zulu, which were at 310 degrees at 15 knots gusting to 25 knots, visibility 10 statute miles and clear. Tr. at 635-36. Finally, there is no evidence of the gust factor more than 15 knots. Here, the TAF reflects a gust factor of 6

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certain requirements. Among these is the demonstration of being satisfactorily controllable with no exceptional degree of skill or alertness on the part of the pilot in 90° crosswinds up to a velocity equal to 0.2 VSO [two-tenths of the airplanes stalling speed with power off]. *Id.*

The manufacturer provides a demonstrated crosswind component in the normal operating section of the pilot's operating handbook (POH). This is not the maximum side wind that the aircraft can theoretically handle, but is the most wind that the test pilots actually experienced while testing the aircraft for certification. *See* Landsberg, AOPA Air Safety Foundation, *Charting the Winds: Crosswind Tools and Training*, available at https://www.aopa.org/asf/publications/inst_reports2.cfm?article=3651.

[99] *Id.*

knots (17 knots gusting to 23 knots) while the METAR reflects a gust factor of 10 knots (15 knots gusting to 25 knots).[100] In either case, the objective evidence establishes that the gust factor was less than 15 knots. Further, to correct this flight condition, the FAA recommends as an acceptable practice to use the aircraft's normal landing speed plus one-half of the wind gust.[101] In this case, using the higher gust factor, one would add 5 knots to the aircraft's normal landing speed. However, a gust factor was not particularly significant on this day as the winds were essentially blowing down the middle of the runway; there would be little if any impact on landing heading or stability. *See* Tr. at 734.

The objective evidence generally supports Complainant's hearing testimony, but shows that his assertion of "wind greater than 30 kts at TO/landing airport or gust factor 15 kts or more" is an exaggeration. Complainant's explanation for why he assigned risk to his July 9 flight assignments for the category ("[winds] still blowing in excess of 20 knots at 10:00 pm" (Tr. at 630-31)) conflicts with his prior assertion on the FRAT that the winds were greater than 30 knots. Therefore, Complainant's entry for this category is suspect, and shows a lack of good faith, reasonable belief in the contents of the FRAT.

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[100] AIRPLANE FLYING HANDBOOK, *supra*, at 8-18; *see also* FAA Safety Briefing (March/April 201) at 13, available at https://www.faa.gov/news/safety_briefing/2010/media/marapr2010.pdf.

[101] *Id.*

6) Moderate Turbulence in Forecast

Complainant's FRAT entry reflects that moderate turbulence was present or forecasted on July 9. JX 25; Tr. at 634. However, he presented no evidence, other than his own testimony that "there's always turbulence over the mountains." Tr. at 639. In fact, the actual forecasts presented to the Tribunal make no mention of moderate turbulence and, had such a forecast for turbulence existed, it would have been readily available. NOAA issues an AIRMET Tango when moderate turbulence – sustained surface winds of 30 knots or greater – and/or nonconvective low-level wind shear is forecasted. *See* AIM, at 7-1-13. Further, if turbulence were forecasted, there are several additional sources that would have supported Complainant's assertion that turbulence was in the forecast.[102] Mr. Bower also noted that wind shear would have been reported in the forecast reports such as the TAF, but it was not. Tr. at 419. Complainant has the burden of proof at this stage and he could have produced them if they supported his contention.

[102] For information on those resources, *see* AIM, *supra*, at Chap. 7.

7) Wind Shear +/- 10 or Greater Forecast or Reported

Complainant also reported in his July 9 FRAT that wind shear[103] "+/- 10 or greater" was forecasted or reported. When asked about this risk assessment at hearing, Complainant stated that he made this assessment based on his experience flying around the mountains for many years. Tr. at 641. He asserted that the Columbia River creates its own weather phenomenon by dragging air along its flow to the East. Since winds in the Pacific Northwest are typically out of the North and West, he maintained that pilots always encounter wind shear as the approach Columbia Gorge. Tr. at 640-41.

Standing alone, the undersigned views this risk assessment as plausible, but inconsequential to protected activity. Even accepting Complainant's belief in this risk factor as in good faith and objectively reasonable, nothing about the presence of wind shear would have rendered his scheduled flights in violation of FAA standards. Accordingly, Complainant's report of wind shear does not constitute protected activity.

8) Additional Safety Concerns

Complainant also expressed concerns to Respondent that The Dalles airport was "very hostile in terms

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[103] Wind shear is the rapid change in wind direction or velocity. Advisory Circular 00-54, *Pilot Windshear Guide* (Nov. 25, 1988), available at https://www.faa.gov/documentLibrary/media/Advisory Circular/AC00-54.pdf.

of operating at night with limited rest." He commented that it was a non-towered airport with no radar services near mountains. Tr. at 578-79. However, Mr. Bower testified that the airport was a fairly normal one, with a good ILS instrument approach. It did have terrain in the vicinity but it was not particularly threatening. Tr. at 400. This was not an airport that Respondent thought warranted a familiarization flight.[104] *Id.*

The facts generally favor Respondent's assertion that no special danger adhered to Complainant's assigned flights.[105] On the evening of July 9, 2014, the

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[104] Nevertheless, the Tribunal acknowledges that approaches into airports at night are more risky that daytime approaches.

[105] In reviewing the VFR maps of the area (*see* http://vfrmap.com/?type=vfrc&lat=45.619&lon=121.168&zoom=10), Mount Hood, with an elevation of 11,299 feet, is southwest of the airport but more than 20 miles away. To the North of the airport there are hills with an elevation up to 3,200 feet. The airports elevation is 247 feet. There are also towers to the south of the airport as tall as 1,257 feet MSL. To the east approximately 20 miles there is a wind farm with wind mills as tall as 2,432 MSL. So there were hazards in the general vicinity of the airport. Therefore, looking solely at a VFR sectional map, Complainant's concerns might have merit. However, Complainant was flying a very capable single engine turboprop aircraft. Any higher than normal dangers would not be en route, but during an approach. As an ATP, he surely knows that instrument approach procedures factor in any obstacles that pose any kind of hazard during the landing phase of a flight. As Mr. Miles explained:

> As a fixed-wing pilot, I can look at an approach pla[te] for any airport in the United States and get in and out of it safely based on my training. I don't need prior experience at any airport to get in and out of it. . . . As a pilot, you're trained to get in and out of any airport with

weather reports presented show no adverse weather during the period Complainant was to fly to The Dalles. Tr. at 714, 716. Complainant seemed to prefer to fly at night. Tr. at 410. As credibly noted by Mr. Pike, in the Western United States, flying to an airport having terrain in the area is an everyday occurrence.[106] Tr. at 735. Complainant points to no FAA standard that would have been violated by his flights on the evening of July 9 in light of the terrain. Accordingly, this assertion does not constitute protected activity.

Complainant indicated on his FRAT that additional risk was presented by flying with a medical crew member who has less than one year of Air Ambulance experience, and because there was a new medical crew/pilot mix. *See* JX 25. He explained at hearing that there were some new medical personnel at The Dalles, and he assumed that any medevac flights would be with them. Tr. at 619-20.

This Tribunal again notes that Complainant's concerns stemmed from speculation about future flight assignments that he had not even received, compounded with further assumptions about which medical crew members would fly with him. This is another example of Complainant breaking with his usual (and Respondent-prescribed) practice of filling out a FRAT for each

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> an approach pla[te], and I frequently have gone to unfamiliar, never been there in my life, and the information provided to you as a pilot is – is more than adequate.

CX 95, at 55-56.

[106] *See also* CX 99 at 97 (deposition of Mr. Swakon).

individual flight. For these reasons, the Tribunal finds that Complainant did not have a good faith, objectively reasonable belief than these risk factors were present in his assigned flights.

c. Conclusion

This Tribunal's review of Complainant's July 9, 2014 safety reports finds them wanting. In numerous instances, Complainant exaggerated the flight risks presented by Respondent's assigned flight, which tends to show a lack of good faith belief in the substance of his reports. He has also been unable to demonstrate that his expressed safety concerns were objectively reasonable in light of the conditions present that night. Moreover, even assuming Complainant's beliefs were held in good faith and objectively reasonable, he has failed – even in a broad sense – to relate his concerns to actual or imminent violations of FAA standards. Complainant's concerns merely represented *potential issues* that could have arisen during the course of his duty time, for which Respondent was prepared to respond with appropriate remedies.

As noted above, a complainant need not identify a specific violation for his reporting to be considered protected activity. *See Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009). Nevertheless, taking the totality of Complainant's reports to Respondent into account, this Tribunal finds that it does not implicate violations of federal law relating to aviation safety. Complainant reasonably apprised

Respondent of logistical concerns, but never had a good faith, objectively reasonable basis to conclude that his flight schedule would result in violations of any FAA standard.

For all these reasons, Complainant has failed to establish that he engaged in protected activity under AIR 21.

4. Adverse Action

The Act provides, "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee" engaged in protected activity. 49 U.S.C. § 42121(a). In *Vannoy v. Celanese Corp.*, the Board observed, "An adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis." ARB No. 09-118, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, slip op. at 14 (Sept. 13, 2011) (explaining that use of the "tangible consequences standard," rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error). However, the Board has clarified, "*Burlington's* adverse action standard, while persuasive, is not controlling in AIR 21 cases," but that it is

"a particularly helpful interpretive tool." *Menendez*, ARB Nos. 09-002, 09-003 at 15.

The Board has held "that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions." *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09018, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated, "Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it "would deter a reasonable employee from engaging in protected activity." *Id.* at 20.[107] Accordingly, the Board

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[107] *See also Williams*, ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases: "To settle any lingering confusion in AIR 21 cases, we now clarify that the term "adverse actions" refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term "discriminate" is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress").

views "the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline." *Williams*, ARB No. 09-018 at 10-11. The Board further observed that "even *paid* administrative leave may be considered an adverse action under certain circumstances." *Id.* at 14 (emphasis in original) (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998) (holding that "although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus)).

Notably, the implementing regulations specifically mention blacklisting as a "prohibited act." 29 C.F.R. § 1979.102(b). Blacklisting "is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." *Pickett v. Tennessee Valley Authority*, ARB Nos. 02056 and 02-059, p. 5 (Nov. 28, 2003). The goal of blacklisting activity is "to disseminate damaging information that affirmatively prevents another person from finding employment." *Id.* To rise to the level of blacklisting, the communication "must be motivated at least in part by protected activity." *Odom v. Anchor Lithkemko/Inter'l Paper*, ARB Case No. 96-189, p.11 (Oct. 10, 1997) (finding a complainant's allegations of blacklisting "without merit because he did not prove" that his employer's

criticism of his work performance and ineligibility for rehire were "based on or motivated even in part by any of his protected activity, including this complaint"); *see Gaballa v. The Atlantic Group*, 94-ERA-9 (Sec'y Jan. 18, 1996) (upholding an ALJ's finding of a violation of the Energy Reorganization Act's whistleblower protection provisions when a complainant's former employer discussed complainant's discrimination complaint with a putative employer). Anti-blacklisting legislation is designed to preclude an employer from making "improper references [about] an employee's protected activity" to future employers. *Pickett*, ARB Nos. 02-056 and 02-0596 at 6.

Discussion of Adverse Action

There can be no argument that termination of employment constitutes adverse action. Respondent does not dispute that it terminated Complainant's employment, only the reason for the termination. Accordingly this Tribunal finds Respondent's termination of Complainant's employment on July 10, 2014 was an adverse action.

In addition, Complainant alleges that Respondent blacklisted Complainant from future aviation employment. *See* Compl. Br. at 15-16. As evidence, Complainant recounts an event that occurred sometime in the Spring of 2015 at Boeing field. According to Complainant, he was well on his way to becoming employed by another operator, Corporate Air. He had flown with the Chief Pilot to Boeing Field and the Chief Pilot was

supposedly so impressed with Complainant that Corporate Air started indoctrination training while waiting for its charter customers to return from their business in Seattle. As Complainant was preparing to aircraft for the return flight, he was in the cockpit when he observed an exchange between a person, who he believes was Mr. Werner, and the Corporate Air Chief Pilot. After flying back to Burlington, Complainant continued his effort to engage with Corporate Air management, but learned that they were going in a different direction.

The Tribunal finds the facts presented are insufficient to establish that blacklisting occurred. At best, Complainant assigns nefarious conduct on the part of Mr. Werner merely because he had a conversation with the Corporate Air Chief Pilot. Complainant could not hear the substance of the conversation. He testified that Mr. Werner was animated, but for what reason he could not say. It is just as speculative to conclude Mr. Werner was upset with a recent Seattle Mariners' loss as it is to assume that the conversation must have involved Complainant. Complainant has the burden to establish the adverse action. He provided no witness from Corporate Air who could corroborate the substance of his observations. It would be a simple matter for him to have obtained the testimony of the Chief Pilot, but he did not. What evidence does exist about the substance of the conversation comes from Mr. Werner and he denies even discussing Complainant with the Corporate Air's Chief Pilot. This lack of evidence is supported by Complainant's brief itself where he

essentially concedes the point, instead arguing that the event was offered to buttress the termination of employment claim. Compl. Br. at 29.

Adverse Action: Conclusion

Complainant has successfully established that Respondent committed adverse action when it terminated Complainant's employment on July 10, 2014. However, Complainant has not established that Respondent engaged in any sort of blacklisting of Complainant subsequent to his discharge.

5. Contributing Factor Analysis

As Complainant has not established he engaged in protected activities the Tribunal need not address this element.

6. Conclusion: Complainant's *Prima Facie* Case

Complainant and Respondent are subject to the Act. Complainant's actions in completing the FRAT does not constitute a protected activity. Respondent's termination of Complainant's employment as a pilot was an adverse action, but Complainant failed to establish that blacklisting occurred.

IV. CONCLUSION

Although Complainant has established that he and Respondent are subject to the Act and he suffered an adverse action, he has failed to establish that his conduct was protected. Thus, Complainant's complaint fails and this Tribunal must dismiss it.[108]

V. ORDER

Complainant's complaint is hereby DISMISSED with prejudice.

SO ORDERED

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

[108] Additionally, because Complainant has not established a prime facia case, this Tribunal need not address the joint employer issue raised by Complainant at the hearing and in its brief.

U.S. Department of Labor
Administrative Review Board [SEAL]
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ROBERT KREB,	**ARB CASE NO. 2018-0065**
COMPLAINANT,	**ALJ CASE NO. 2016-AIR-00028**
v.	**DATE: September 28, 2020**
JACKSON JET CENTER, ET AL.,	
RESPONDENT.	

Appearances:

For the Complainant:
Erin M. Pettigrew, Esq.; ***EMP Law, LLC; Portland, Oregon*****; and David E. Breskin, Esq.;** ***Breskin Johnson Townsend, PLLC*****; Seattle, Washington**

For the Respondent:
Brad P. Miller, Esq. and Carsten A. Peterson, Esq.; ***Hawley Troxell Ennis & Hawley LLP*****; Boise, Idaho**

BEFORE: James D. McGinley, ***Chief Administrative Appeals Judge*****, James A. Haynes and Randel K. Johnson,** ***Administrative Appeals Judges***

DECISION AND ORDER

PER CURIAM. The Complainant, Robert Kreb, filed a retaliation complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)[1] with the Department of Labor's Occupational Safety and Health Administration (OSHA). Complainant alleged that Respondent, Jackson Jet Center (JJC) retaliated against him in violation of the whistleblower protection provisions of AIR 21. OSHA concluded Complainant neither engaged in protected activity, nor was he blacklisted from employment with Corporate Air Center. Complainant appealed this decision to the Office of Administrative Law Judges (OALJ). A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the complaint after a hearing and receiving evidence. He found that Complainant had failed to prove by a preponderance of the evidence that he engaged in protected activity. Complainant has appealed the dismissal of his complaint to the Administrative Review Board (ARB). We affirm the ALJ's denial.

BACKGROUND[2]

Complainant was hired as a Fixed Wing Pilot by JJC under its Part 135 Certificate to Fly Life Flight

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[1] 49 U.S.C. § 42121 (2000). MR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2018).

[2] This background follows the ALJ's Decision and Order and undisputed facts. In reciting these background facts, we make no independent findings of fact.

Network's (LFN) aircraft for medical transport services. Complainant was based at LFN's Lewiston, Idaho base.

On March 6, 2014, Respondent's Chief Pilot, Mr. Ryan Pike, emailed Complainant a template copy of the Flight Risk Assessment Tool (FRAT) form used by pilots to determine the risk of a single flight by checking off different safety risks producing a numerical result to determine an overall risk score. The pilots were routinely directed to fill out a single FRAT for each flight.

On July 8, 2014, Complainant worked an evening shift into the morning of July 9. At 9:00 a.m., Complainant completed this shift and then went home to rest. Complainant woke up to an email sent by Respondent's Director of Operations, Mr. Steve Bower, with a flight assignment: reposition aircraft N890WA from the Lewiston base to the Dallesport, Washington base, and then return with a Dallesport pilot the next morning. Complainant was expected to cover the night shift and perform any EMS flights assigned to him out of the Dallesport base. Complainant returned Mr. Bower's email expressing safety concerns if he accepted the assignment and advising that the assignment was a medium to high risk flight under the FRAT checklist.[3] He suggested changes to the pilot schedules

[3] Complainant listed the following safety concerns: "[u]nfamiliar/unknown/limited FW base accommodations in DLS; [h]ostile nighttime operational equipment (Columbia gorge); [n]o synthetic vision installed on N890WA to increase safety margins; [h]eavy encroachment of rest periods yesterday/today book-ending a long duty period last night due to scheduling mix-ups; [and]

to mitigate the flight risk. Mr. Pike called and instructed that they were to go ahead as planned with the flight.

Complainant arrived for his evening shift. He had not received a response from his email other than the phone call with Mr. Pike. Around 10:00 p.m., LFN redirected him to fly to Aurora, Oregon, with a helicopter pilot. Complainant contacted LFT's COM Center, or dispatch, to get feedback about his safety concerns with LFN. Complainant spoke to the manager, and reiterated his concerns that the assignment would be a medium to high risk flight, because he was not familiar with the Dallesport base, and he would be encroaching on the surrounding mountains in the dark. He also stated he expected to run out of time, potentially violating the 14-hour duty rule, and that he would become fatigued, causing the aircraft to be grounded somewhere inconvenient.

Around 10:45 p.m., Complainant filled out a FRAT and generated a Risk Assessment Total of 60.[4] Under the Respondent's metrics, a score of 60 falls within a medium level of risk. Complaint submitted the FRAT

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[a]nticipation of typically heavy LFN demand from DLS and [r]epositioning flights risk increasing fatigue and possible [g]rounding from flight/duty rest requirements under recently [c]larified restrictions to Part 91 Flight completion within duty [p]eriods by JJC."

[4] Complainant filled out the FRAT as an evaluation of not just one flight, but as to the cumulative effect of the whole shift, with his expectation of returning to the Lewiston base the next morning on July 10. D. & O. at 11-12.

via email to Mr. Bower and Mr. Pike, and repeated his scheduling concerns. Ten minutes later, Complainant called Mr. Pike who advised that he had not received the FRAT, but Complainant could get a hotel if he ran out of duty time or became too tired. Complainant prepared to depart for the airport, but received a phone call from dispatch advising LFN cancelled the reposition flight and to stand down. Ultimately, the Complainant did not fly during the July 9 shift. In the afternoon of July 10, 2014, Mr. Pike told Complainant that his employment with Respondent was terminated. Respondent filled out a Personnel Action Form, which indicated Complainant's employment was terminated in part for falsifying company documentation to indicate that the flight assignment was unsafe and for being dishonest with management.

Sometime in 2015, Complainant was interviewing with Corporate Air Center's Chief Pilot and flew with him to Seattle during the interview process. While in Seattle, Complainant witnessed but did not hear a conservation between Corporate Center's pilot and a Charter and Maintenance Supervisor for Respondent. Two weeks after this interaction, Complainant received a voicemail advising that Corporate Air Center was going to go in another direction for the position.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's AIR 21 decision.[5] The Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as they are supported by substantial evidence.[6]

DISCUSSION

AIR 21's employee protection provisions generally prohibit covered employers and individuals from retaliating against employees because they provide information or assist in investigations related to the categories listed in the AIR 21 whistleblower statute.[7] To prevail on an AIR 21 whistleblower complaint, the Complainant must prove by a preponderance of the evidence that he or she was an employee who engaged in activity the statute protects, suffered an adverse employment action, and that the protected activity was a contributing factor in the employer's decision to take the adverse action.[8] The failure to prove any one of

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[5] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[6] 29 C.F.R. § 1979.110(b); *Yates v. Superior Air Charter, LLC, d/b/a Jetsuite Air*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019).

[7] *See* 49 U.S.C. § 42121(a).

[8] *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. §1979.109(a); *Hukman v. U.S. Airways, Inc.*, ARB No. 2018-0048, ALJ No. 2015-AIR-00003, slip op. at 5 (ARB Jan. 16, 2020). *See also Poulter v. Cent. Cal Transp. LLC*, ARB No. 2018-0056, ALJ No. 2017-STA-00017,

these elements necessarily requires dismissal of a whistleblower complaint. As the ALJ found that Complainant did not establish by a preponderance of the evidence that he engaged in protected activity, a required element, we will limit our discussion to this finding and will not reach the other elements of Air 21 actions.

Complainant argues the ALJ erred in requiring him to prove an actual violation or use specific citations to a Federal Aviation Administration (FAA) rule to establish protected activity. We note that the ALJ correctly stated more than once that Complainant did not need to identify or describe an actual violation or to prove that a violation was certain to occur.[9] We find that Complainant misstated the standard the ALJ employed to define "protected activity."

Complainant also argues on appeal that the ALJ should have considered the reasonableness of the safety reports at the time the first report was made. However, the ALJ was correct to hold that an employee engages in protected activity whenever the employee provides or attempts to provide information related to

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slip op. at 11-13 (ARB Aug. 18, 2020) (the ALJ must evaluate the countervailing evidence to determine whether a complainant engaged in protected activity).

[9] The ALJ properly summarized the law on this point by noting: "Though the complainant "need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety.)." D. & O. at 56 (citing *Malmanger v. Air Evac EMS, Inc.*, ARB No. 2008-0071, slip op. at 9 (ARB July 2, 2009)).

a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable.[10]

In the case before us, the ALJ thoroughly considered Complainant's contention that he engaged in protected activity when he raised safety concerns about the July 9 flight assignment.[11] The ALJ carefully went through the potential federal aviation regulation violations and safety concerns Complainant raised, made credibility findings,[12] and evaluated the evidence to

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[10] 49 U.S.C.A. § 42121(a)(1).

[11] The employee must persuade the factfinder—here, the ALJ—of the existence of protected activity. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) ("The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.") (alterations in original and internal quotation marks omitted); *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 2012-0028, ALJ No. 2010-SWD-00001, slip op. at 11 (ARB Apr. 25, 2014) ("[T]he preponderance of the evidence standard requires that the employee's evidence persuade[ ] the ALJ that his version of events is more likely true than the employer's version. Evidence meets the 'preponderance of the evidence' standard when it is more likely than not that a certain proposition is true" (alteration in original and internal quotation marks omitted).).

[12] The Board will uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable." 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics*, Inc., ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted). Complainant did

determine whether Complainant held an objectively reasonable belief that the safety information he provided in the FRAT and emails was a violation of federal aviation regulations or laws.

After reviewing the FAA regulations and other provisions of Federal law relating to air carrier safety, the ALJ found Complainant did not have an objectively reasonable belief that a violation existed or was likely to occur considering the knowledge available to a reasonable person in the same factual circumstances. Critical in this regard are the ALJ's findings, supported by the substantial evidence of record, that none of the safety concerns were imminent or entirely truthful. The record shows that a pilot with the same experience and training would not have thought the cited safety concerns were likely or imminent violations of federal aviation standards, but at most possibilities dependent on factors that were unknown or unlikely at the time Complainant raised his concerns. Complainant offered no evidence that a pilot with his training and experience would have agreed that accepting the July 9 flight assignment would have posed a safety risk. The ALJ found that Complainant's refusal to accept the flight assignment, his FRAT report, and his other comments about safety concerns did not meet the definition of protected activity.

Substantial evidence supports the ALJ's finding that Complainant's report of safety concerns exaggerated or

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not offer any evidence that the ALJ's credibility determinations were inherently incredible or patently unreasonable.

misrepresented the risks of the July 9 flight assignment.

The ALJ concluded, as noted earlier, that Complainant did not have an objectively reasonable belief that he engaged in protected activity when he provided safety concerns relating to federal law or regulations that he believed would be violated if he completed his intended flight assignment. We agree. Accordingly, we affirm the ALJ's finding that Complainant did not engage in protected activity.

CONCLUSION

The ALJ's determination that Complainant did not engage in protected activity is supported by the substantial evidence. Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** Robert Kreb's complaint.

SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT KREB, Petitioner, v. U.S. DEPARTMENT OF LABOR, Respondent.	No. 20-73497 LABR No. ARB Case No. 2018-0065 Department of Labor (except OSHA) ORDER (Filed Oct. 12, 2022)

Before: WALLACE, FERNANDEZ, and SILVERMAN, Circuit Judges

Appellant's petition for rehearing (Dkt. Entry No. 23) is DENIED.