



**In the Matter of:**

**SHANE SITTS,**

**ARB CASE NO. 09-130**

**COMPLAINANT,**

**ALJ CASE NO. 2008-AIR-007**

**v.**

**DATE: May 31, 2011**

**COMAIR, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**W. Kash Stilz, Jr., *Roush & Stilz*, Covington, Kentucky**

*For the Respondent:*

**Douglas Hall, *Ford & Harrison*, Washington, District Of Columbia; J.  
Stephen Smith, *Graydon, Heady & Ritchey, LLP*, Fort Mitchell, Kentucky**

**Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado,  
*Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge***

### **FINAL DECISION AND ORDER**

This case arises from a complaint brought under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act).<sup>1</sup> The Complainant, Shane Sitts, who worked as a pilot at

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<sup>1</sup> 49 U.S.C.A. § 42121 (Thomson/West 2007).

COMAIR, Inc., alleged that his termination for refusing to fly an assigned flight for safety reasons violated AIR 21. The Occupational Safety and Health Administration (OSHA) dismissed the complaint on March 24, 2008. An administrative law judge (ALJ) held a hearing, and on July 31, 2009, entered a Decision and Order granting relief to Sitts.

## BACKGROUND

### I. Proceedings Below

Complainant Sitts was a pilot with COMAIR, a subsidiary of Delta Air Lines that provides regional flights throughout the United States. COMAIR terminated his employment after he reported a malfunctioning passenger power door assist system to COMAIR that he believed affected aircraft safety, and when COMAIR failed to address his safety concern, refused to fly the plane. The inoperable power door appeared on the aircraft's Minimum Equipment List (MEL) as equipment that could remain malfunctioning under specific conditions but still allow for operation of the flight. Sitts filed a complaint with OSHA alleging that his termination violated AIR 21. OSHA determined that because "the malfunctioning power door assist system is a MEL-deferrable item approved by the FAA," it was "not related to aviation safety or the airworthiness of the [air]craft," and dismissed the complaint.<sup>2</sup>

Following a two-day hearing, the ALJ entered a Decision and Order Granting Relief (D. & O.), determining that COMAIR's termination of Sitts' employment violated AIR 21. *See* 49 U.S.C.A. § 42121. The ALJ ordered Sitts' immediate reinstatement and awarded him \$122,440 in backpay, pre- and post-judgment interest, compensatory damages in the amount of \$25,000, and attorney's fees and costs. We believe that the D. & O. is comprehensive, well reasoned, consistent with law, and fully supported by the record evidence. Accordingly, we affirm.

### II. Regulatory Background

Title VI of AIR 21 provides whistleblower protection for employees of air carriers who notify authorities (the employer or Federal Government) that their employers are violating federal law related to air carrier safety.<sup>3</sup> In enacting the statute, Congress understood that:

[c]urrently, . . . employees face the possibility of harassment, negative disciplinary action, and even termination if they report violations. . . . For that reason,

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<sup>2</sup> The ALJ's Decision and Order Granting Relief, ALJ No. 2008-AIR-007 at 7 (July 31, 2009) (D. & O. at 7).

<sup>3</sup> 49 U.S.C.A. §. 42121(a)(1).

we need a strong whistleblower law to protect aviation employees from retaliation by their employers when reporting incidents to federal authorities.<sup>[4]</sup>

To prevail under the AIR 21 whistleblower statute, a complainant must prove he engaged in activity the statute protects. Sitts alleges that his reporting of the malfunctioning power passenger door to COMAIR, and subsequent refusal to fly the aircraft when COMAIR failed to remedy his safety concern, was protected activity because it was based upon a reasonable belief that the malfunctioning door posed a safety hazard. In determining whether Sitts' conduct was protected activity under AIR 21, however, assessing the reasonableness of his conduct requires some understanding of FAA regulations pertaining to the Minimum Equipment Lists.

Except as provided in 14 C.F.R. § 91.213, all instruments and equipment on an aircraft must be operative to engage in flight. In 1988, the FAA amended the FAR to allow the publication of a Minimum Equipment List (MEL) for aircraft, which permits an owner or operator to conduct operations with certain inoperative equipment and instruments.<sup>5</sup> When an aircraft is manufactured, the FAA develops a Master Minimum Equipment List (MMEL) in cooperation with the manufacturer.<sup>6</sup> The MMEL “contains a list of items of equipment and instruments that may be inoperative on a specific type of aircraft.”<sup>7</sup> The MMEL serves as the basis for the development of an individual operator's MEL, which is the “specific inoperative equipment document for a particular make and model aircraft by serial and registration numbers.”<sup>8</sup> The FAA's Advisory Circular advises that “the MEL *permits* operation of the aircraft under specified conditions with certain equipment inoperative.”<sup>9</sup> The 1991 Advisory makes clear that “operators must exercise good judgment and have, at each required inspection, any inoperative instrument or equipment repaired or inspected or the maintenance deferred, as appropriate.”<sup>10</sup>

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<sup>4</sup> 145 Cong. Rec. S2855 (Statement of Sen. John Kerry) (Mar. 17, 1999).

<sup>5</sup> See Department of Transportation, Federal Aviation Administration, Inoperative Instruments or Equipment, Final Rule, 53 Fed. Reg. 50,190 (No. 239) (Dec. 13, 1988).

<sup>6</sup> See FAA Advisory Circular No. 91-67 (dated June 28, 1991).

<sup>7</sup> *Id.* at iii.

<sup>8</sup> *Id.* at iv.

<sup>9</sup> *Id.* at iv, Par. 6. See also 14 C.F.R. § 91.213 (MEL regulation).

<sup>10</sup> *Id.* at ii, Par. 5; see also 53 Fed. Reg. 50,190.

### III. Facts

#### A. *The MEL-Deferred Passenger Door Power Assist System*

The passenger door power assist system, PDPAS, is a mechanism that regulates the opening and closure of the cabin door passengers use to enter and exit the plane.<sup>11</sup> The PDPAS automatically closes the cabin door on departure, and eases the opening of the door by flight attendants and grounds crew on arrival.<sup>12</sup> The MEL for the plane that COMAIR assigned Sitts to fly on November 12, 2007, stated that the PDPAS “may be inoperative provided [the] door is verified manually operative (opens and closes) without any interference.”<sup>13</sup> The MEL specified how to handle an inoperative PDPAS:

For an inoperative Passenger Door Power Assist System, do as follows:

1. Do a deactivation of the Passenger Door Power Assist Motor . . . .
2. Open and close the passenger door to make sure the inoperative Power Assist System does not affect the normal door operation.
3. Have a qualified person available to assist in closing the door prior to departure.

Placard the Flight Attendant Panel

NOTE 1: Stand clear of door when opening (door opens faster).

NOTE 2: A qualified person should be capable of closing the door from the outside without the Power Assist System operating. A flight crewmember inside the airplane can assist by pulling the interior hand grip to move the door to the CLOSED position.<sup>[14]</sup>

#### B. *Events Leading To Sitts’ Termination by COMAIR*

The ALJ made findings as to a series of factual events that occurred related to COMAIR’s MEL-deferred use of inoperable power cabin door systems, which led to Sitts’ termination in November 2007. We defer to the ALJ on credibility of the witness testimony, and hold that the ALJ’s findings are fully supported by substantial evidence in the record. The factual findings are summarized below.

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<sup>11</sup> D. & O. at 2 & n.1.

<sup>12</sup> *Ibid.*

<sup>13</sup> D. & O. at 2, citing Complainant’s Exhibit (Compl. Exh.) 7 at p. 8.

<sup>14</sup> Compl. Exh. 7, p. 8.

1. January 2004

In January 2004, Sitts was waiting to board a plane that he was assigned to fly from Pittsburgh to Cincinnati when he heard a “large bang.”<sup>15</sup> Deplaning crew members told Sitts that the aircraft had a deferred PDPAS and that the cabin door had been dropped.<sup>16</sup> Maintenance crew inspected the door and found it airworthy to operate to Cincinnati. Sitts contacted operations in Cincinnati and asked to have ramp agents assist with the door on arrival.<sup>17</sup> Sitts flew the aircraft to Cincinnati. On landing, the plane sat at the gate for 20 minutes waiting for ramp personnel to open the door.<sup>18</sup> After several requests for assistance there was a knock on the door. Flight attendants pushed the door open from inside, and nearly hit a ramp agent’s face by less than an inch.<sup>19</sup> The ramp agent became upset, and told Sitts that she had not been instructed on how to properly open a door with an inoperable PDPAS.<sup>20</sup> Sitts testified that a COMAIR maintenance supervisor, Terry Dunaway, inspected the door and told Sitts “the airplane is not going anywhere, it’s a safety issue.”<sup>21</sup> Dunaway told Sitts that an inoperable PDPAS can damage the door itself, the wheel of the plane, and/or the frame.<sup>22</sup> Dunaway also told Sitts that the unassisted door, which weighs about 250 pounds, is a “safety issue with ramp personnel” because there is no warning on the door that it would fall unassisted nor instruction on how the door should be handled on opening.<sup>23</sup> Sitts testified that Dunaway refused to sign off on the aircraft, and Sitts was reassigned to a different plane to make the assigned flight.<sup>24</sup>

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<sup>15</sup> Hearing Transcript (Tr.) at 42.

<sup>16</sup> Tr. at 42.

<sup>17</sup> *Id.*

<sup>18</sup> Tr. at 43.

<sup>19</sup> Tr. at 43-44.

<sup>20</sup> Tr. at 44.

<sup>21</sup> Tr. at 44-45; D. & O. at 4.

<sup>22</sup> Tr. at 45.

<sup>23</sup> *Id.*

<sup>24</sup> Tr. at 45-46; Compl. Exh p. 15; see also D. & O. at 3-4.

## 2. February 2004

In February 2004, Sitts was waiting to board an aircraft that had just landed. When the flight attendant opened the door, the door hit the ground and bounced six feet back into the air then bounced “multiple” times after that.<sup>25</sup> Sitts requested that maintenance inspect the door, and maintenance responded that they would inspect the door but not repair it.<sup>26</sup> Sitts testified that he informed Chief Pilot Max Roberts about his concerns with the door and the safety hazard that it posed, particularly with the “ice” and “snow on the ramp.”<sup>27</sup> Sitts testified that he was reassigned from the flight, and Roberts told Sitts that he would need a union official “because he was going to be fired.”<sup>28</sup> Sitts met with Roberts and a Union representative. On February 23, 2004, Sitts received a letter from COMAIR stating that he had, inter alia, engaged in “insubordination by refusing to fly a legally assigned trip with an A/C [aircraft] with a legal deferral.”<sup>29</sup> The letter stated that COMAIR considered terminating Sitts, but decided instead to impose a 30-day suspension. The letter stated that future instances of “sub-standard performance and/or violation of the rules would result in immediate termination.”<sup>30</sup>

## 3. October 2005

In 2005, COMAIR maintenance called Sitts to “ferry” an aircraft (i.e., fly a plane with no passengers) from Boston to Cincinnati.<sup>31</sup> He was informed that the plane’s PDPAS cable broke at JFK and the door was deferred.<sup>32</sup> The plane was nonetheless flown to Boston with passengers. When the door was opened in Boston, a cable malfunctioned causing the door to hit the ground and damaging the “skin” of the door and a wheel attached to the bottom of the door.<sup>33</sup> Sitts testified that the inoperable PDPAS had caused severe damage to the outdoor skin of the main cabin door, and that

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<sup>25</sup> Tr. at 59; see also D. & O. at 4.

<sup>26</sup> Tr. at 59-60.

<sup>27</sup> Tr. at 60.

<sup>28</sup> Tr. at 61-62; D. & O. at 5.

<sup>29</sup> Tr. at 62-65; Compl. Exh. 4.

<sup>30</sup> *Ibid.*

<sup>31</sup> Tr. at 46.

<sup>32</sup> *Id.*

<sup>33</sup> Tr. at 46-47; D. & O. at 13.

the door had been shut with speed tape.<sup>34</sup> Sitts learned that the door was taped shut because the cable wires were hanging out.<sup>35</sup> Sitts testified that he was told not to use the cabin door, and to fly the plane unpressurized, below 10,000 feet, and at 250 knots.<sup>36</sup> Sitts believed that the door must have been damaged and would not close and that the tape kept the door shut during flight.<sup>37</sup> Sitts believed that the directive to fly the plan unpressurized was consistent with that belief because pressurization pushes out on the fuselage and could force open a door that was not securely closed.<sup>38</sup> Sitts boarded the flight through the service door and ferried the plane to Cincinnati as ordered.<sup>39</sup>

#### 4. November 12, 2007

In November 2007, Sitts was scheduled to operate Flight 4996 from Cincinnati to New York.<sup>40</sup> The plane's logbook noted that the PDPAS was deferred.<sup>41</sup> Sitts asked the maintenance crew whether the door would be fixed.<sup>42</sup> Sitts understood that it took only "a couple of minutes" to replace the service unit.<sup>43</sup> Maintenance told Sitts that the door would not be fixed at that time because there was no time or that there were no mechanics available.<sup>44</sup> Sitts conveyed his concerns to maintenance, including information that Dunaway had told him in 2004.<sup>45</sup> Sitts next explained his concerns to Chief Pilot Eric Barrell.<sup>46</sup> Barrell told Sitts that he would contact maintenance at JFK to

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<sup>34</sup> Tr. at 46-47.

<sup>35</sup> Tr. at 46.

<sup>36</sup> Tr. at 48-49.

<sup>37</sup> Tr. at 48-53.

<sup>38</sup> Tr. at 52-53; see also D. & O. at 13.

<sup>39</sup> Tr. at 53.

<sup>40</sup> Tr. at 111.

<sup>41</sup> Tr. at 112.

<sup>42</sup> *Id.*

<sup>43</sup> Tr. at 112; see also D. & O. at 5.

<sup>44</sup> Tr. at 112-113.

<sup>45</sup> Tr. at 113.

<sup>46</sup> *Id.*

manually open the door when the plane arrived.<sup>47</sup> Sitts objected because the MEL states that personnel must stay clear of the door when opening. Sitts told Barrell that he would not fly the plane unless his safety concern was addressed.<sup>48</sup> Barrell assigned another crew to the flight.<sup>49</sup>

On December 4, 2007, Sitts was informed that his employment was terminated because he refused to pilot Flight 4997 on November 12, 2007, and for previously failing to pilot a flight in 2004.<sup>50</sup> In both situations, Sitts reported an inoperable PDPAS to COMAIR, and the company did not take measures to remedy the unsafe condition.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary has jurisdiction to review the ALJ's decision under AIR 21.<sup>51</sup> The Secretary has delegated that authority to the Administrative Review Board

The Board reviews the ALJ's factual findings for substantial evidence, and conclusions of law de novo.<sup>52</sup> In this case, the ALJ's factual findings are based on credibility determinations of the witnesses at trial. The ARB defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable, because the ALJ, unlike the ARB, observes witness demeanor in the course of the hearing."<sup>53</sup>

## DISCUSSION

### I. Legal Standard of AIR 21 Whistleblower Complaint

AIR 21 provides:

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<sup>47</sup> *Id.*

<sup>48</sup> Tr. at 112-113.

<sup>49</sup> Tr. at 113; see also D. & O. at 5.

<sup>50</sup> Tr. at 111-114; Compl. Exh. 3.

<sup>51</sup> 49 U.S.C.A. § 42121(b)(3); 29 C.F.R. § 1979.110 (2010).

<sup>52</sup> *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

<sup>53</sup> *Chen v. Dana Farber Cancer Inst.*, ARB 09-058, ALJ No. 2006-ERA-009, slip op. at 9 (ARB Mar. 31, 2011).



No 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 . . . 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.<sup>[54]</sup>

To prevail under AIR 21, Sitts must prove by a preponderance of evidence, that, inter alia, he engaged in protected activity.<sup>55</sup> Protected activity under AIR 21 has two elements: (1) the information that the complainant provides must involve a purported violation of a regulation, order or standard relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be objectively reasonable.<sup>56</sup> A complainant need not prove an actual violation, but only establish a reasonable belief that his or her safety concern was valid.<sup>57</sup>

## II. Sitts Engaged In Protected Activity

### 1. *Sitts reasonably believed that the information he reported on the inoperable PDPAS involved a violation of aircraft safety*

a. The Federal Aviation Regulations would lead a pilot to reasonably believe that he or she has direct responsibility for determining whether an aircraft is in safe condition, and the duty to report such concerns. For example, the FAA regulations expressly provide that the “pilot in command” is “directly responsible for, and is the final authority as to the operation of that aircraft.”<sup>58</sup> The FAR instructs, inter alia, that

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

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<sup>54</sup> 49 U.S.C.A. § 42121(a); *Vieques Air Link, Inc. v. Dep't of Labor*, 437 F.3d 102, 107 (1st Cir. 2006).

<sup>55</sup> *Hoffman v. Solis*, 636 F.3d 262, 267-268 (6th Cir. 2011); *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (ARB Nov. 30, 2006).

<sup>56</sup> *Douglas v. Skywest Airlines*, ARB Nos. 08-070, 08-074; ALJ No. 2006-AIR-014 (ARB Sept. 30, 2009).

<sup>57</sup> *Rooks*, ARB No. 04-092, slip op. at 6.

<sup>58</sup> 14 C.F.R. § 91.3(a).

- (b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.<sup>59]</sup>

The pilot in command “is, during flight time, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo, and airplane.”<sup>60</sup> Further, the pilot in command has the final authority, along with the dispatch officer, to sign off on a flight and that authority is exercised only after both believe that the flight is safe.<sup>61</sup>

b. The ALJ found that Sitts had “a genuine safety concern related to perceived violations of regulations related to air safety and the responsibilities of a pilot.”<sup>62</sup> Substantial evidence fully supports that determination.

Sitts believed that flying the aircraft on November 7, 2007, with a faulty PDPAS, compromised the integrity and safety of the aircraft and ground crew. This reasoning was based on his experiences in January 2004, when Sitts spoke with COMAIR’s maintenance supervisor, Terry Dunaway, who told Sitts that a malfunctioning PDPAS on the cabin door of the plane that Sitts observed presented a safety issue. Dunaway, a maintenance specialist, told Sitts how a malfunctioning PDPAS can damage the plane, including the wheel and frame of the aircraft. Sitts testified that in 2004, Dunaway refused to sign off on such an aircraft for flight. Moreover, Sitts saw the safety threat that such a malfunctioning door presented to ground crew. Sitts saw on a flight that he captained with a MEL-deferred PDPAS in February 2004, that a ramp agent was nearly hit in the face when the door was suddenly opened, and he observed that COMAIR’s

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<sup>59</sup> 14 C.F.R. § 91.7.

<sup>60</sup> 14 C.F.R. § 121.533(d); see also *Douglas*, ARB Nos. 08-070, 08-074; slip op. at 9 (pilot’s decision to declare himself and crew “unfit for flight” due to fatigue stems from authority under 14 C.F.R. §§ 91.3 and 121.533 giving pilot “full control and authority in the operation of aircraft [including] over other crewmembers.”).

<sup>61</sup> 14 C.F.R. § 121.663 (“The pilot in command and an authorized aircraft dispatcher shall sign the release only if they both believe that the flight can be made with safety.”). See also *In Re Air Crash at Dallas/Fort Worth Airport, on Aug. 2, 1985*, 919 F.2d 1079, 1084 (5th Cir.) cert. denied, 502 U.S. 899 (1991) (under 14 C.F.R. § 91.3, the captain is the “airplane commander” and “preeminent authority” of an aircraft, and that “[a]lthough aircraft operational safety is the responsibility both of ground personnel and of the air crew, [t]he pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.”).

<sup>62</sup> D. & O. at 9-10.

chief pilot failed to properly warn the ground crew about how to handle the opening of a cabin door with a malfunctioning PDPAS to avoid injury. Further, Sitts testified that when he expressed his concerns to COMAIR Chief Pilot Barrell on November 12, 2007, he stated that Barrell offered to tell the ground crew to stand under the door on landing. This instruction, however, directly contravened the instructions on the MEL, thus suggesting that COMAIR had not put in place proper direction for ground crew to handle opening a cabin door with an inoperable PDPAS system. Based on these ALJ findings, Sitts had a “reasonable belief” that the malfunctioning PDPAS “implicated safety.”<sup>63</sup>

The ALJ’s finding as to the reasonableness of Sitts’ concerns is bolstered by COMAIR’s response to the complaint that Sitts filed with the Airline Safety Action Program (ASAP) after he was informed that he would be terminated.<sup>64</sup> Sitts explained his concerns with the “safety hazards associated with this deferral” as: (1) the absence of “labeling on the outside of the door that states the operation of the door with the deferral, i.e.: how to open the door safely, how to avoid injury by door, needing assistance to open and close door, and not to stand under door while opening door” and (2) “the excessive damage that is caused to door if dropped to the ramp without assistance,” e.g., the “wheel on the door can be damaged, the door can be bent or twisted, the door frame can be bent or pulled from the AC itself.”<sup>65</sup> Sitts further reported that he understood that the “deferral has been around for a considerable time, but after talking to multiple people within COMAIR’s safety program [including the] manager, maintenance supervisors and ALPA safety reps[.] [t]hey all agree this MEL needs to be changed to a shorter duration repair interval.”<sup>66</sup> The following month, the ASAP manager for COMAIR “agree[d]” that Sitts raised “a significant safety factor,” and that COMAIR would “pursu[e] getting the MEL changed with the Program manager’s office.”<sup>67</sup>

c. COMAIR argues that the safety obligations of the pilot in command do not extend to the ground crew. However, we agree with the ALJ’s determination that Sitts reasonably interpreted his obligations as pilot in command broadly to include ground personnel who assist in deplaning.<sup>68</sup> Although Sitts is not required to prove that flying

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<sup>63</sup> *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, 07-121; ALJ No. 2006-AIR-022 (ARB June 30, 2009).

<sup>64</sup> Tr. at 114; Compl. Exh. 7.

<sup>65</sup> Compl. Exh. 7.

<sup>66</sup> *Id.*

<sup>67</sup> Compl. Exh. 7; see also Tr. at 116.

<sup>68</sup> D. & O. at 14 (“I find that it was reasonable for Sitts to believe that [his concern over the safety of the grounds crew on arrival] was consistent with his legal obligation to ensure safety.”).

the aircraft on November 7, 2007, would violate a specific air carrier safety regulation,<sup>69</sup> he understood, consistent with the FAR, that his position as pilot in command makes him responsible for the safe “operation of [the] aircraft.”<sup>70</sup> Sitts credibly testified that his responsibility for the safety of the aircraft “begins when you’re first assigned to a flight with an aircraft . . . [a]nd it ends . . . at your destination.”<sup>71</sup> Sitts’ understanding of his obligations over aircraft operations during flight time included the moments prior to take off, and the moments after takeoff and deplaning. He testified, “You’re responsible for how the plane is safely operated on the ground . . . when you land. You’re responsible to make the decision to make the airplane operate where it won’t cause injury to anybody on, either the ground or inside the aircraft.”<sup>72</sup>

d. COMAIR contends that the pilot in command regulations, e.g., 14 C.F.R. §§ 91.3 and 91.7, conflict with the MEL regulation, 14 C.F.R. § 91.213, and that MEL-deferrals should take priority over a pilot’s authority to report concerns over inoperable equipment and to refuse to fly aircraft with MEL-deferred equipment. However, these two regulations do not necessarily conflict. While the MEL regulation authorizes pilots to fly aircraft with malfunctioning equipment, there is *nothing in the regulation requiring that pilots do so*. Indeed, there is no language in the MEL regulation mandating that aircraft with MEL-deferred equipment be flown. Rather, the MEL regulation *permits* pilots to fly such aircraft by carving an exception to the general rule that “no person may take off an aircraft with inoperative instruments or equipment installed unless” certain conditions are met.<sup>73</sup> This interpretation of 14 C.F.R. §§ 91.3 and 91.7 (pilot in command regulations) and 14 C.F.R. § 91.213 (MEL regulation) is consistent with the practices that witnesses testified to at the trial. For instance, the ALJ found that Sitts, who had worked as a pilot for seven years before being terminated in 2007, reasonably believed that as the pilot in command, he had final authority to determine whether malfunctioning equipment adversely affected the safety of an aircraft, even if the equipment appeared on the MEL-deferred list.<sup>74</sup> COMAIR pilot Sarker, a six-year veteran at the airline, testified that a refusal to fly based on MEL-deferred equipment on a plane is a “judgment call” for the pilot in command.<sup>75</sup> Testimony by Burrell and Briner

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<sup>69</sup> Rooks, ARB No. 04-092, slip op. at 6.

<sup>70</sup> 14 C.F.R. § 91.3(a).

<sup>71</sup> Tr. at 71.

<sup>72</sup> Tr. at 71-72.

<sup>73</sup> 14 C.F.R. § 91.213.

<sup>74</sup> D. & O. at 11 (“Thus I do not find that the testimony presented at hearing establishes that Sitts was unreasonable in believing either that a MEL is not a guarantee of safety or that a pilot has an independent obligation to ensure safety, notwithstanding the MEL.”).

<sup>75</sup> Tr. at 179.

did not directly contravene that practice, as neither of them testified that pilots are mandated to fly an aircraft that contains inoperable equipment that is listed as MEL-deferred.<sup>76</sup>

e. COMAIR next argues that the ALJ's decision contravenes the court of appeals' decision in *Air Line Pilots Ass'n Int'l v. FAA*,<sup>77</sup> in which a pilot union challenged before the FAA an airliner's suspension of two pilots who refused to fly a regularly scheduled flight due to weather conditions. Their refusal was based on their claim that weather conditions and the inoperative condition of the aircraft's autopilot feature, which was MEL-deferred, made the flight unsafe.<sup>78</sup> The FAA dismissed the complaints based in part on its determination that the MEL "modifies the scope of the pilot's authority under [14 C.F.R. §] 91.3, and that therefore the pilot had no FAA protected right to refuse flights for lack of operable equipment not required by the MEL."<sup>79</sup>

The court of appeals affirmed the dismissal of the pilots' whistleblower complaints, holding that the "FAA construction is not without rational basis."<sup>80</sup> However, the court of appeals' decision in *Air Line Pilots Ass'n* is not dispositive here. First, the court of appeals' decision involved a complaint with the FAA, and was issued in 1971, many years before AIR 21's enactment on April 5, 2000. Indeed, AIR 21 was enacted for just this purpose; to improve airline safety by protecting airline employees from retaliation for reporting alleged violations of federal laws related to aviation safety. Second, a close evaluation of the court of appeals' decision reveals that the court struggled with the correctness of the FAA's policy position on this issue. While the court recognized a rational basis for the FAA's policy position, the court observed that "a different view of the interrelationship of the MEL regulations and the pilot-in-command regulation might represent better policy."<sup>81</sup> Indeed, the court of appeals stated as follows:

It is entirely possible to view the two regulations as complementing each other doubly to ensure air safety. Thus viewed, the pilot could not authorize a flight lacking any MEL required equipment, while at the same time no flight could be undertaken when the pilot believes in good

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<sup>76</sup> See D. & O. at 10-11; see also Tr. at 234 (Burrell); Tr. at 253-254 (Briner).

<sup>77</sup> 454 F.2d 1052 (D.C. Cir. 1971).

<sup>78</sup> *Id.* at 1053.

<sup>79</sup> *Id.* at 1054.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Air Line Pilot's Assn*, 454 F.2d at 1054.

faith that in light of all the circumstances the flight would be unsafe even with all the required equipment.<sup>[82]</sup>

Our reading of the two regulations as applied to the set of facts presented in this AIR 21 whistleblower case is consistent with the court of appeals' alternative view of reconciling the FAR's pilot in command regulation with the MEL regulation.

Finally, COMAIR's reliance on this Board's recent decision in *Hindsman v. Delta AirLines, Inc.*,<sup>83</sup> is unavailing. In *Hindsman*, we held that a flight attendant who was fired for refusing to return to work after an incident in which she reported as possibly unsafe a questionable portable oxygen device (POC) on board a flight. Under these facts, the flight attendant alleged that she engaged in protected activity when she took time at the start of a flight to check whether a POC on board was FAA-approved. We determined that she established that the POC complied with FAA rules prior to the flight taking off, and for this reason, among others, we determined that her termination for failure to return to work was not protected under AIR 21. COMAIR asserts that the same result should apply here because the MEL-deferred PDPAS undercuts any objective reasonableness that Sitts would have that MEL-deferred equipment would ever pose a safety concern.

The facts in *Hindsman*, however, are factually distinguishable. First, the complainant in *Hindsman* was a flight attendant, and under the FAR does not have final authority for ensuring the safe operation of flights as does the pilot in command. Second, the complainant in *Hindsman* checked the Flight Manual to ensure that the POC was FAA-authorized before the flight took off. Once she checked and established that that the POC on board was FAA-authorized, the captain was informed and the flight was dispatched. In this case, the malfunctioning PDPAS was never fixed, and based on Sitts' past experiences with inoperable PDPAS systems; he had a reasonable belief that this equipment affected air safety *despite* that it was MEL-deferred. Unlike the flight attendant in *Hindsman*, Sitts, as pilot in command of the aircraft, has final authority to determine whether an aircraft is safe. His reporting of the MEL-deferred equipment as unsafe and failing to pilot a plane when COMAIR did not address his safety concern, is protected activity under AIR 21 where he, as the pilot in command, reasonably believes that the inoperable equipment compromises air carrier safety.

## **2. *Sitts' concerns over aircraft safety were objectively reasonable***

The ALJ found that Sitts had an objectively reasonable belief that flying an aircraft with a malfunctioning PDPAS, even though MEL-deferred, was unsafe. Substantial evidence fully supports that finding as well.

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<sup>82</sup> *Id.* at n.5.

<sup>83</sup> ARB No. 09-23, ALJ No 2008-AIR-013 (ARB June 30, 2010).

The ALJ was fully convinced by the truthfulness of Sitts' testimony as to his experiences with malfunctioning power door systems on COMAIR aircraft, and the genuineness of his concerns about the safety of such aircraft.<sup>84</sup> Sitts' testimony is not undermined by COMAIR's assertions that other pilots regularly flew with MEL-deferred equipment, including MEL-deferred PDPAS systems. COMAIR pilot Sarker testified that MEL-deferred equipment does not ensure that a plane is fully safe for flight.<sup>85</sup> Sarker also testified that he had no disagreement with Sitts' decision not to fly with a MEL-deferred PDPAS.<sup>86</sup> Sarker testified that "it's good to consider the people who work around you and not just the aircraft."<sup>87</sup> COMAIR Chief Pilot Barrell testified that he does not think that a MEL-deferred PDPAS affects aircraft safety, but did not go so far as to state that pilots are required to fly such aircraft. The ALJ found that Barrell's understanding of the FAR is that a pilot in command has authority to refuse to fly a plane with MEL-deferred equipment where there is "some logic or some judgment" to support that decision.<sup>88</sup> COMAIR's Director of Flight Operations, Steve Briner, testified that while the company's training program directs that the "MEL usurps [the pilot's] authority" on minor equipment issues, e.g., a bulb for a reading light,<sup>89</sup> Briner admitted that pilots have authority to not fly with inoperable, MEL-deferred equipment when appropriate.<sup>90</sup>

**3. *Sitts' decision not to fly the plane following COMAIR's refusal to address his aircraft safety concerns was protected activity***

Generally, under whistleblower statutes, when a safety concern has been investigated and determined to be safe, and has been adequately explained to the employee, the employee's continuing safety concern is no longer protected.<sup>91</sup> When, as here, a pilot expresses a safety concern that relates to the aircraft, and that safety concern

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<sup>84</sup> D. & O. at 10-20.

<sup>85</sup> Tr. at 175 ("there are lots of MELs out there where you can defer items but you cannot carry any passengers onboard because it's not as safe").

<sup>86</sup> Tr. at 179.

<sup>87</sup> *Id.*

<sup>88</sup> D. & O. at 6, *citing* Tr. at 234.

<sup>89</sup> Tr. at 252-253.

<sup>90</sup> Tr. at 253-255.

<sup>91</sup> *See, e.g., Rocha v. AHR Util. Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001, -002, slip op. at 10-14 (ARB June 25, 2009) (involving the whistleblower protection section of the Pipeline Safety Improvement Act of 2002).

is not addressed by the company, the pilot's failure to work (i.e., fly the aircraft) must obviously be considered part of the protected activity, otherwise a pilot would be forced to choose between flying an unsafe aircraft or risk termination from employment.<sup>92</sup> In other words, a pilot's refusal to fly when he or she reasonably believes that an aircraft is unsafe is fully consistent with the purposes of AIR 21.<sup>93</sup>

In this case, the ALJ found that the only investigative measures taken by COMAIR, and explanation given to Sitts, occurred in a "15-20 minute phone call between Sitts and Barrell."<sup>94</sup> During this conversation, "Sitts believed that Barrell understood what his concerns were."<sup>95</sup> Although Barrell stated that he would have maintenance meet the plane at JFK, Sitts remained concerned because he knew that having ground personnel assist in opening the door, if done incorrectly, would violate the MEL and pose a safety hazard.<sup>96</sup> The ALJ found that "[s]ince Barrell testified that he did not know what maintenance would do to open the door safely, he clearly could not have given an explanation to Sitts."<sup>97</sup> The ALJ found that Barrell did not further engage Sitts because "he had other issues going on" and just wanted "to move on with it."<sup>98</sup> The ALJ concluded, and we agree, that COMAIR's efforts to convince Sitts that working conditions were safe were insufficient to undermine the continuing reasonableness of Sitts' safety concerns.<sup>99</sup> We thus agree with the ALJ that Sitts' activity did not lose its protected status at any time.<sup>100</sup> Given COMAIR's failure, in these circumstances, to

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<sup>92</sup> See, e.g., *Pensyl v. Catalytic, Inc.*, No.1993-ERA-002 (DOL Office of Admin. Apps. Jan. 13, 1994) ("[a] worker has a right to refuse to work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful.").

<sup>93</sup> See *supra* at 2, 145 Cong. Rec. S2855 (Statement of Sen. John Kerry).

<sup>94</sup> D. & O. at 18.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 20.

<sup>98</sup> *Id.*, citing Tr. at 231.

<sup>99</sup> D. & O. at 20, citing *Dobreuenaski v. Associated Univs., Inc.*, ARB No. 97-125, ALJ No. 96-ERA-044, slip op. at 12 (ARB June 18, 1998).

<sup>100</sup> COMAIR also argues that authorizing pilots to refuse to fly planes with MEL-deferred equipment because of air safety concerns will create flight delays and cancellations. There is no evidence in the record to support this generalization. Under the circumstances presented in this case, there is no evidence that Sitts routinely raised concerns over MEL-deferred equipment. Indeed, aside from the November 7, 2007, incident, for which he was terminated, the only other time that Sitts reported safety concerns over MEL-deferred equipment was in February 2004. The 2004 incident also involved a MEL-deferred PDPAS,



investigate and undertake efforts to correct the safety concern, Sitts' subsequent decision not to fly the aircraft was reasonable and protected under the Act.

### **CONCLUSION**

Substantial evidence supports the ALJ's determination that Sitts engaged in protected activity when he reported the inoperable PDPAS and refused to fly the plane when COMAIR failed to address the safety concern. COMAIR's termination of Sitts' employment violated AIR 21. We agree with the ALJ's order reinstating Sitts to his prior position under the terms, conditions, and privileges that he would be entitled to had he not been discharged. We also agree with the ALJ's grant of back pay, pre- and post-judgment interest, compensatory damages, and attorney's fees and costs. Accordingly, the ALJ's decision is **AFFIRMED**.

**SO ORDERED.**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

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and resulted in a 30-day suspension. Briner testified that since his employment with COMAIR in 1997, no pilot, other than Sitts, has been disciplined for reporting MEL-deferred equipment and failing to fly a plane where the equipment was not fixed. Tr. at 256. Thus there is no evidence in this case that a pilot's discretion to usurp a MEL determination based on concerns over safety of the MEL-deferred equipment would cause an inordinate increase in flight delays and cancellations at least with respect to COMAIR. In any event, this concern is one of airline regulatory policy that is outside of our jurisdiction and most appropriately under the purview of the Federal Aviation Administration.