In the Matter of:

ROBERT BENJAMIN,

COMPLAINANT,

v.

CITATIONSHARES MANAGEMENT, L.L.C., N/K/A CITATIONAIR,

RESPONDENT.

ARB CASE NO. 12-029

ALJ CASE NO. 2010-AIR-001

DATE: November 5, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Daniel M. Young, Esq.; *Wofsey, Rosen, Kweskin & Kuriansky, LLP*; Stamford, Connecticut

For the Respondents:
Conrad S. Kee, Esq. and Tal Kadar, Esq.; *Jackson Lewis LLP*, Stamford, Connecticut

BEFORE: Paul Igasaki, *Chief Administrative Appeals Judge*: Joanne Royce, *Administrative Appeals Judge;* and Luis A. Corchado, *Administrative Appeals Judge*

ORDER OF REMAND

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 (Thomson/West 2007), and its implementing regulations at 29 C.F.R. Part 1979 (2013). Robert

Benjamin filed a complaint with the Occupational Safety and Health Administration (OSHA) claiming that CitationShares Management, L.L.C n/k/a CitationAir (CitationAir) terminated his employment in violation of the AIR 21 whistleblower provisions. OSHA dismissed his case, and Benjamin filed objections and a request for hearing with the Office of Administrative Law Judges. Following a hearing held on July 25-29, 2011, the Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) on December 22, 2011, dismissing the claim because he found no protected activity. Benjamin petitions for review. We find that the ALJ's findings establish that Benjamin engaged in at least three protected activities, all of which were inextricably intertwined with one or more unfavorable employment actions CitationAir took against Benjamin. Consequently, we reverse the ALJ's D. & O. and remand for further proceedings.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to the Administrative Review Board to issue final agency decisions in AIR 21 cases. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a). The Board reviews an ALJ's factual determinations under the substantial evidence standard and his legal conclusions de novo. 29 C.F.R. § 1979.110(b); *Williams v. American Airlines,* ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 6 (ARB Dec. 29, 2010).

BACKGROUND[1]

Benjamin, a licensed pilot, flew passenger jets for CitationAir from February 1, 2004, until CitationAir terminated his employment on March 31, 2009.[2] CitationAir flies Cessna Citation jets for private clients, including both businesses and individuals. Flight crews typically worked seven-day tours of duty followed by seven days off work. D. & O. at 3. FAA regulations required pre-flight inspections, and CitationAir also required a post-flight inspection at the end of each day of flying. Complainant's Exhibit (CX) 18; Employer's Exhibit (EX) 33; D. & O. at 4. The pilot in command (PIC) was ultimately responsible for the safe operation of the aircraft, including the pre-flight inspection, but could delegate the inspection duties to the second in command (SIC). CX 18; EX 33; D. & O. at 4.

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[1] For the Background section, we rely on the ALJ's recitation of facts in his "Background" and "Discussion" sections, which we understand as fact findings. We did not accept as fact findings the ALJ's descriptions of witness testimony.

[2] The ALJ found that Benjamin received his termination letter on March 31, 2009, and thus the claim on June 23, 2009, was timely filed. We affirm this finding as Respondent does not challenge it on appeal.

On March 20, 2009, Benjamin began a tour of duty (as captain) with Val Riordan (as the senior captain and the PIC). D. & O. at 9. The plane was not scheduled to fly that day, but Benjamin saw the plane in the hangar where the mechanics were changing an engine on the aircraft and it was undergoing a Continued Service Inspection (CSI). The company's maintenance department performed the CSI every 7 to 10 days. Hearing Transcript (Tr.) at 1025; D & O at 9. The mechanics confirmed in writing that the plane passed inspection on March 20, 2009, including the landing gear struts. On Saturday, March 21, 2009, first Riordan and then Benjamin conducted pre-flight inspections of their assigned aircraft. Benjamin observed that the visible amount of chrome on the left landing gear strut of the aircraft appeared to be outside the acceptable range for flight. Riordan agreed that the strut looked too low and agreed that the discrepancy should be reported. The amount of visible chrome on the landing gear struts directly relates to the ability of the aircraft to properly land. D. & O. at 10.

Despite the fact that Riordan was the PIC, Benjamin called the Flight Duty Officer (FDO) about the defective landing gear strut. The FDO was not familiar with the specifications of the specific aircraft; so the call was forwarded to Kurt Sexauer, the company's Chief Pilot. Sexauer told Benjamin to take certain steps to resolve the problem with the struts. After unsuccessfully attempting to bring the struts within the acceptable range, Sexauer agreed that the aircraft must be grounded. Again, despite the fact that Riordan was ultimately responsible for the safe operation of the aircraft, Sexauer instructed the FDO to remove Benjamin from the flight and assign another pilot to fly the tour of duty with Riordan. CitationAir summoned Benjamin and not Riordan to CitationAir's headquarters in Greenwich, Connecticut to discuss the situation "face-to face."[3] When CitationAir told Benjamin to appear for a "face-to-face" meeting at headquarters, "comments" were made directly connected to the report of the landing gear strut. *Id.* at 12.

On March 22, 2009, Benjamin filed an Aviation Safety Action Program (ASAP) report with the company's Vice President of Safety, Bill Grimes, alleging that "the indirect pressure being put on the Chief Pilots to keep these plains [sic] flying is putting us all in a dangerous spot when we feel we can't write up an unforeseen MX item at departure."[4] CX 3. He added that this "will cause crews to fly broken airplanes and put the PAX and Crew in a dangerous and unsafe situation." *Id.* He spent March 22, 2009, in his hotel room and "expected to be fired." D. & O. at 12-13. CitationAir told Benjamin to report to headquarters at 2:00 P.M. to meet with Sexauer on March 24, 2009. Before that meeting, Benjamin purchased a pocket-size audio recorder. D. & O. at 13.

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[3] In its response brief, CitationAir stated that the pilots do a majority of their work in the field and rarely go to corporate headquarters. It noted that Chief Pilots and management can go several years without seeing some pilots. Tr. at 244, 873-874.

[4] Grimes testified that ASAP is "a program that's a joint program that's designed to facilitate safety reporting between pilots, the FAA and the company in order to understand what are the potential hazards and look for trends within safety issues that might be surfacing." Tr. at 648.

Three managers attended the meeting with Benjamin on March 24, 2009: Sexauer, Gary Gmoser, an Assistant Chief Pilot; and Jennifer Johnson, a Human Resource Department employee. Johnson's presence "reinforced" in Benjamin's mind the likelihood of being fired or disciplined and confirmed at the meeting that "he would need a recording to protect himself" and the timing of his report. *Id*. "[T]he meeting began with a discussion of the wing strut incident." *Id.* Benjamin had the digital audio recorder in his pocket to record the meeting. When the recorder began noisily malfunctioning, and Benjamin could not silence it, Sexauer learned he had been recording the meeting and asked him why he was recording the meeting. Benjamin said he was afraid that Sexauer would yell at him. Sexauer immediately ordered him to turn in his company key and identification card and had him escorted from the building. Several days later, Benjamin received a letter notifying him that CitationAir terminated his employment effective March 24, 2009.

Benjamin asked that CitationAir's Peer Review Panel (PRP) review the decision to terminate his employment. CitationAir policies provided a PRP process to allow employees to seek a neutral review of employment decisions, including "terminations." CX 15, p. 43-45. Karena Kefalas, Senior Vice President for Human Resources for CitationAir, refused to refer Benjamin's request to the PRP.

Benjamin filed a claim with OSHA on June 23, 2009, alleging he suffered "unlawful retaliation" because he brought "matters of violations of the FAA's laws and other provisions of federal law relating to air carrier safety to the Company's attention." OSHA Claim, p. 3. After OSHA dismissed his claim as untimely, he requested a hearing. In his request for hearing, Benjamin alleged that he was suspended and called to a disciplinary meeting as unlawful retaliation for his "protected activity of raising legitimate safety concerns." Request for Hearing, p. 7. He further asserted that CitationAir terminated his employment and Kefalas denied him peer review because "he sought to expose the Company's unlawful intimidation of its employees during that disciplinary meeting." Request for Hearing, p. 7.

DISCUSSION

AIR 21's whistleblower protection provision, 49 U.S.C.A. § 42121, provides at subsection (a):

> No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . provided or is about to provide . . . 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.

To prove unlawful retaliation under AIR 21, a complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor to the alleged unfavorable employment action. 49 U.S.C.A. § 42121(b)(2)(B)(iii). Unlawful "retaliation" includes "intimidate[ion]" and "threaten[ing]" conduct. 29 C.F.R. § 1979.102(b). If the complainant proves that the respondent violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv). With these points in mind, we examine Benjamin's claim that the ALJ erred in finding no protected activity when he: (1) reported his concern about the landing gear struts on March 21, 2009; (2) filed the ASAP report on March 22, 2009; and (3) attempted to record the March 24th meeting.

A. Protected activity

1. Events of March 21, 2009 – Report of a safety defect

The ALJ found that Benjamin had not proven by a preponderance of the evidence that he had engaged in protected activity. In deciding whether Benjamin engaged in protected activity, the ALJ focused on only the "grounding of the aircraft" and the "attempted audio recording" and found neither to be protected activity. He rejected the March 21 grounding of the aircraft as protected activity because "everyone concerned" agreed that the plane had to be grounded. D. & O. at 24. As for the attempted audio recording, the ALJ determined that "the recording was not expected or intended to preserve evidence of a compromise of safety" and therefore was not protected activity. *Id.* at 25.

Benjamin argues that he engaged in a number of protected activities, including that he "reported" his doubts about the "airworthiness of his assigned aircraft," reported in an ASAP safety report about pressure to ignore safety defects, and attempted to record safety-related conversations or retaliation at the March 24th meeting. Complainant's Brief (Compl. Br). at 16, 31-32. CitationAir argues that only Benjamin's non-protected activity prompted CitationAir's employment actions, specifically: (1) Benjamin's failure to report a safety concern on March 20, 2009; (2) his wrongful attempt to secretly audio-record the March 24, 2009 meeting without an expectation or intent "to preserve evidence of a compromise of safety;" and (3) lying about his attempt to record the meeting. Respondent's Brief (Resp. Br.) at 1, 21-25. CitationAir also rejects that the ASAP report constitutes protected activity, arguing that it allegedly "did not include any allegations that CitationAir violated an order, regulation, or FAA standard." *Id.* at 23. As we explain below, we disagree with the ALJ's conclusions on the issue of protected activity.

As a matter law, an employee engages in protected activity any time he or she provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, so long as the employee's belief of a violation is

subjectively and objectively reasonable. 49 U.S.C.A. § 42121(a)(1); *Blount v. Northwest Airlines*, ARB No. 09-120, ALJ No. 2007-AIR-009, slip op. at 6 (ARB Oct. 24, 2011). The federal aviation regulations governing air safety confer on the pilot in command "final authority and responsibility for the operation and safety of the flight." 14 C.F.R. § 1.1 (2013). The fact that management agrees with an employee's assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee's disclosure was objectively reasonable.

It is undisputed that Benjamin reported a passenger plane's defective landing gear strut, a defect both the CSI mechanics and the PIC overlooked. He also recommended that the plane be grounded. The condition of the landing gear strut directly related to the plane's ability to land properly. D. & O. at 10. As a matter of law, Benjamin engaged in protected activity by reporting the safety concern about the landing gear strut, even if CitationAir agreed with his concern and his decision to ground the plane.[5] The ALJ's focus solely on the "grounding" of the plane was too narrow and overlooked that the "safety report" was protected activity regardless of the grounding of the plane. Given this protected activity, the ALJ erred in dismissing this matter for lack of protected activity. This error alone requires that we remand this matter, but Benjamin's ASAP report provides an additional reason.

[5] CitationAir not only overlooked the protected nature of Benjamin's safety report but also cited inapposite ARB precedent, *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008). Resp. Br. at 22. In *Sievers*, the Board held that the complainant failed to sufficiently identify the safety violation at issue. From the Board's ruling in *Siever*, it is not clear to us whether the mechanical concerns at issue related to "air carrier safety" or minor maintenance issues, that is, the "wing slat droop, the cracked window cover, the allegedly defective hydraulic reservoirs, or the missing placards." Regardless, the Board affirmed the ALJ's finding that Sievers engaged in protected activity when he refused to override a mechanic's decision to take a plane out of service due to a mechanical defect. Unlike the *Sievers* case, no one in this case disputes that Benjamin correctly identified a pre-flight safety concern that required grounding of the aircraft, making *Sievers* inapposite. Also unlike this case, the Board in *Sievers* apparently found that the employer's "legitimate reasons" were the sole reason for terminating Sievers's employment. *Id.* at 11 ("the record demonstrates that Alaska [employer] terminated him because of timecard fraud"). In this case, unlawful retaliation contributed to CitationAir's unfavorable employment actions but the issue remains whether CitationAir can prove by clear and convincing evidence that it would have taken the same actions for non-retaliatory, legitimate reasons. For further discussion regarding the independent standard of proof under AIR 21, see *Araujo v. New Jersey Transit Rail Operations*, 708 F.3d 152, 156-158 (3d Cir. 2013); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 7 (May 31, 2013).

2. March 22, 2009 - ASAP report

In reviewing the evidence, the ALJ noted that Benjamin filed an ASAP report with Grimes, the Vice President of Safety, on March 22, which raised concerns that pressure had been placed on the pilots to keep the planes flying to the point where they felt they could not report unforeseen maintenance issues at departure. CX 3; D. & O. at 12. In the context of CitationAir's removal of Benjamin from the March 21st flight and arranging a meeting at headquarters, the ASAP raised general concerns about pressure that "could cause crews to fly broken planes." CX 3. This concern was supported by the testimony of Captains Kevin Kazmaier, Tom Little, Nick Jakowiw, Tr. at 472-473, 610, 613, 812-814; former Captains Bill McCavey and Jeff Herman, Tr. at 371, 423, 581-584; First Officer Mark Payne, Tr. at 515-518, and former First Officer Jason Tabor, Tr. at 555. *Id.* Based on testimony in the record and Benjamin's prior experiences with management, the ALJ found that Benjamin had a "reasonable expectation" that he might be fired at the meeting and that he was "singled out for disciplinary action." D. & O. at 20. The ALJ's finding establishes that Benjamin had a reasonable belief of being disciplined in connection with raising a safety concern. Benjamin expressly referenced the ASAP report in his request for hearing, but the ALJ made no ruling as to whether the ASAP report was protected activity.

Given the ALJ's findings, we hold that the ASAP Benjamin filed qualifies as protected activity in this case, as a matter of law, because (1) it expressly raised specific safety concerns about the incident on March 21, and (2) CitationAir's manager agreed that the plane needed to be grounded, confirming that Benjamin's safety concerns were reasonable. Again, this finding alone also requires a remand.

3. March 24, 2009 – Attempted taping of meeting

The ALJ rejected Benjamin's contention that his attempt to record the March 24 meeting with management was protected activity. As the ALJ correctly noted, the Board has held that under the proper circumstances, the lawful taping of conversations to obtain information about safety-related conversations is protected activity and should not subject an employee to any adverse action. *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007 (ARB Mar. 24, 2011). [6] Nevertheless, the ALJ found that Benjamin's attempted recording out of

[6] In *Hoffman*, the Board considered a case in which the company had a policy restricting employees from tape recording in-person or telephone conversations of other employees without management's consent. *Hoffman*, ARB No. 09-021, slip op. at 1. In addition, the complainant had been warned to stop recording conversations but continued to make recordings, many of which were not regarding protected activity. *Id* at 2. Unlike in *Hoffman*, CitationAir had no company policy regarding the recordation of fellow employees, and the evidence does not indicate that Benjamin had tried to record a meeting before, or had been disciplined for recording. None of this is meant to convey that we condone the surreptitious audio recording of co-workers. *See also Melendez v. Exxon Chems. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-006, (ARB July 14, 2000), citing *Mosbaugh v. Georgia Power Co.*, Nos. 1991-ERA-001, -011 (Sec'y Nov. 20, 1995).

fear of Sexauer yelling at him was insufficient to constitute protected activity because such a "recording was not expected or intended to preserve evidence of a compromise of safety." D. & O. at 25. We disagree.

As we previously stated, an employee engages in protected activity when he provides or is about to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, so long as the employee's belief of a violation is subjectively and objectively reasonable. The relevant "federal law related to air carrier safety or any other law of the United States" obviously includes the federal whistleblower laws under AIR 21, laws which focus directly on the issue of carrier safety.[7] Consequently, an employee engages in protected activity if he attempts to provide information of retaliation that violates AIR 21. Under AIR 21, unlawful retaliation includes employment actions that "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" because the employee has engaged in protected activity. *Williams,* ARB No. 09-018; 29 C.F.R. § 1979.102(b).

In his OSHA complaint, Benjamin said that he was called to a "disciplinary meeting on March 24, 2009" because of CitationAir's "disappointment" with his decision that his aircraft was unsafe and he refused to fly it. See OSHA Complaint, p. 2. Similarly, in his request for a hearing, Benjamin stated that "he was being disciplined for having raised a legitimate safety concern" and, after filing an ASAP report, CitationAir suspended him and called him to its Connecticut office for a "disciplinary meeting in March 24, 2009." See Request for Hearing, p. 4. If Benjamin held a reasonable belief of retaliation at the March 24th meeting, then his attempted recording of such retaliation was protected activity. The ALJ held that "the recording was not expected or intended to preserve evidence of a compromise of safety." D. & O. at 25. But the ALJ should have also considered whether Benjamin had a subjectively and objectively reasonable belief that he would suffer unlawful whistleblower retaliation at the meeting, including discipline, intimidation, threats, or coercion. We find that the ALJ resolved all the material facts on this issue, leaving only a legal question as to whether Benjamin's attempted

[7] Appropriately, the AIR 21 whistleblower statute is entitled "Protection of employees providing air safety information." 49 U.S.C.A. § 42121. Furthermore, AIR 21's legislative history indicates that AIR 21's whistleblower protection provision holds aviation safety as its preeminent goal. The legislative history shows that during the congressional floor debates preceding the statute's enactment, it was discussed as a mechanism for ensuring aviation safety. See, e.g., 146 Cong. Rec. S1247-07, S1252 (daily ed. Mar. 8, 2000) (statement of Sen. Grassley) ("whistle-blower protection adds another, much needed, layer of protection for the traveling public using our Nation's air transportation system."); 146 Cong. Rec. S1255-01 at S1257 (statement of Sen. Hollings) (AIR 21 includes "whistleblower protection to aid in our safety efforts and protect workers willing to expose safety problems."); 146 Cong. Rec. H1002-01 at H1008 (statement of Rep. Boehlert) (AIR 21 "provide[s] whistle-blower protection for both FAA and airline employees so they can reveal legitimate safety problems without fear of retaliation.").

recording constituted protected activity. Therefore, we may resolve this issue and need not remand this question to the ALJ.[8]

We hold that the ALJ's fact findings establish that Benjamin's attempt to record the March 24, 2009 meeting constituted protected activity and substantial evidence in the record supports these ALJ findings. To begin with, the ALJ unequivocally found that "Benjamin's belief that the meeting had been called to fire him was a reasonable expectation, and perhaps the most reasonable expectation available to him in light of his past involvement with senior management." *Id.* at 20. The ALJ further found that "[e]verything about the weekend's events was calculated to reinforce the impression that Mr. Benjamin was being singled out for disciplinary action . . . ." *Id*. One of Sexauer's e-mails to management suggests the likelihood of an unfavorable employment action.[9] The ALJ expressly recognized that "an inspection by the flight crew is of little value" when the assigned aircraft underwent an engine change and Continued Service Inspection (CSI), as was the case here on March 20, 2009. *Id.* at 9. In fact, the CSI checklist included an inspection of the landing gear struts. *Id.* Pre-flight and post-flight inspections are "generally performed after the maintenance personnel have signed off on the work." *Id.* On March 21, 2009, the maintenance crew having signed off on their work, both Riordan (the PIC) and Benjamin performed the FAA required pre-flight inspection. *Id.* at 10. Only Benjamin detected the defective condition of the landing gear strut and called Sexauer to resolve the problem. *Id*. Everyone agreed that the plane should be grounded to fix the landing gear strut. *Id.* at 24. Yet, only Benjamin was pulled off the assignment and called to headquarters for a meeting about this incident. While waiting for the meeting to occur, Benjamin filed his March 22nd ASAP report in which he stated that CitationAir was subjecting him to "indirect pressure" to avoid writing up maintenance issues and fly "broken planes." *Id.* at 12. These findings establish that Benjamin reasonably believed that the imminent meeting at headquarters was "indirect pressure" to discourage pilots from "writing up maintenance issues."[10] Therefore, under the facts of this case, Benjamin's attempt to record the "yelling" he expected was a protected attempt to document the unlawful intimidation he raised in his March 22nd ASAP.

The ALJ does not rule out Benjamin's reasonable fear of unlawful retaliation for raising safety concerns by finding that it was "clear to him [Benjamin]" that the purpose for the meeting

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[8] A remand is not necessary if the findings of fact lead to only one conclusion. *See, e.g., Fergiste v. INS*, 138 F.3d 14, 20-21 (1st Cir. 1998); *Empire Co. v. OSHRC*, 136 F.3d 873, 877 (1st Cir. 1998); *Cotton Petroleum Corp. v. United States Dep't of Interior*, 870 F.2d 1515, 1528-29 (10th Cir. 1989).

[9] See CX 8 (responding to Jeffrey Buchanan's question whether he will be needed at the March 24th meeting, Sexauer says "I will at the PRP [peer review procedure]").

[10] CitationAir's brief expressly describes how unusual it was for an employee to be called to headquarters for a face-to-face meeting, which further demonstrates why Benjamin would feel intimidated or pressured following his safety report. Resp. Br. at 6.

was the "sufficiency of the inspection" and "not the grounding" of aircraft. *Id.* at 24. First, as previously stated, the ALJ's finding too narrowly focuses on only the actual "grounding" of the aircraft but not on the protected act of reporting the safety concern. Second, the ALJ's finding that CitationAir planned to discuss the "sufficiency of an inspection" became an issue solely because of Benjamin's report and necessarily meant that CitationAir planned to discuss Benjamin's reported safety concern, whether it was the nature of the complaint, the timing of the complaint, or any other aspect of the complaint. Third, the ALJ's finding is not supported by substantial evidence. The record contains no written or verbal communication from CitationAir managers to Benjamin explaining the purpose of the meeting. Sexauer did not communicate directly with Benjamin to explain the purpose of the meeting. Even the intra-management e-mail exchanges in the record about the meeting do not clarify the purpose of the meeting, but actually further suggest that it would be about Benjamin's safety-related reports. See CX 30 (Sexauer asks whether there was "OIR from the other day").[11] Benjamin was simply removed from his duty, sent to a hotel to wait for a couple of days, and finally summoned to the meeting when CitationAir was ready to meet. There was some unclear testimony from Benjamin about the possible purpose of the meeting, that is, Sexauer's "comments about the delay, the timing that it took to write the airplane up, why it took the time that it did, why it was not caught on Friday why didn't you write it up," Tr. at 116, D. & O. at 12; and testimony that he also wanted to discuss the landing gear tire incident at the meeting, Tr. at 859; D. & O. at 12. Again, this testimony confirms that the meeting was about the safety concerns he raised. There was "nothing audible" on the recording Benjamin tried to make. D. & O. at 18. Consequently, we see no substantial evidence supporting a finding that the purpose of the meeting was "clear" to Benjamin.

Benjamin's previous conflicts with CitationAir management over raising safety issues contributed to his concern of possible whistleblower retaliation at the March 24th meeting. In April 2008, Benjamin raised a concern regarding lights on the cabin door steps. The aircraft's manual did not resolve his concerns, so he contacted the company for guidance. The FDO directed him to proceed with his flight, but while the engines were running, his direct manager ordered him to stand down, which caused a delay of the flight. The plane was later determined to be airworthy. As a result of this incident, Benjamin was demoted from captain to first officer and was called to a disciplinary meeting. Following the meeting, J.D. Witzig, Senior Vice President of Flight Operations, decided to terminate Benjamin's employment, but relented with a "final warning," and admonition that his job was in jeopardy if there was another problem. EX 7; Tr. at 66. In January 2009, Benjamin requested that worn tires be replaced at the beginning of the tour, which was denied. Several days into the tour, the first officer noticed cord showing during a pre-flight check. It had not been seen during the previous post-flight inspection due to chocks on the wheels. Benjamin reported the defective tire and grounded the plane. Benjamin was reprimanded for not reporting the problem earlier and was told to call senior management

[11] Respondent's exhibit 4 explains that the purpose of an "electronic OIR" is to meet CitationAir's "commitment to safety and to consistently deliver the highest level of customer service." EX 4.

about any mechanical issues at departure that would delay departure of the aircraft. Tr. at 86-88; D. & O. at 8.

To summarize our findings on protected activity, contrary to the ALJ's ultimate ruling, the fact findings and undisputed facts establish that Benjamin engaged in protected activity when he (1) made the safety reports about the landing gear struts, (2) submitted an ASAP report and (3) attempted to record retaliation through intimidating and threatening conduct he reasonably believed would occur at the March 24th meeting. Therefore, we reverse the ALJ's dismissal of this case. Typically, we would remand this matter for the ALJ to decide whether any of the protected actions contributed to unfavorable employment actions. However, as we explain below, the ALJ's findings and undisputed facts also establish that each of Benjamin's protected actions contributed to one or more unfavorable employment actions, leaving unresolved only the questions about CitationAir's affirmative defense and damages, if any.

B. Contributing factor

Because the ALJ found that Benjamin had not proven that he had engaged in protected activity, logically, the ALJ determined that there was "no further analysis to be done under the AIR 21 standards of proof." D. & O. at 25. The ALJ did find that Benjamin proved that he "suffered the unfavorable adverse personnel actions of being terminated and having his request for peer review denied." *Id*. The ALJ also found that CitationAir "unequivocally acknowledged" that Benjamin's attempted recording of the March 24 meeting was "not only a contributing factor but the decisive factor" in the termination of his employment and the denial of peer review. *Id.* Given these findings, and our holding that the attempted recording constituted protected activity, we must necessarily find that protected activity contributed to these adverse actions. CitationAir presented evidence that the objectionable nature of the attempted recording included the alleged deceitful manner of Benjamin's conduct and that he lied about the recorder. Consequently, we must remand this matter for the ALJ to determine whether CitationAir can show, by clear and convincing evidence, that it would have terminated Benjamin's employment and denied peer review because of the unprotected aspects of Benjamin's conduct. We see no need to explain any more about the remand on the issue of the attempted recording. But the ALJ's findings and undisputed facts also establish that Benjamin's other protected activity, reporting safety concerns and filing an ASAP, were inextricably intertwined with CitationAir's decision to remove Benjamin from the March 21st flight and call the March 24th meeting at headquarters. We briefly explain our ruling on these latter issues.

A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012). A complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct, another [contributing] factor is the complainant's protected" activity. *Hoffman*, ARB No. 09-021, slip op. at 4. An employee may prove causation through indirect or circumstantial evidence, which requires that each piece of evidence be

examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence.

The ARB has repeatedly found that protected activity and employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment action in question or the employment action cannot be explained without discussing the protected activity. In *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 3 (ARB Feb. 29, 2012), the employee's suspension was directly intertwined with his protected activity because the employer investigated the reason for the reported injury and blamed the employee for the injury. In *Smith*, ARB No. 11-003, slip op. at 4, the employee reported a rule violation and was fired for reporting the violation late. Similarly, in *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 4 (ARB Oct. 26, 2012), the employee was also fired for an allegedly late reporting of an injury as well as for causing the injury. Where protected activity and unfavorable employment actions are inextricably intertwined, causation is established without the need for circumstantial evidence; however, such evidence may certainly bolster the causal relationship.[12]

As we have previously discussed, the ALJ's fact findings establish that Benjamin's safety report about the landing gear strut was the sole source for CitationAir's alleged concern about insufficient reporting. The same safety report was the sole cause for CitationAir's decision to remove Benjamin from his flight assignment and call him to a face-to-face meeting at headquarters. Moreover, Sexauer expressly asked for the OIR for the March 21st incident to prepare for the March 24, 2009 meeting. CitationAir had absolutely no other evidence, no other testimony or separate investigation suggesting that the landing gear struts were non-compliant. To the contrary, CitationAir's mechanics approved the landing gear struts on March 20 after finalizing the CSI, which had a checklist that specifically included the landing gear struts. Stated simply, CitationAir could not hold a discussion about the "sufficiency" of the alleged March 20th non-reporting without discussing the safety report that Benjamin raised on March 21. CitationAir's response brief highlights this point more than once: (1) "Mr. Sexauer explained that his concern was that Mr. Benjamin did not report *the discrepancy* that he had recognized on March 20th in a timely manner"; (2) "it was clear to everyone involved that the March 24th meeting was intended to address the fact that *the discrepancy* had not been reported on March

[12] Circumstantial evidence certainly may further demonstrate a causal relationship. For example, the closer a temporal proximity between the protected activity and the adverse action, the stronger becomes the inference of a causal connection. *See Negron v Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010 (ARB Dec. 30, 2004), *aff'd sub nom., Vieques Air Link, Inc. v. Dep't of Labor*, 437 F.3d 102, 109 (1st Cir. 2006). For example, Benjamin reported a safety concern on the same day that he was removed from his flight assignment and called to headquarters.

20." Resp. Br. at 10, 23 (emphasis added). Again, "the discrepancy" in question was the very discrepancy that Benjamin reported on March 21 and known to CitationAir solely because Benjamin reported it. In the end, similar to *Smith* and *Henderson*, we find that the protected activity was inextricably intertwined with the adverse actions of Benjamin being removed from his flight assignment, the call to the meeting, and to the purpose for the meeting.

In sum, we hold that the ALJ's findings and undisputed facts establish as a matter of law that Benjamin engaged in several acts of protected activity, which then contributed to unfavorable employment actions. The protected activities are: (1) Benjamin's report of safety concerns about the landing gear struts on March 21, 2009; (2) the ASAP report he filed on March 22, 2009; and (3) his attempt to record anticipated retaliation at the March 24, 2009 meeting. The unfavorable employment actions are: (1) removing Benjamin from his flight assignment; (2) sending him to a meeting at headquarters; (3) terminating his employment; and (4) denying his request for peer review. The burden now shifts to CitationAir to demonstrate by clear and convincing evidence that it would have taken the same personnel actions absent the protected activity. Typically, respondents meet this burden of proof by showing what they would have done if protected activity had never actually occurred. Arguably, that is an impossible burden in this case. Here, Benjamin's report of safety concerns arguably was the single catalyst for the adverse actions taken against him. Consequently, in remanding this case, we leave open the question of whether the statute permits CitationAir to meet its burden under AIR 21 by showing with clear and convincing evidence that it would have taken the same action based solely on non-retaliatory and legitimate reasons, rather than proving what it would have done if protected activity had never occurred. If CitationAir fails to meet its burden, the ALJ must then determine the issue of damages on remand.

CONCLUSION

Accordingly, for the foregoing reasons, the Board **REVERSES** the ALJ's decision on the issue of protected activity, **FINDS** that the ALJ's findings settled the issues of causation, and **REMANDS** the case to allow the ALJ to determine damages, after permitting CitationAir to present clear and convincing evidence, if any, to avoid damages.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI,
Chief Administrative Appeals Judge

JOANNE ROYCE,
Administrative Appeals Judge