



In the Matter of:

JOHN A. ROBINSON, Jr.,

ARB CASE NO. 04-041

COMPLAINANT,

ALJ CASE NO. 2003-AIR-22

v.

DATE: November 30, 2005

NORTHWEST AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Eric D. Satre, Esq., Connor, Satre & Shaff, LLP, Minneapolis, Minnesota

For the Respondent:

Timothy R. Thornton, Esq., Elizabeth M. Brama, Esq., Briggs and Morgan, PA, Minneapolis, Minnesota

FINAL DECISION AND ORDER

John A. Robinson, Jr., filed a complaint against Northwest Airlines, Inc. under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2005), and its implementing regulations, 29 C.F.R. Part 1979 (2005). He alleged that Northwest violated AIR 21 in subjecting him to a psychiatric examination and barring him from duties as a pilot. For the reasons set forth below, we deny Robinson's complaint.

BACKGROUND

Robinson, a long-time airline pilot who started work for Northwest in 1991, was first officer on a 747 flight from Detroit to Amsterdam on May 1, 2001. Prior to take-off,

customs inspectors detained two passengers for currency violations, but their luggage was left on the plane. Robinson complained to his captain and to airline dispatchers because Northwest's Flight Operations Manual stated that if passengers who have checked baggage do not board the plane or remain on board, "their baggage **must** be removed before departure." Complainant's Exhibit (CX) 1.

Subsequently, Robinson called the Federal Aviation Administration (FAA) and a union representative about the baggage security violation. On June 25, 2001, he wrote a 10-page letter to the FAA's security inspector describing the incident and his discussion with a Northwest agent who claimed that pulling the baggage was discretionary, not mandatory. CX 2.

In his letter, Robinson described the "apparent breach" of the FAA-established security protocol that requires a positive bag match with each passenger. That means that, on international flights, the baggage of passengers who do not board the plane is removed before the plane takes off. Robinson wrote that he asked the agent the following:

1. How do we actually know that those two passengers never intended not to board, i.e., intentionally had excess undeclared currency conspicuously to be detected by the U.S. Customs dog with explosives in their bags; or #2: possibly were innocent 'pigeons' with excess currency (unknown to them) planted in their handbags and explosives (also unknown to them) planted in their bags; or #3: were willing agents with excess currency stuffed in their handbags and explosives secreted in their checked bags and then after being detained (with false ID) simply vanish into the U.S. underground?!!!

In a July 6, 2001 "continuation" of his earlier letter, Robinson copied five other pilots and "Osama bin Laden (in absentia) [sic]." CX 3. He noted a "worldwide security caution" and wrote:

Since it is now common knowledge that Osama bin Laden (probably the world's most notorious and elusive terrorist—once a C.I.A.-sponsored operative against the U.S.S.R. in Afghanistan) uses the Internet in a coded fashion to dispatch messages to his far-flung deputies; furthermore, since it is U.S. government protocol that my letter herein becomes readily available to the public-at-large through the Freedom-of-Information Act; Essentially I am sending a copy of this letter to Osama bin Laden (in absentia) for his further disposition/consideration. Accordingly, I hereby conclude that the security issues I

have raised herein are even more timely than first appeared to be the case.

On Friday, September 7, 2001, Robinson, who had contracted severe food poisoning after a flight to Tokyo, went to the Detroit office to request sick leave and was accosted by Captain John J. Balliet, Director of Flying. Balliet asked Robinson to explain why he copied bin Laden with his letter to the FAA. Hearing Transcript (TR) at 79-83, 226-30. Subsequently, Robinson passed a physical checkup in October 2001 and qualified to fly 757s a month later. CX 4.

On December 23, 2001, Robinson became locked in a pilots' baggage room while preparing for a flight in Detroit. He contacted a crew scheduling technician by cell telephone about his dilemma and stated, "I'm in no frame of mind to go fly an airplane after this crap." He added that somebody should send the fire department to rescue him or "shoot a bazooka" to open the door. Respondent's Exhibit (RX) 8. Maintenance workers finally got the door open, and Robinson made his flight. As was its customary practice, Northwest recorded Robinson's conversation with the technician.

Following this incident, Balliet consulted with John Nelson, Northwest's labor counsel, and Dr. David Zanick, its medical services director, about Robinson's behavior in the baggage room and the tape recording of his conversation. TR at 350-55. On January 16, 2002, Balliet informed Robinson that Northwest believed that he "may have developed a medical impairment" to his ability to fly and was therefore requiring that he undergo a psychiatric examination in accord with the collective bargaining agreement between the company and its pilots. RX 9.¹ Balliet took Robinson out of service as a pilot and placed him on paid status pending the results of the examination.

Robinson flew to Los Angeles to be examined by Dr. Garrett O'Connor, a diplomate of the American Board of Psychiatry. RX 11. While there, he sent Balliet a Mickey Mouse postcard, thanking him for "arranging my newfound 'CB' company business 'vacation' here in Southern California! It's driving me 'absolutely goofy.'" Robinson signed the postcard, "Monkey Pilot." RX 13.

In a letter to Dr. O'Connor, Nelson explained the "circumstances giving rise" to Northwest's request for the examination of Robinson. He listed a series of incidents which in recent years had caused "some concern" among Northwest's managers about Robinson's psychological condition. Nelson included the baggage room tape recording,

¹ Section 15.B. of the agreement states that if a company has "reasonable cause to believe that a pilot has developed a medical impairment to his ability to perform his duties between the routine medical examinations required by the Federal Aviation Administration," the company may require the pilot to submit to a medical examination with a doctor the company chooses. RX 10.

the June 2001 letter with the bin Laden addendum, the transcript of an arbitration hearing on October 25, 2000, over Robinson's medical reimbursement after being bitten by a monkey in India, an October 4, 2000 letter to Balliet describing Robinson's "belligerent" and "aberrant" behavior interacting with FAA staff,² pages of an arbitration transcript from November 18, 1999, regarding Robinson's "outdoor" living arrangements in Hawaii, and Robinson's application for a cost of living allowance dated June 30, 1997. CX 8; TR at 360-62.

Based on two visits with Robinson, psychological examination results from Dr. Robert W. Elliott, the information from Nelson, and voluminous documents Robinson submitted, Dr. O'Connor concluded that Robinson was "not currently fit for duty" as a commercial aviator. He agreed with Dr. Elliott's recommendation that Robinson undergo two months of counseling and then be re-examined to rule out an obsessive compulsive disorder. RX 11. Robinson did not undergo the recommended counseling. Nor did he arrange another examination by a psychiatrist of his own choosing, as was his right under the collective bargaining agreement.³

On March 21, 2002, Northwest prohibited Robinson from access to its flight decks "to include the jump seat" in the cockpit, but permitted him airline travel for company-related business and limited personal use. RX 14. On April 9, 2002, Northwest placed Robinson on long-term sick leave, based on Dr. O'Connor's opinion. RX 18. Robinson grieved Northwest's actions; his grievance was denied following arbitration.⁴ RX A.

Robinson filed a complaint on May 3, 2002, with the Occupational Safety and Health Administration (OSHA), which determined on March 24, 2003, that Northwest did not retaliate against Robinson for raising the safety violation issue with the FAA.

² The letter was from Brian M. Romer, an air traffic manager for the Federal Aviation Administration (FAA). He described Robinson as being "rude and insulting" while trying to obtain a tape recording of his conversation with Detroit approach control during a flight. According to Romer, one of his employees, a certified flight instructor for 20 years, was so upset that he stated, "if I knew he [Robinson] was the pilot on an aircraft, I would never get in it. In my opinion, I do not believe that he needs to be in the cockpit of any aircraft in his present state of mind." RX 19.

³ In a follow-up letter dated December 10, 2002, Dr. O'Connor emphasized that he and Dr. Elliott did not consider Robinson to be fit for duty as a commercial aviator beginning in February 2002, but that no final determination could be made until after Robinson had undergone the recommended counseling and the results had been evaluated. RX 12.

⁴ After the hearing, the ALJ admitted into the record the Decision and Award of the System Board of Adjustment, which denied Robinson's grievance. RX A. One of the issues in the arbitration was whether Northwest retaliated against Robinson.

ALJ Exhibit 1. Robinson requested a hearing, ALJX 2, which was held on August 26, 2003. The Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) dismissing the complaint. Robinson petitioned the Administrative Review Board (ARB), and both parties filed briefs in support of their respective positions.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's recommended decision under AIR 21 § 42121(b)(3) and 29 C.F.R. § 1979.110. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary's authority to issue final orders under, inter alia, AIR 21 § 42121). We review the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). We review conclusions of law de novo. *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-AIR-4, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 03-AIR-10, slip op. at 4 (ARB Dec. 30, 2004).

ISSUE PRESENTED

We consider whether Robinson proved by a preponderance of the evidence that his complaint about an air safety violation in 2001 was a contributing factor to Northwest's actions of sending him for a medical examination and prohibiting him from flying.

DISCUSSION

Elements of an AIR 21 whistleblower complaint

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors from discharging or "otherwise discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in the air carrier safety-related activities the statute covers. 49 U.S.C.A. § 42121(a). The implementing regulation describes the protected activities, including the following:

- (1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law

relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States;

29 C.F.R. § 1979.102(b)(1).

The AIR 21 complainant must allege and later prove that he was an employee who engaged in activity the statute protects; that an employer subject to the act had knowledge of the protected activity; that the employer subjected him to an “unfavorable personnel action;” and that the protected activity was a “contributing factor” in the unfavorable personnel action. 49 U.S.C.A. § 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.104(b)(1)(i)-(iv). If the complainant proves by a preponderance of the evidence that the respondent has violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.104(d). *See, e.g., Negron*, slip op. at 6; *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004).

Findings of the ALJ

The ALJ found that Robinson’s June 2001 letter complained about a violation of the FAA-established security protocol that requires a positive bag match with each passenger. He also found that Northwest’s managers knew about the letter and its bin Laden addendum. The ALJ determined that Robinson’s complaint amounted to protected activity under AIR 21. D. & O. at 15-16. He found no evidence that Robinson expressed any safety violation regarding the pilots’ baggage room incident. D. & O. at 16. The ALJ indicated that Northwest’s decisions to send Robinson for a psychiatric examination and to remove him from the flight deck were adverse actions that changed the conditions of his employment. D. & O. at 15.

Substantial evidence in the record supports the ALJ’s factual findings regarding the June 2001 letter to the FAA, Northwest’s knowledge of the complaint, and its personnel actions against Robinson. D. & O. at 8-13. Therefore, these findings are conclusive and we affirm them.

Robinson’s failure to prove causation

The ALJ concluded, however, that Robinson failed to demonstrate that his protected activity of communicating the baggage removal violation to the FAA in June

2001 was a contributing factor in Northwest's adverse actions.⁵ The final element of a whistleblower case is to show causation between the protected activity and an adverse employment action. The burden is on a complainant to show by a preponderance of the evidence that his protected activity was a contributing factor in the employer's adverse action. 49 U.S.C.A. § 42121(b)(2)(B)(iii).

Robinson argues on appeal that the ALJ erred in not finding that the June 2001 letter was a contributing factor in Northwest's adverse employment actions against him. Complainant's Brief at 15. Robinson asserts that the record contains direct and indirect evidence, which the ALJ ignored, of a causal connection between his protected activity and Northwest's actions. *Id.* at 17. Had the ALJ considered this evidence, Robinson contends, he would have found that June 2001 protected activity was a contributing factor to Northwest's adverse employment actions. *Id.* at 17-21.

The direct evidence, according to Robinson, consisted of the September 2001 meeting at which Balliet berated Robinson for his complaint to the FAA about the luggage removal issue and Balliet's "admission" that Robinson was sent for an examination because of the June 2001 complaint. *Id.* Robinson urges that this evidence, coupled with other indirect evidence, shows that the June 2001 protected activity was a contributing factor in Northwest's actions against him.

Contrary to Robinson's argument, the ALJ did examine what Robinson terms direct evidence. The ALJ credited Balliet's testimony that Robinson's June 2001 complaint to the FAA was not the focus of their meeting on September 7, 2001. D. & O.

⁵ After correctly stating Robinson's ultimate burden of proof, D. & O. at 15, the ALJ wrote that Robinson "failed in his initial burden of proof to make a prima facie case," and even if he had met that burden, Northwest had shown by clear and convincing evidence that it would have taken the same action absent the protected activity, D. & O. at 16. At the hearing stage, a complainant must establish by a preponderance of the evidence that protected activity was a contributing factor that motivated a respondent to take adverse employment action against him. 49 U.S.C.A. § 42121(b)(2)(B)(iii). Only if the complainant meets this burden is it necessary for the fact-finder to determine whether a respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable action absent the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); *Peck v. Safe Air In'l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR 3, slip op. at 18 n.7 (ARB Jan. 30, 2004). We need not reach the respondent's burden of proof in this case because Robinson failed to prove that his protected activity was a contributing factor in Northwest's adverse employment actions. *See Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 03-STA-54, slip op. at 5 (ARB Sept. 30, 2005) (noting that the ALJ's error in terming the ultimate elements of proof the "prima facie" case is merely one of nomenclature).

at 16. Balliet testified that he and Robinson did not talk about the contents of the June 2001 letter. TR at 228. Balliet stated that he was concerned about Robinson's "bizarre message" to bin Laden and asked Robinson for an explanation. TR at 228. Balliet remarked that he wanted to know why any pilot would share his concerns for safety with a terrorist, but Robinson did not provide an answer. TR at 229.

Further, Balliet never "admitted" that the June 2001 letter was the reason Northwest ordered the psychiatric examination. He stated on cross-examination that his concern was a Northwest pilot "wanting to communicate with a known terrorist" and that the contents of the letter concerning the baggage match protocol were "fine;" it was a safety issue. TR at 251-52, 267-68. As the ALJ found, it was not the report itself but the addendum purporting to copy bin Laden that concerned Balliet and Northwest's managers. Substantial evidence supports the ALJ's crediting of Balliet's testimony.

As for the indirect evidence of causation, Robinson asserts that he was certified medically fit on October 3, 2001, and Northwest could not contractually send him for an examination unless he developed an impairment after that. He also claims that, at the time of the alleged erratic behavior in the baggage room in December 2001, he had qualified as a 757 captain and was flying those planes. Because he was certified and qualified to fly, Northwest used the recording of his conversation in the baggage room as a "manufactured excuse" to pull him from service. Moreover, Northwest never characterized any of the incidents, described to doctors as the basis for the psychiatric examination, as a performance problem when they occurred—they became problematic only after his June 2001 letter was sent to the FAA. Robinson urges that this evidence therefore establishes that the protected activity had to have been a contributing factor in Northwest's adverse actions. Complainant's Brief at 18-19.

The ALJ addressed this argument and the indirect evidence Robinson cited. D. & O. at 3-13, 16. The ALJ credited Balliet's testimony concerning the baggage room incident. It was not the fact that Robinson was locked in for a time, but his recorded reaction, including a reference to shooting a bazooka, that was "the straw that broke the camel's back," according to Balliet. TR at 384. He explained that Robinson had no performance problems—"he seemed to be flying the plane just fine"—but that his reaction upon finding himself locked in the baggage room was "uncontrolled" in that he was "this excited, this out of control, this anxious over being in a 10 by 12 room, there was no peril, no danger." TR at 232. This conduct, coupled with the "bizarre message" of the bin Laden addendum, the "funny" postcard, and other incidents over the past few years, persuaded Balliet that Robinson's psychological condition could be impaired. TR at 228, 231, 272.

The ALJ considered that Robinson had passed his FAA flight physical in October 2001, had been promoted to 757 captain in November, flew planes without incident in December, and was slated to fly as a second officer after his 60th birthday in February 2002. D. & O. at 16. However, the ALJ credited the testimony of Balliet, Dr. Zanick, and John Nelson. They agreed that several incidents of aberrant behavior over the past few years, culminating in Robinson's reaction to being locked in the baggage room,

necessitated a psychiatric examination under section 15.B. of the contract between Northwest and its pilots. D. & O. at 16; TR at 233, 353-84. We agree with the ALJ's finding that, given Robinson's "pattern of conduct over time leading up" to the baggage room incident, his outburst then was enough to cause concern "about [his] potential conduct in the cockpit once under stress." D. & O. at 16.

Finally, Robinson argues that the timing of Northwest's decision to send him for a medical examination establishes a causal connection between its adverse action and the June 2001 protected activity. Complainant's Brief at 20. According to Robinson, discrimination should be inferred because Northwest's adverse action followed closely in time the protected activity. Also, discrimination should be inferred because Northwest waited until after he engaged in protected activity to bring up the alleged aberrant behavior that occurred prior to the June 2001 protected activity. *Id.*

While an inference of discrimination may arise when the adverse action closely follows protected activity, temporal proximity is not always dispositive. *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 96-ERA-34, 38, slip op. at 6-7 (Mar. 30, 2001); *cf. Svendsen v. Air Methods, Inc.*, ARB No. 03-074, ALJ No. 02-AIR-16, slip op. at 8 (Aug. 26, 2004). For example, where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action. *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001).

In this case, more than six months elapsed from the June 2001 letter until the January 2002 request that Robinson undergo a psychiatric examination. Moreover, in the interim, Balliet found out about the bin Laden addendum to the June 2001 letter and listened to the tape recording of Robinson's conversation during the baggage room incident in December. The ALJ credited Balliet's testimony that Robinson's recorded reaction to being locked in the baggage room was the last "straw." Thus, this incident could have independently supported Northwest's action. Therefore, Robinson's proximity argument and his contention that Northwest delayed bringing up his unusual behavior have no merit.

Respondent's arguments

On appeal, Northwest completely neglects to address the issues raised in Robinson's brief. Rather, Northwest argues that the ARB lacks subject-matter jurisdiction to decide this case, that *res judicata* precludes Robinson's whistleblower complaint, and that his petition for review to the ARB was untimely. Respondent's Brief at 2-9. Northwest's first two arguments are not before us because it did not appeal those issues, which the ALJ decided against them. *See In the Matter of Tom Rob, Inc.*, WAB No. 94-03, slip op. at 4 (Sec'y June 21, 1994) (a party's failure to appeal the denial of summary judgment on two grounds precluded review by the Board).

Northwest's timeliness argument has no merit. To be effective, a petition for review must be filed within ten business days of the ALJ's decision. 29 C.F.R. § 1979.110(a). The regulation adds that the date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing.

Robinson's attorney signed a service sheet certifying that he had mailed the petition for review on January 2, 2004, which is exactly ten business days—excluding weekends and the year-end holidays—from December 17, 2003, when the ALJ issued his decision. In the record before us is an envelope postmarked January 2, 2004, Minneapolis, Minnesota, from the attorney's law firm, which contained Robinson's petition for review. While the ARB did not record its receipt of the petition for review until January 13, 2004, the postmarked envelope demonstrates that the petition was timely filed.

CONCLUSION

We have examined the entire record in this case and conclude that the ALJ competently evaluated all the evidence. Substantial evidence supports his factual findings. We therefore affirm them. We agree that Northwest did not violate AIR 21 because Robinson failed to prove by a preponderance of the evidence that his protected activity was a contributing factor in Northwest's decisions to order a psychiatric examination and remove him from flight status. Accordingly, we **DENY** Robinson's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge