



In the Matter of:

MARK J. HOFFMAN,

ARB CASE NO. 06-141

COMPLAINANT,

ALJ CASE NO. 2005-AIR-026

v.

DATE: June 16, 2009

NETJETS AVIATION, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard R. Renner, Esq., *Tate & Renner*, Dover, Ohio

For the Respondent:

Celeste M. Wasielewski, Esq., *Duane Morris LLP*, Washington, District of Columbia

ORDER ON RECONSIDERATION

This case arises under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2008) and its implementing regulations, 29 C.F.R. Part 1979 (2007).¹ Mark Hoffman, a pilot,

¹ AIR 21 provides that “[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,” 49 U.S.C.A. § 42121(a), because the employee has engaged in certain protected activities. These protected activities include: providing to the employer or (with knowledge of the employer) the Federal Government “information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or

complained that his employer, NetJets Aviation (NetJets), violated AIR 21 by denying him an instructor's position in retaliation for his reporting unsafe aircraft conditions.

A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) denying Hoffman's complaint. The Administrative Review Board (ARB or Board) issued a Final Decision and Order (F. D. & O.) on July 22, 2008, affirming the ALJ's recommendation to dismiss. *Hoffman v. NetJets Aviation, Inc.*, ARB No. 06-141, ALJ No. 2005-AIR-026 (ARB July 22, 2008). Hoffman appealed his case to the Sixth Circuit. *Hoffman v. Solis, appeal docketed*, No. 08-4128 (6th Cir. Sept. 15, 2008).² When the Board forwarded the record to the court of appeals, the record did not include an audio disc containing 19 recorded conversations. Complainant's Recordings (CR) 1-19.³ The Board did not have and therefore did not rely on the audio disc when it issued its decision. Upon the Secretary of Labor's motion, the Sixth Circuit issued an order suspending briefing for the Board to obtain and consider the contents of the audio disc. Upon reconsideration, we affirm our prior decision.

BACKGROUND

Further facts appear in our F. D. & O. We summarize them briefly here for background purposes. Hoffman began working at NetJets in 1997. At all relevant times, NetJets managed an air charter operation with about 340 aircraft and 2000 pilots. Hoffman informed the company of his maintenance and safety concerns. These incidents involved flying with a fuel leak in 2001; landing at a closed airport in 2001; referring an aircraft to maintenance for worn nose bay latches in 2004; and refusing to fly with broken landing lights in 2005. F. D. & O. at 2.

An incident involving a ferry permit figures prominently in this case. On July 16, 2004, NetJets scheduled Hoffman to ferry (i.e., transport without paying passengers) an aircraft from Denver to Wichita. NetJets assigned crewmembers from a different fleet to be transported on the flight. Prior to taking off, Hoffman noted that the ferry permit did not authorize carrying non-essential personnel. Hoffman initially discussed the issue with an assistant chief pilot for NetJets, Billy Smith, but, unable to resolve the issue to his satisfaction, Hoffman contacted Dennis Garcia at the Federal Aviation Administration (FAA), who gave verbal approval. Smith later faxed a revised ferry permit form that authorized transport of the other crewmembers. *Id.*

any other provision of Federal law relating to air carrier safety" 49 U.S.C.A. § 42121(a)(1); 29 C.F.R. § 1979.102; *Fullington v. AVSEC Servs., LLC*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 4 (ARB Oct. 26, 2005).

² The court originally docketed this appeal as *Hoffman v. Chao*, but the court substituted Secretary of Labor Solis for Secretary Chao after Secretary Solis replaced Secretary Chao as the current Secretary of Labor.

³ Hoffman labeled the recordings Complainant's Exhibits (CX) 1-19. We have adopted the ALJ's designation of CR to avoid confusion with other exhibits.

On August 2, 2004, NetJets suspended Hoffman for three days for unprofessional conduct for the manner in which he dealt with Garcia and for not following the chain of command within NetJets before contacting Garcia. Hoffman filed a grievance to protest the suspension. After grievance hearings on August 12, 2004, and October 6, 2004, NetJets removed all records of the incident from Hoffman's personnel file and awarded him back pay. *Id.*

Hoffman contended that his maintenance and safety complaints caused NetJets to retaliate against him in violation of AIR 21. In particular, he complained that NetJets denied him an Initial Operating Experience (IOE) Instructor position because of this protected activity. On May 3, 2004, prior to the ferry permit incident, NetJets posted a bid for IOE instructor positions. Candidates for the IOE position were scored from "0" to "3" points in each of three categories: chief pilot and assistant chief pilot feedback, peer feedback, and international experience. *Id.* at 2-3.

Of thirty candidates, NetJets awarded seven IOE positions on July 9, 2004. Hoffman did not receive one of the positions. He scored a "0" in both international experience and supervisory feedback, received a total score of "1," and ranked 27 out of the 30 candidates. *Id.* at 3, 5. By Hoffman's own account, he had applied over 25 times for IOE positions and was "repeatedly denied." Complainant Mark Hoffman's Brief to ARB at 15.

On August 5, 2004, Hoffman filed a grievance over his failure to receive an IOE instructor position. The System Board of Adjustment (SBA) held a hearing on November 3, 2004. Although it did not find a labor law violation, the SBA recommended that Hoffman be granted an interview for the position. The interview took place on November 16, 2004, and, on December 8, 2004, Hoffman learned that he was not awarded an IOE position. Hoffman filed another grievance with the SBA on January 5, 2005. The SBA denied Hoffman's second grievance, citing poor feedback from supervisors and peers, and negative comments concerning his interview as reasons he did not get the position. F. D. & O. at 3.

On March 7, 2005, Hoffman filed his complaint with the Occupational Safety and Health Administration (OSHA), alleging that NetJets denied him an instructor position because of his safety complaints. OSHA investigated Hoffman's allegations, and on May 5, 2005, it determined that NetJets had not violated AIR 21. Hoffman requested a hearing before an ALJ. The ALJ held a hearing on February 7-8, 2006.

During the course of litigation, NetJets became aware that Hoffman had recorded hundreds of conversations between himself and other NetJets employees without their knowledge. After this disclosure, NetJets suspended Hoffman on April 21, 2006, for violating the company's recordation policy. Hoffman's Apr. 25, 2006 motion to add new evidence. Hoffman requested leave to file a supplemental pleading introducing new evidence concerning this suspension. The ALJ denied the motion and issued an R. D. & O. on August 4, 2006.

The ALJ found that Hoffman had engaged in protected activity and that the denial of the IOE position was an adverse action. R. D. & O. at 18. However, the ALJ also ruled that NetJets proved by clear and convincing evidence that it would have denied Hoffman the IOE position

even if he had not engaged in protected activity, and therefore NetJets did not violate AIR 21's employee protection provisions. *Id.* at 19.

We concurred with the ALJ that Hoffman engaged in protected activity and that the denial of the IOE position was an adverse action. F. D. & O. at 4. We further agreed with the ALJ that NetJets proved by clear and convincing evidence that it would have taken the same action absent Hoffman's protected activity.⁴ *Id.* at 5. As noted, Hoffman appealed our decision to the Sixth Circuit, and when the court of appeals received the record, the recordings, CR 1-19, were missing. Although the Board considered testimony and other exhibits covering these same matters, it did not have the audio disc when it issued its decision.

DISCUSSION

The Board has inherent authority to reconsider its opinions.⁵ Hoffman asserts that the audio disc, CR 1-19, contains material facts that we did not consider before rendering our decision. Accordingly, we reconsider our opinion.

As we said in our F. D. & O. at 4, an AIR 21 complainant must 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). The complainant is then entitled to relief unless the employer 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). *See, e.g., Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-003, slip op. at 18 (ARB Jan. 30, 2004).

We will not repeat the application of this paradigm to all the evidence, but rather concentrate on the extent to which, if any, consideration of the recorded conversations makes a

⁴ We noted that the ALJ should have determined whether Hoffman's protected activity was a contributing factor in the alleged adverse action before deciding whether NetJets proved by clear and convincing evidence that it would have taken the same action absent Hoffman's protected activity. F. D. & O. at 5. However, since NetJets met its ultimate burden, the error is harmless.

⁵ *Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. 1-4 (ARB Dec. 21, 2007). The Board applies a four-part test to determine whether to reconsider a case: (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision. *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 2 (ARB July 24, 2006); *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 03-048, 03-084; ALJ Nos. 2002-CAA-005, 2003-ERA-010, slip op. at 2 (ARB May 17, 2006).

difference to the outcome of this case. We note at the outset that, after suspension of the briefing schedule before the Sixth Circuit, NetJets moved that we strike several of the recordings on the audio disc on the ground that they were not admitted below. *See* NetJets' Motion to Strike and Memorandum dated April 1, 2009. Which exhibits were included in the record should have been taken up with the ALJ. It appears from the R. D. & O. that the ALJ deemed CR 1-19 admitted, but he noted that only the recording of the IOE instructor interview, CR 19, warranted discussion. R. D. & O. at 4 & n.4, 12-13, 18. We deny NetJets' motion as untimely and not properly before us, and proceed to the merits of reconsideration.

The recordings include telephone calls arranging for Hoffman's grievance hearings regarding the ferry permit incident and a hostile work environment (lack of flying assignments) claim, and the hearings themselves (e.g., CR 1-7, 9a, b, c, 11-12); telephone calls regarding worn nose bay latches (CR 10) and broken landing lights (CR 14, incorrectly cited to in Hoffman's brief as CX 18); the need to take family medical leave due to his mother's illness (CR 16-17); the IOE interview (CR 19); and the reasons he was not awarded the position (CR 13). Hoffman's 50-page brief refers us to some of the recordings, often in string cites in which he has discussed witness testimony and other evidence. We discuss particularly those he has called to our attention.

The recordings on the audio disk fall into two groups: those that relate to Hoffman's claims of protected activity, and those that relate to his claim that NetJets did not award him the IOE instructor position because of his protected activity.

As we have written, NetJets initially suspended Hoffman over the ferry permit incident, and he filed a grievance. At the beginning of the process, David MacGhee, Senior Vice President, acknowledged that Hoffman had not been treated well and apologized, adding that he and Director of Operations Gary Hart were new and had a business to run. CR 1. The context of the grievance hearings was adversarial; Mark Okey, Director of Labor Relations was disciplining Hoffman in part for not following NetJets' chain of command. *See* Hoffman Brief at 34. But the tone was not. The participants conducted themselves professionally, without raised voices, interruptions, or rudeness.

Although the specific FAA safety regulation at issue was not identified, both the ALJ and the ARB credited Hoffman with protected activity under AIR 21. After two grievance hearings, NetJets presumably concluded that it could not discipline Hoffman for going outside the chain of command for making a complaint to the FAA, and removed evidence of the adverse action from his personnel file, and restored his back pay. The resolution of the grievances was favorable to Hoffman and does not support his theory of malice. Okey, who played a significant role in the grievance process, is not known to have participated in Hoffman's non-selection as an IOE instructor.

Hoffman's brief also discusses the broken landing lights incident. Hoffman Brief at 9-11. Although Hoffman cites to his exhibit CX 18, the conversation he references with Director of Operations Gary Hart and Chief Pilot David Cimarolli is reported on the audio disk at CR 14. NetJets placed the broken landing lights on a minimum equipment list (MEL), meaning in this instance that the plane could fly during the day until scheduled maintenance. Hart and Cimarolli

told Hoffman that the broken landing lights were eligible for a MEL. The director of maintenance and quality control determined that the plane was safe to fly. Nevertheless, Hoffman refused to fly it without (what sounds on the tape to be) FAA approval. In view of the mechanics' assurances that the aircraft was safe to MEL, Hoffman's refusal may not have been reasonable. However, the ALJ and the ARB again credited Hoffman with making a protected safety complaint.

Hoffman correctly reports the conversation between Hoffman, Hart, and Cimarolli in his brief, Hoffman Brief at 11, but he misperceives its significance. After Hoffman's refusal, Hart told him that another pilot would fly the aircraft and that Hoffman would be assigned another airplane. He was not disciplined. Malice is not evident in the tone or the substance of the conversation. CR 14. And even if, as Hoffman asserts, Cimarolli harbored some resentment toward him because of this incident or the nose bay latch incident, *see, e.g.*, Hoffman Brief at 4, he can only speculate that Cimarolli interfered with his selection for the IOE position. Hoffman Brief at 14; *compare* testimony of Todd Jacob, Assistant Director of Flight Standards, Hearing Transcript (Tr.) at 307-07 (could not state that Cimarolli interfered with the selection process at issue).

This brings us to Hoffman's non-selection as IOE instructor. CR 19; *see* Hoffman Brief at 14-20. In our F. D. & O., we concluded that substantial evidence supported the ALJ's findings that NetJets denied Hoffman the job because he did not have international experience, scored poorly among the thirty candidates, and did not interview well. R. D. & O. at 5. As to the content and tone of the interview, we relied upon the trial testimony of witnesses who attended the interview, identified as including Jacob Decker, John Martin, James Nichols, and Billy Smith. *Id.* at 3, 5. After listening to the tape, we find that it is consistent with the trial testimony we have already considered and that substantial evidence supports the ALJ's conclusion "that the interview was conducted in a non-threatening and professional manner." R. D. & O. at 12.

The interview lasted less than an hour. The atmosphere is relaxed with Hoffman and the interviewers addressing each other by their first names. Many of the questions seem to be standard interview questions, showing no hostility or animus toward Hoffman: Why are you interested in the job? What is your background in instructing? What standards would you hold pilots to? How would you deal with a pilot who is not meeting the standards? Would you bend the rules if you were low on fuel, but near an airport? How about training on policies you don't agree with? Have you determined that another pilot was not fit for duty? Hoffman's responses appear to be somewhat indecisive, trying to walk a line between being informal and practical in his handling of situations and being rigid and by the book; he several times refers to following the "chain of command." CR 19.

Hoffman also admitted that he had no international flying experience. When asked what other people would say about him, he first answered that he had "personality conflicts," but then stepped away from that comment to say they would describe him as safety conscious and professional; "pretty diligent I guess." One of the last questions evidently came from Smith, who asked a question that appeared to be based on the ferry permit incident. Hoffman said the issue should be resolved "in-house" but admitted that he would go "as far as I felt was necessary" to be sure things were done right. CR 19.

Hoffman declined an offer to ask questions or make a closing statement. The tape concludes with small talk and laughter about Hoffman's lodging and travel arrangements for the interview. CR 19. While we do not substitute our judgment for that of the interview panel with regard to the substance of Hoffman's answers, it is clear that on the whole the recording does not support his claim of hostility toward him. Even if Smith's question showed individual malice over the ferry permit incident, it does not overcome the tone or testimony of other witnesses who were not involved in Hoffman's safety complaints and who provided abundant evidence that his protected activity had nothing to do with their denial of his promotion to IOE instructor. Substantial evidence thus supports the ALJ's determination that NetJets provided clear and convincing evidence that it would have denied Hoffman the position, even if he had not engaged in protected activity. R. D. & O. at 12.

CONCLUSION

We **DENY** NetJets' Motion to Strike; again **AFFIRM** the ALJ's R. D. & O.; **AFFIRM** our F. D. & O. in all respects; and, upon reconsideration, **DENY** Hoffman's complaint.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge