**In the Matter of:**

**NICK ROUGAS,** **ARB CASE NO. 04-139**

**COMPLAINANT,** **ALJ CASE NO. 04-AIR-3**

**v.** **DATE: July 31, 2006**

**SOUTHEAST AIRLINES, INC.**

**RESPONDENT,**

**Appearances:**

***For the Complainant:***
**Craig L. Berman, Esq.,** ***Berman Law Firm, P.A.,*** **St. Petersburg, Florida**

***For the Respondent:***
**Michael V. Abcarian, Esq.,** ***Epstein, Becker, Green Wickliff & Hall, P.C.,***
**Dallas Texas**

## FINAL DECISION AND ORDER

Complainant John Nicolas "Nick" Rougas, Jr. brought a complaint against charter airline Southeast Airlines (SEAL) under the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 1997), and its implementing regulations, 29 C.F.R. Part 1979 (2003). After finding that Rougas had not engaged in activity protected under AIR 21, the ALJ dismissed the complaint. Decision and Order (D. & O.), filed June 30, 2004. Rougas appealed to the Administrative Review Board (Board). 29 C.F.R. § 110(a). For reasons explained below, we remand for further consideration of whether the activities in which Rougas engaged were protected under AIR 21.

## BACKGROUND

Rougas joined SEAL in April 1999, when SEAL owned just one plane. T. 124-125.[1] By 2002, SEAL had eight planes and over 60 pilots. T. 227, 382. Each month, SEAL pilots selected by seniority a monthly schedule of flights, reserve days, and days off. T. 50, 129-30. Schedulers prepared the monthly schedules and arranged coverage by reserve pilots when a scheduled pilot could not fly or there was a schedule change. T. 131. During a month, there frequently were changes to the originally prepared schedules. *Id*.

The flight hours of SEAL's pilots were limited in various ways by FAA rules, including the "one-in-seven" rule. T. 84, 108. Under this rule, in any period of seven consecutive days a pilot has to be given 24 consecutive hours off. T. 84, 108, 437; 14 C.F.R. § 121.503(c). The requirements relate to consecutive hours, not to calendar days. Thus, a pilot who worked until 2 p.m. one day and was required to be back at work at 2:01 p.m. the next day has had 24 consecutive hours off. This rule caused some confusion among SEAL's pilots, some of whom mistakenly believed that they were entitled to a full calendar day off in every seven-day period. T. 83-84, 108-09; HD at 44-47. Rougas, for example, filed a written complaint with Lusk expressing his belief that SEAL was implementing the one-in-seven rule incorrectly. T. 137.

Rougas was a First Officer, so on each flight he reported to the Captain serving on that flight. T. 102. In other circumstances, Rougas and all other pilots reported to Captain David Lusk, who became SEAL's Chief Pilot in October 2002. T. 111-12. Lusk reported to Captain Steven Malone, SEAL's operations director, and Malone in turn reported to the vice president of operations, and to Vice President and General Manager Tom Balkenhol. *Id*.

### December Events

In mid-December, Rougas fell sick with a gastro-intestinal illness. T. 145. For the next two weeks, Rougas engaged in numerous conversations with various personnel at SEAL relating to his illness and to his ability to fly during this period.

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[1] We use the following abbreviations: T. – Transcript; CX – Complainant's Exhibits; RX – Respondent's Exhibits; CB – Complainant's Opening Brief; RB – Respondent's Opening Brief; LD – Deposition of Captain David Lusk, taken April 23, 2004; HD – Deposition of Bruce Haseltine, taken April 28, 2004.

*1. Calling in sick, and complaining to Lusk*

Rougas called in sick on Friday December 13, 2002 and asked to be taken off the reserve list. T. 146. Because Malone believed Rougas sometimes feigned illness on reserve days in order to referee hockey games, Malone asked Rougas to provide a doctor's note. T. 357-59, 380, 412-13. Rougas testified that he obtained a note dated December 13, 2002, which stated that Rougas should not fly for the next two days. T. 145; CX-17. Rougas testified that he faxed the note both to Jean Robbins, Director of Human Resources, and to the scheduling department, and that he followed up with a phone call to make sure that the note had been received. T. 49, 156. Malone testified that he did not remember when or whether he himself had received this note, but also indicated that such notes normally did not come to him. T. 146.

Rougas testified that during the rest of that day, the scheduling department repeatedly called and urged Rougas to reconsider his illness. As Rougas described it, "Most of th[e calls] started off with, we're relaying this message from Malone – or, Captain Malone, as per our company policy, your sick day ends at midnight, Captain Malone says you really need to do this trip, could you please help us out, pretty please." T. 146. Rougas testified that he felt harassed by these repeated calls and that he attempted to complain by calling Lusk later that afternoon of December 13th, but that he "never got any response." T. 146-47; D. & O. at 4.

*2. Back to duty?*

The next day, Saturday December 14th, Rougas told the scheduling department that he was feeling "a little bit better" and told them: "if you need something smaller I might be able to help you out, but I'm still questionable." T. 147. Rougas was not needed that day, or on Sunday December 15th, but – despite the injunction in the doctor's note that he should not fly for two days – Rougas felt that he was on reserve these two days, apparently because the original December schedule had scheduled him as reserve for these two days. T. 147.

*3. The test flight*

On Monday December 16th, the scheduling department asked whether Rougas could test a plane in Miami by acting as co-pilot on a 45-minute test flight without passengers. Rougas reluctantly agreed, explaining that he still didn't feel well but that he thought he could handle a short flight with no passengers. T. 148. When Rougas reached Miami, he discovered that the plane was not yet ready to test. *Id.* He stayed in Miami, and finally flew the test flight when the plane was ready in the late afternoon on Wednesday December 18th. T. 150.

*4. The Newark-Fort Lauderdale flight, Malone's threat, and the call to O'Brien*

In the late afternoon of December 18th, after Rougas had landed the test flight, Eric Hansen from the scheduling department called and told him to ferry that plane to Fort Lauderdale and then, the next day, pilot a round-trip passenger flight from Fort Lauderdale to Newark. T. 150. Rougas again was reluctant. According to Rougas, he told Hansen that he was "still sick" and that by agreeing to fly the test flight he had "agreed to help you out, not to stay down here and continue to fly." T. 150.

Malone then joined the call and pressed Rougas to fly. *Id*. The substance of the conversation was disputed at the hearing, but it was agreed that Malone had said that if Rougas did not fly he would be fired. T. 151, 414. It also was agreed that Malone quickly had "recanted" the threat. T. 151, 414. According to Rougas, Malone refused to accept that Rougas was too sick to fly and threatened Rougas in order to pressure him into agreeing to fly. According to Malone, Malone simply was trying to get Rougas to state with certainty whether or not he was too sick to fly. T. 414-15, 432. Lusk testified that, as he understood the situation based upon conversations that day with both Malone and the scheduling department:

> [Rougas] was indicating that there were some things he could do and some things he couldn't do, and yet, if you're ill, you're ill. If you're too ill to fly, you're too ill to fly. It doesn't matter what you're doing. You can't go out and do one thing and not another.

LD at 70.

At the close of his conversation with Malone, Rougas agreed to ferry the plane to Fort Lauderdale and to fly the Newark trip the next day. T. 151. Rougas testified that later that evening, after landing in Fort Lauderdale, he left a voice message with Hansen and also called Captain Jack O'Brien, SEAL's safety officer, to complain about Malone's threat. *Id.* According to Rougas, he said "Jack, I shouldn't be here, I should be home, I'm sick." *Id*. Also according to Rougas, O'Brien replied, "[y]ou know these people, if you don't do the flight, they would fire you, but don't do anything illegal." *Id*.[2]

*5. The refusal to fly, and the two explanations*

The next day, Thursday December 19th, while Rougas was flying the Newark round-trip, Hansen called him with instructions to handle two Baltimore-Aruba trips on December 21-22. *Id.* In order to do so, Rougas would need to catch a flight from Fort Lauderdale to Tampa that evening so that he could fly from Tampa to Baltimore the next morning (December 20th). *Id*. In his testimony, Rougas described his response as follows:

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[2] O'Brien did not testify at the hearing.

> I said, Eric, this flight coming up here [to Newark] almost killed me. I said, I'm sick. I said, I'll do the flight going back [to Fort Lauderdale] to get the plane back for you, because I know you don't need pilots up here. But I said, that's it, I'm not flying anything. I said, I haven't been able to get well, I'm still sick. No, he says, well, it's pretty much mandatory you do this flight, you need to be, you know, flying the flight. I said, Eric, sick is sick, I'm not doing it.

*Id*. Later in his testimony, Rougas described a different reason for his reluctance to accept the Baltimore-Aruba flights. This time, Rougas focused upon the divergence from the original schedule and upon his belief that the one-in-seven rule would be violated if he flew. According to Rougas:

> I was reserve on Saturday [December 14th], reserve on Sunday [December 15th], Monday and Tuesday [December 16th-17th] I was on reserve. Wednesday and Thursday [December 18th-19th] I was supposedly off, but I was doing the test flights. Friday [December 20th], I came back [from Newark to Fort Lauderdale to home]. I was scheduled to be on reserve, and then they wanted me to do a flight Saturday and Sunday. And I again expressed my concern. I said, I need a 24-hour break in there. And I said, I'm not even legal to go, I'm not even legal to move anything, I could not – I could bring it up there, but I'm not legal to do the flight.

T. 154.

When Rougas arrived back from Newark on the evening of December 19th, he went home. T. 153. On Friday, December 20th, Rougas stayed home. He did not fly to Baltimore, and thus was unable to fly the Baltimore-Aruba flights on Saturday and Sunday December 21st and 22nd. Although he did not fly on Friday, he testified that he considered himself on reserve. T. 154.

*6. Back to duty?*

After not flying on Friday, Rougas testified, on Saturday December 21st, he "was much better." He called scheduling to tell them that and to find out "what was going on." Although he had refused to fly Saturday's Baltimore-Aruba flight, Rougas testified that he believed that on both Saturday and Sunday he was "on reserve, but [he] was not called or notified of any flights." T. 155. On Monday December 23rd, Rougas called Robbins to let her know that he had "notified [scheduling] over the weekend that [he was] doing better, that [he could] be returned to the line to fly [his] assigned trips as required." T. 156. Rougas also wanted to ask Robbins "is there anything else I need to do to let them know that I'm back." T. 156. According to Rougas, Robbins told him that there was nothing else that he needed to do. *Id*. On both Monday December 23rd and Tuesday December 24th, Rougas felt that he was on reserve, apparently because those days had been allocated as reserve days for him on the December schedule as originally prepared.

The record does not make apparent whether any interaction occurred between Rougas and SEAL on December 25th and 26th.

According to the original December schedule, Rougas was supposed to pilot a flight from Baltimore on December 28th. T. 157. On Friday December 27th, Rougas called scheduling to find out how scheduling wanted him to get to Baltimore. *Id*. Rougas testified that Hansen was surprised and replied that Rougas was "still showing … on sick leave." *Id*. After consulting with Malone, Hansen called Rougas back and said that Malone had told him that Rougas needed a doctor's note in order to be released back into service. *Id*. Rougas obtained a note, apparently backdated to December 21st, stating that he was fit to fly as of December 22, 2002. CX-17. Rougas faxed the note to Hansen. T. 157. According to Rougas, a copy of the note also was given to human resources. *Id*. Malone confirmed that he ultimately received that second note, although he did not remember when he received it. T. 416.

**January events**

Rougas did not fly any more flights for SEAL after providing the second doctor's note. Instead, Lusk contacted him on December 31, 2002 and instructed him to report on January 2, 2003 to Lusk's office. At the meeting on January 2, Lusk suspended Rougas for 60 days. LD at 28-30; T. 364, 368. Lusk gave Rougas a document listing four reasons:

> Recent illness and problems with documentation[;] Cooperation with Scheduling[;] Use of language on the company radio that is inappropriate on 10-26-02 [;] Poor working attitude with other crewmembers.

CX-3.

During his suspension, Rougas contacted Bruce Haseltine, an inspector with the FAA who had recently been assigned to monitor SEAL. T. 164.[3] He spoke repeatedly to Haseltine about Malone's threat. HD at 9, 40, 47. Based on this information, but aware that there was "some discrepancy" between what Rougas had said and what he had heard from others at SEAL, Haseltine ultimately sent a Letter of Investigation to SEAL regarding the allegation that SEAL had required a pilot to fly while he was ill. HD at 9

[3] Rougas also had talked to Haseltine prior to his suspension. T. 164; HD at 44. In addition, Rougas testified, he had spoken with another FAA inspector, E.J. Simpson, who had been investigating allegations that Malone had terminated another SEAL pilot's employment when that pilot refused to fly an overweight plane. HD at 17-19; T. 164, 171. Certain other pilots from SEAL also had spoken to the FAA about that incident and about other incidents involving Malone. HD at 45-46.

and Exhibit 2.[4] Haseltine stated that although his knowledge of SEAL was based in part on information from Rougas, he did not inform SEAL that Rougas was one of his sources. HD at 61.

**February events**

In early February, Rougas was called back early from his suspension. T. 374. Rougas testified that a day or two after he was called back, Malone told him that "we know who's been talking to the FAA, and we're going to fire their a--, and then we're going to sue them for defamation of character." T. 171. According to Rougas, Malone had made similar threats throughout his tenure as operations director. T. 171-72. As Haseltine confirmed, Rougas again contacted Haseltine to inform him about this threat. HD at 47. Haseltine said that the FAA ultimately did not take any action with regard to Malone's alleged statement, but did not give any further details. HD at 48.

At around the same time, it had been determined that Lusk would replace Malone as operations director and Malone would return to his previous position as a line pilot. T. 378-79. A day or two later, when Rougas went to Robbins to arrange for the return of his ID badge, he spoke with her about Malone's return to the line. T. 172. Rougas told Robbins that he wished Malone luck, but that he did not want to fly with him. T. 174, 279. Rougas also said that he knew of several people who had indicated to him that they also would not wish to fly with Malone. *Id*.

An administrative assistant, Vicky Vogel, overheard the conversation between Rougas and Robbins. T. 287-88, 426. After work that evening she told Malone what she had heard. *Id*. Malone became "mad" and "disgusted." T. 385, 439. Later that evening, Malone called Rougas and told him to report to his office the next morning. T. 385. Malone then called Lusk and told him that "there had been an incident in [the HR] office regarding some … negative attitudes coming from Mr. Rougas, and that … the next day … there was probably going to be a termination." LD at 61-62; T. 385. The next morning, Malone informed Rougas that SEAL had decided to terminate his employment. T. 387.[5]

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[4] The letter was not sent until after SEAL had made its termination decision. HD at 11. Haseltine also talked to Lusk about the incident, but not until after the termination decision. HD 11-12. Haseltine also spoke with SEAL President Tom Kolfenbach about the incident, and this conversation took place prior to the termination. HD at 13-14; T. 111.

[5] The ALJ did not investigate either the particular decision process followed by SEAL or SEAL's reasons for making its decision. Because of our decision to remand, we do not summarize the evidence relating only to causation, nor do we discuss whether Rougas proved his contention that actual and/or perceived protected activity contributed to the termination of his employment.

## CASE HISTORY

Rougas filed a complaint with OSHA on March 31, 2003. RX-5 (letter from OSHA, dated September 30, 2003). After an investigation, OSHA determined that "it is reasonable to believe that [SEAL] has not violated [AIR 21]." RX-5 at 1. OSHA explained that "Complainant alleges he was terminated after Malone was told about the comment" that Rougas made to Robbins, but that "there is no evidence that anyone mentioned issues related to safety or that the comment was considered activity protected under the Act." RX-5 at 2, 3. OSHA does not appear to have investigated whether any other activity engaged in by Rougas might have constituted protected activity.

Rougas requested a hearing from an ALJ, and one was held on March 30-31, 2004. The ALJ concluded that Rougas had not engaged in protected activity, and dismissed the complaint. D. & O. at 23. Rougas petitioned for review by the Board.[6] We granted the petition and issued a briefing schedule. Both Rougas and SEAL filed briefs.

## ISSUE PRESENTED

Did the ALJ err in concluding that Rougas did not engage in any protected activity before SEAL terminated his employment?

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to review an ALJ's recommended decision in cases arising under AIR 21. *See* 49 U.S.C.A. § 42121(b)(3) (West 1997) (granting authority to the Secretary of Labor to issue final decisions in AIR 21 cases); Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating Secretary's authority to review AIR 21 cases and issue final decisions); 29 C.F.R. § 1979.110 (allowing appeals to the Board in AIR 21 cases).

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[6] SEAL did not petition for review. Therefore, it is likely that SEAL is precluded from pursuing on appeal its argument that "Rougas' admission that he flew while unfit precludes him from asserting an AIR 21 claim." RB at 14-15; *see* 29 C.F.R. § 1979.110(a) ("Any party desiring to seek review … of a decision of the administrative law judge … must file a written petition for review…. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties"). In any case, it does not appear, from the facts found thus far, that Rougas has admitted that he actually "flew while unfit." Because of our decision to remand, we deem it premature to address SEAL's contention further at this time.

In reviewing an ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [she] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, we review questions of law de novo, and review the ALJ's factual findings under the substantial evidence standard. 29 C.F.R. 1979.110(b). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 04-SOX-51, slip op. at 7 (ARB June 29, 2006) (substantial evidence standard). In weighing evidence, we give great deference to credibility findings that rest explicitly on an "evaluation" of the demeanor of a witness. *Henrich*, slip op. at 11-12 & n.13; *see Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 99-STA-21, slip op. at 9 (ARB July 31, 2001) (quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983)).

Although in assessing the substantiality of evidence we "must take into account whatever in the record fairly detracts from its weight," we must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice had the matter been before us de novo." *Universal Camera*, 340 U.S. at 488; *Henrich*, slip op. at 7.

## GOVERNING LAW

In order to receive relief under AIR 21, a complainant must prove that he was a covered employee, that he engaged in activity protected under AIR 21, and that a covered employer subjected him to an unfavorable personnel action because he engaged in protected activity. 49 U.S.C.A. § 42121(a) (West 1997); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op at 6-10 (explaining "scope of coverage, procedures, and burdens of proof under AIR 21").

As relevant here, an employee has engaged in protected activity when the employee has "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." *Id*. at § 42121(a)(1); *see Peck*, slip op at 6-10.

In order for the provision of "information" to constitute protected activity, the information must be "specific in relation to a given practice, condition, directive or event," and the complainant must reasonably believe "in the existence of a violation." *Peck*, slip op. at 13. In addition, the employee does not "provide[] information" unless he actually expresses his concerns. *See Henrich*, slip op. at 11 (for activity to be protected under Sarbanes Oxley Act (SOX), employee must actually express concern); *Knox v. United States Dep't of the Interior*, ARB No. 06-089, ALJ No. 01-CAA-3, slip op. at 5

(ARB Apr. 28, 2006) (for activity to be protected under Clean Air Act, employee must actually express concern).

## ANALYSIS

Rougas argues that the ALJ erred in various respects in finding that he did not engage in any protected activity.[7]

*The ALJ's finding that Rougas "never communicated to Respondent" on December 18th that he was too ill to fly*

Rougas argues that the ALJ erred in finding that he did not inform Malone during the December 18 call that he was too ill to fly the next day. Recognizing that this finding rested at least in part upon the ALJ's finding that Malone was more credible than Rougas regarding these events, Rougas further argues that the ALJ erred in finding credible "certain witnesses" because those findings were "contradicted by the conflicts in testimony" and because the ALJ made those findings "without any rationale." CB at 22. Specifically, Rougas argues that "Rougas was unequivocal" when he "told Eric Hansen that he was too sick to fly," and that "it is logical to believe that Malone intervened because Rougas said he was too ill." CB at 25, 24.

Rougas does not, however, offer any reason why we should overturn the ALJ's finding that he did not communicate to Malone that he was too ill to fly. While the ALJ did not provide a *demeanor-based* rationale for his choice to believe Malone rather than Rougas regarding the December 18 call, he did provide a rationale for finding that the testimony given by Rougas was "only partially credible" and was "entitled to less probative weight." *Id.* Specifically, the ALJ found that the testimony given by Rougas was "called into question by the various inconsistencies between his testimony and the testimony of … credible witnesses," including Malone, whose "testimony regarding Complainant's sick days in December 2002 exposes more inconsistencies in Complainant's testimony." D. & O. at 20.

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[7] Rougas also argues that "AIR 21 is unconstitutional" because it "does not provide a *statutory* right to a jury trial." CB at 29. Rougas did not make this argument to the ALJ prior to the ALJ's issuance of the D. & O., nor did he make this argument directly to the ALJ after such issuance. (Rougas tangentially mentioned his constitutional concern in the course of a request that the ALJ stay his decision so that Rougas could pursue his case in state court, but Rougas did not ask the ALJ to rule on the constitutional issue. *See* Complainant's Motion for a Stay Pending Completion of State Court Proceedings and Request for Oral Argument and Hearing, filed July 1, 2004.) Therefore, we consider this constitutional argument to have been made for the first time on appeal. Because we do not generally consider arguments made for the first time on appeal, we do not consider the merits of this constitutional argument.

Moreover, however "unequivocal" he may have been with the schedulers, Rougas does not argue that he actually told *Malone* that he was too ill to fly the next day. Rougas argues that Malone must have been aware he was too ill, because Rougas had so informed the scheduling department and Malone had then joined the call to ask him to rethink his position. But Rougas appears to admit that, in talking to Malone, he did back down from his initial position that he was too ill to fly.[8] Thus even if Rougas did tell the scheduling department that he was too ill to fly, Rougas does not give us a reason to disbelieve the ALJ's conclusion that Rougas did not tell *Malone* that he was too ill to fly. We conclude that because Rougas spoke directly to Malone, yet did not state during his conversation with Malone that he was too ill to fly, any initial statement Rougas may have made to the scheduling department did not constitute notification to Malone.[9] Therefore, we find that substantial evidence supports the ALJ's finding that Rougas did not communicate to Malone on December 18 that he was too ill to fly the next day.

Perhaps because Malone was SEAL's chief of operations, and because Rougas actually spoke with Malone after speaking with the scheduling department, the ALJ also concluded that Rougas did not notify SEAL that he was too ill to fly. Rougas argues that he "did not withdraw his report that he was sick [because] *that night* he spoke with O'Brien." CB at 25. We note that O'Brien did not supervise Lusk, so we conclude that Malone, who did supervise Lusk, also was senior to O'Brien. T. 53. In this situation, where it seems that Rougas made inconsistent reports to different personnel at various levels of SEAL, we do not think we can conclude that there was not substantial evidence for the ALJ's decision to rely upon the conversation between Rougas and Malone, the individual who represented the highest level at SEAL, rather than upon the conversation between Rougas and O'Brien. Relying upon the conversation with O'Brien, which occurred later in time and took place with SEAL's Safety Officer, might also have been a justifiable choice. But, as we have explained, where there is substantial evidence on both

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[8] Rougas appears to suggest that we should excuse his failure to so inform Malone because he was "coerced to fly" by Malone's threat. CB at 21. But Rougas admits both that Malone retracted the threat almost immediately, and that he understood during the call that Malone had done so. Thus, Rougas knew that the threat had been retracted when he decided what to tell Malone. Because Rougas knew the threat was no longer in force before he ended his conversation with Malone, it seems unlikely that Malone's threat forced Rougas to stay silent and thus unlikely that that Rougas deserves to be excused for his failure. In addition, this apparent theory of excuse depends upon facts that are yet to be found, such as the assertion that Rougas was coerced, and the question whether Rougas had a genuine and reasonable safety concern. Finally, Rougas does not point to any case in which we have found that "coercion" to take an action excuses a complainant's failure to comply with the requirement that he express concern about the action in order to be found to have engaged in protected activity. Because of our decision to remand, we do not need to decide whether, or to what extent, this excuse theory could or does succeed.

[9] Our view might be different if Rougas had communicated only with the scheduling department and had relied upon that department to pass the message up the chain of command. But that is not this case.

sides we will not disturb the finding of the ALJ. Therefore, we conclude that substantial evidence supports the ALJ's conclusion that Rougas did not tell "Respondent" that he was too ill to fly.[10]

*The ALJ's decision to analyze only two incidents*

Rougas also argues that the ALJ erred in focusing only on the call with Malone on December 18, 2002 (the Malone call) and the conversation with Robbins on February 13, 2003 (the Robbins conversation). While he does not contest the ALJ's conclusion that the Robbins conversation did not itself constitute protected activity, Rougas argues that the ALJ "ignore[d] other instances of protected activity in the record, including but not limited to Rougas' communications with Eric Hansen, Bruce Haseltine, Steve Malone, Jack O'Brien, and David Lusk." CB at 22. For example, Rougas argues that he engaged in protected activity when he "objected to flying sick on several dates," "reported Malone's illegal directive to Jack O'Brien," and "refused to work the Baltimore-Aruba flights scheduled for December 21-22, 2002." CB at 23. Rougas further argues that he engaged in protected activity by reporting Malone's threat to Lusk on January 2, 2003 and by making "several protected reports to Haseltine concerning improper conduct by SEAL, including the threat made [by Malone] on December 18, 2002." CB at 26, 27.

SEAL does not take issue with the contention that the ALJ analyzed only the Malone call and the Robbins conversation,[11] and we agree that the most natural reading of the opinion indicates that it analyzes only those two incidents. The ALJ's opinion contained only two paragraphs analyzing the possibility of protected activity. In the first paragraph, entitled "The December Suspension," the ALJ found that Malone's testimony was "substantially more credible than that of Complainant concerning *the events in December* 2002," and concluded that Rougas "did not engage in protected activity *in*

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[10] Rougas makes two other arguments related to the December 18 call. First, he asserts that the ALJ must have based his finding upon the fact that Rougas did fly the next day, and argues that the ALJ erred in having done so because his decision to fly was based upon Malone's threat. CB at 25. Because there is no evidence that the ALJ relied on the fact that Rougas actually flew, we need not address this particular argument. In any case, as we note above, the decision to fly does not appear to have been based on any threat then in force. See n.8.

Second, Rougas argues that he expressed a safety concern merely by stating (for example, to Hansen) that he was sick, and that his later decision to fly does not alter the character of his already-expressed safety concern. CB at 22. The ALJ should determine on remand whether these communications constituted an independent protected activity.

[11] SEAL limits its argument to the contention that the fact that the FAA did not find that a violation had occurred with regard to this incident "undercuts any connotation of error based upon '[t]he ALJ [having] ignored that, during his suspension, Rougas made several protected reports to Haseltine.'" RB at 14 n.7.

*December* 2002." D. & O. at 21 (emphasis added). But the ALJ also noted that "Captain Conover, who flew with Complainant on *the flight in question*, denied that Complainant appeared to be ill or claimed to be ill."[12] D. & O. at 22 (emphasis added). The ALJ's use of the phrase "the flight in question" suggests strongly that he intended to analyze only the communications with Malone regarding the flight on December 19, and not any of the other communications made by Rougas. Therefore, we read this paragraph to indicate that the ALJ found only that Rougas did not tell *Malone*, on December 18, that he was too ill to fly the next day. Because this paragraph does not analyze the communications Rougas made prior to and during December to Hansen, Lusk, O'Brien, and the FAA, we conclude that the paragraph did not determine whether any of these communications were protected activities.

Similarly, in his second paragraph of analysis, entitled "The February Termination," the ALJ concluded that Rougas "did not engage in protected activity *in February* 2003." D. & O. at 22 (emphasis added). But the ALJ explained that Rougas "asserts he expressed safety concerns *to Ms. Robbins*," and that he "simply did not find Complainant's version of events to be credible," because "according to the credible testimony of Ms. Robbins and Ms. Vogel, Complainant's comments did not have anything to do with safety." D. & O. at 22 (emphasis added). Thus, it appears that the ALJ's broad conclusion that Rougas did not engage in protected activity "in February 2003" was based solely upon his finding that Rougas did not tell Robbins about any safety concerns during their conversation on February 13, 2003. Therefore, we read this paragraph to indicate that the ALJ determined only that the Robbins conversation was not protected activity. Because this paragraph does not analyze the communications Rougas made in January and February to Lusk and to the FAA, we conclude that the ALJ did not determine whether any of these communications were protected activities.

Determining whether any of a complainant's activities were protected is an essential component of an ALJ's task. Therefore, we agree with Rougas that the ALJ erred in not analyzing whether the activities listed by Rougas in his post-hearing brief – the report to Lusk about Malone's purported disregard for the one-in-seven rule; the reports to Lusk and O'Brien about Malone's threat; the multiple reports to the FAA about Malone; and the various communications with the schedulers (the notifications that

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[12] Rougas takes issue with the ALJ's reliance on Conover's letter, arguing that it is "rank hearsay" because Conover did not testify at the hearing. CB at 26. Because Rougas himself (through counsel) first used the letter, as an exhibit to Haseltine's deposition, we do not view with much sympathy his contention that the ALJ should not have relied upon the letter. Rougas also notes that "there is no evidence that Captain Conover ever spoke with SEAL management during December 2002 about Rougas' condition." *Id*. But the ALJ relied upon Conover's letter only to support his conclusion that Rougas did not tell Malone that he was too ill to fly, and did not rely upon the letter to make any determinations about the cause of SEAL's termination decision. Thus insofar as Rougas is suggesting that the ALJ erred in relying upon the letter to support a judgment about causation, that suggestion is misplaced.

Rougas was too ill to fly, the request to be removed from the reserve list, and the refusal to fly the Baltimore-Aruba flights)[13] – were protected activities.

The determination whether any of those activities were protected depends upon facts that have yet to be found. For this reason, we prefer to allow the ALJ to determine in the first instance whether any of those activities were protected.[14] In so doing, the ALJ should apply the governing law as we have stated it above – i.e., in order to conclude that an activity was protected, the ALJ must find (1) that Rougas genuinely believed there was or would be a violation or alleged violation of an FAA order, regulation or standard, or a Federal law relating to air carrier safety; (2) that his concern was objectively reasonable in the circumstances; and (3) that Rougas expressed his concern in a manner that was "specific" with respect to the "practice, condition, directive or event" giving rise to the concern.

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[13] Complainant's Post-Hearing Brief, at 21-22, reads as follows:

> B. Protected Activity Before the Suspension.
>
> Rougas engaged in protected activity before his suspension by reporting Malone's disregard for the 1 in 7 rule to Lusk. In December 2002, Rougas objected to flying while sick on December 13-19, 2002. Rougas further reported Malone's illegal directive to Jack O'Brien on December 18. On December 19, 2002, Rougas … refused to work the eleven (11) hour Baltimore-Aruba flights scheduled for December 21-22, 2002 based on his continuing sickness.
>
> C. Protected Activity During and After the Suspension.
>
> Rougas objected to his suspension after January 2, 2003…. In the chronology provided to Lusk, Rougas wrote that he was threatened with termination on December 18, 2002 if he did not fly despite being sick…. Rougas made several protected complaints to Haseltine concerning the conduct of SEAL, including the threat made on December 18, 2002…. Rougas made other reports to the FAA before his suspension concerning Malone's disregard of FAA regulations, including weights and duty time.

[14] Because arguments made for the first time on appeal are waived, the ALJ need analyze only those activities that Rougas drew to his attention at the hearing. Those activities appear to be listed in Complainant's Post-Hearing Brief at 21-22 (see previous footnote).

If the ALJ determines that any activity in which Rougas engaged did constitute protected activity, then he should proceed to determine whether such protected activity contributed to SEAL's termination decision.[15]

## CONCLUSION

Rougas did not take exception to the ALJ's conclusion that he did not engage in protected activity during the Robbins conversation, and substantial evidence supports the ALJ's conclusion that Rougas did not engage in protected activity during the December 18, 2002 call with Malone because he did not tell Malone, and thus did not tell SEAL, that he was too ill to fly. But because the ALJ did not determine whether various other activities in which Rougas engaged were protected activities, and because, as we have explained, those determinations should be made by the ALJ, we **REMAND** the complaint for further proceedings consistent with this opinion.

**SO ORDERED**.

**A. LOUISE OLIVER**
**Administrative Appeals Judge**

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

[15] If the ALJ concludes that any of the conversations between Rougas and the FAA constituted protected activity, then he first should determine whether SEAL had knowledge of those conversations.