UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 12 July 2016

ALJ NO: 2014-SPA-00004

In the Matter of:

JOHN R. LOFTUS,
Complainant,

v.

HORIZON LINES, INC.,
Respondent,

and

MATSON ALASKA, INC.,
Successor-in-Interest.

Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

Charles C. Goetsch, Esq., Charles C. Geotsch Law Offices, LLC, New Haven, Connecticut, for the Complainant

Kevin S. Joyner, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Raleigh, North Carolina, for the Respondent

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DECISION AND ORDER AWARDING DAMAGES

I. Statement of the Case

This proceeding arises under the whistleblower protection provisions of the Seaman's Protection Act ("SPA"), 46 U.S.C. § 2114(a), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L 111-281, and as implemented by 29 C.F.R. § 1986. On June 20, 2013, John Loftus ("Loftus" or "Complainant") filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") alleging his employer, Horizon Lines, Inc. ("Horizon"), unlawfully retaliated against him. Specifically, Loftus alleges Horizon constructively discharged him for reporting to the United States Coast Guard ("USCG") and its agent, the American Bureau of Shipping ("ABS"), what he believed to be violations of maritime safety law and regulations on the ship he worked as Master.

On August 6, 2014, OSHA's Assistant Regional Administrator issued an order dismissing Loftus's complaint on behalf of the Secretary of Labor ("Secretary") concluding a prior arbitration proceeding concerning the same allegations correctly resulted in Horizon's favor. ALJX-1.[1] On September 3, 2014, Loftus appealed the Secretary's order to the Office of Administrative Law Judges and the case was transferred to me.

I held a three day formal evidentiary hearing in Boston, Massachusetts, on May 5th, 6th, and 7th of 2015. Four days before, Loftus filed a Motion in Limine Regarding Video and Arbitration Documents, and the parties filed Joint Pre-Trial Stipulations. ALJX-10 & 11. The following nine witnesses testified: The Complainant; Maritime experts Kevin O'Halloran, Walcott Becker, James Staples, and Mark Bisnette; and Horizon employees Pete Strohla, Timothy Close, Gregory Hohm, Andrew Philips, and John Hazel.

Several exhibits were admitted including Administrative Law Judge Exhibits 1 through 11. TR at 780.[2] I admitted Complainant's Exhibits ("CX") 1 through 47 in full including CX-25A and CX-37A; CX-48 was only marked for identification, and CX-49 and 50 were only admitted to the extent the information was discussed during examinations. TR at 780-81. Additionally, I admitted Respondent's Exhibits ("RX") 1 through 38 in full with the exception of RX-32, which is limited to the flow sheet. TR at 781.

At the close of trial, I ordered the parties to cross-reference their exhibits to identify all duplicates, which the parties did resulting in the following information:

Complainant's Exhibits	**Respondent's Duplicative Exhibits[3]**
6	3 and 22
8	28
14	21
15	26
16	27
18	5
19	16
20	17
21	2

[1] Administrative Law Judge Exhibits appear as "ALJX-[#]."

[2] Transcript references are denoted "TR at [#]."

[3] Respondent's duplicative exhibits are noted in parenthesis where applicable.

On June 10, 2015, the parties filed a Joint Motion to Amend Caption to reflect Horizon's recent merger with Matson Alaska, Inc., which I granted the same day. I received briefs[4] from both parties on July 31, 2015, along with a List of Trial Transcript Typographical Error Corrections from the Complainant; on September 25, 2015, the transcript was amended and reissued to reflect the correct testimony. The record is now closed.

II. Stipulations

The parties have stipulated to the following facts:

1) Loftus was a Master (i.e., Captain) for twenty years, including on a Horizon ship, the Horizon Trader ("Trader"), from approximately April of 2007 to May 28, 2013, when Horizon informed him that he would not be rejoining the Trader as Master; and

2) In October of 2011, Loftus engaged in protected activity.

ALJX-10.

III. Issues Presented

The following issues are disputed:

1) Did Loftus engage in protected activity in August of 2012, February of 2013, and April of 2013?

2) Did Horizon know Loftus engaged in protected activity?

3) Did Loftus's protected activity contribute to Horizon's decision to take adverse action against him?

4) Did Horizon demonstrate by clear and convincing evidence that it would have taken the same adverse action against Loftus notwithstanding his protected activity?

5) What, if any, economic damages is Loftus entitled to including back pay, front pay, litigation costs, and attorney fees?

6) What, if any, compensatory damages for emotional distress is Loftus entitled to?

7) What, if any, punitive damages should be imposed against Horizon?

ALJX-10.

Based on the record as a whole, I find that Horizon violated Loftus's right to be free from retaliation under the SPA. *See* 46 U.S.C. § 2114(a). Loftus proved by a preponderance of the evidence that he engaged in protected activity in October of 2011, August of 2012, and February and April of 2013 by reporting and threatening to report to the USCG and ABS what he believed to be safety violations on the ship he sailed as Master. Further, I find that Horizon knew of

[4] "Compl. Br. at [#]" refers to Loftus's brief, and Horizon's brief is cited as "Resp. Br. at [#]."

Loftus's protected activity and that his protected activity was a contributing factor in Horizon's decision to take adverse action against him. Horizon did not prove by clear and convincing evidence that it would have demoted Loftus absent his protected activity. Accordingly, I find that Loftus is entitled to $655,198.90 in back pay plus interest compounded on a daily basis, $10,000 in compensatory damages for emotional distress, $225,000 in punitive damages, and reasonable litigation costs including attorney fees.

IV. Basic Legal Framework[5]

The SPA prohibits Seamen from being unlawfully retaliated against for engaging in conduct deemed protected activity. Specifically, § 2114(a) provides as follows:

> A person may not discharge or in any manner discriminate against a seaman because . . . the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred.

46 U.S.C. § 2114(a). An underlying goal of the SPA is to facilitate the Coast Guard's enforcement of maritime safety laws and regulations. *Gaffney v. Riverboat Servs.*, 451 F.3d 424, 444 (7th Cir. 2006). "The statute accomplishes this goal by guaranteeing that, when seamen provide information of dangerous situations to the Coast Guard, they will be free from the 'debilitating threat of employment reprisals . . . .'" *Id.*, *quoting Passaic Valley Sewerage Comm'rs v. U.S. DOL*, 992 F.2d 474, 478 (3d Cir. 1993).

In determining whether Horizon violated Loftus's rights under the SPA, I must follow the procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"). Title twenty nine, Part 1986 of the Code of Federal Regulations provides that the "SPA incorporates the procedures, requirements, and rights described in the whistleblower provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105." 29 C.F.R. § 1986.100(a). Section 31105 of the STAA in turn states that "[a]ll

[5] In his brief, Loftus cites the ARB's *en banc* decision in *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ 2010-FRS-030 (Mar. 20, 2015), as controlling precedent with respect to the broader legal framework applicable here, and more notably, for analyzing the contributing factor element in determining whether he has made a *prima facie* case; however, on May 23, 2016, the ARB vacated *Powers v. Union Pac. R.R. Co.*, ARB 13-034, ALJ 2010-FRS-030 (ARB Apr. 21, 2015, reissued with full dissent), to revisit the effect of the "contributing factor" analysis addressed in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (Oct. 9, 2014). Compl. Br. at 4-6, 18-19, 25. Consequently, I consciously omit any reference to the *Powers* decision as it is no longer good law and has no bearing on the outcome of this case.

complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)" of AIR21. 49 U.S.C. § 31105(b); 49 U.S.C. § 42121(b).

There is a two-pronged burden-shifting framework applicable to whistleblower cases that incorporate the legal standards set forth in AIR21. 42 U.S.C § 42121(b); *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 447 (2d Cir. 2013); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 5 (ARB May 31, 2013). Loftus has the initial burden of satisfying prong one of the two-part AIR21 test. *See* 42 U.S.C § 42121(b); *Bechtel*, 710 F.3d at 447; *Araujo*, 708 F.3d at 157; *Allen*, 514 F.3d at 475-76; *Harp*, 558 F.3d at 723; *Hutton*, ARB No. 11-091, slip op. at 5. In doing so, Loftus must demonstrate the following four elements by a preponderance of the evidence: (1) He engaged in protected activity; (2) Horizon knew he engaged in protected activity; (3) He suffered an adverse action; and (4) His protected activity was a contributing factor in Horizon's adverse action against him. *See* 42 U.S.C § 42121(b); *Bechtel*, 710 F.3d at 447; *Araujo*, 708 F.3d at 157; *Allen*, 514 F.3d at 475-76; *Harp*, 558 F.3d at 723; *Hutton*, ARB No. 11-091, slip op. at 5. If Loftus makes out a *prima facie* case by satisfying all four elements under the first prong of AIR21's analytical framework, the burden then shifts to Horizon to show by clear and convincing evidence that it would have taken the same adverse action against Loftus notwithstanding his protected activity. *See Araujo*, 708 F.3d at 157; *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 3 (ARB Sept. 18, 2014).

V. Factual Background

A. Loftus's Maritime Background

At the time of trial, Loftus was a sixty-six-year-old man who was born on February 23, 1949, and spent his entire adult life working in the maritime industry. ALJX-10; TR at 147-48. Loftus's academic achievements include a Bachelor of Science degree in engineering and transportation from Kings Point, formal training from the U.S. Merchant Marine Academy, and a Third Class Engineer's License. TR at 148. In addition to his educational background, Loftus worked in the maritime industry for approximately forty-two years with experience as First Mate, Second Mate, Chief Mate, and Master. TR at 147-48, 208. Loftus has at least twenty years of experience specifically sailing as Master, having done so as early as 1985, while

working for U.S. Lines. ALJX-10; TR at 147-48. During his career, Loftus has sailed on a variety of vessels including tankers, LASH ships, dry cargo ships, and container ships. TR at 148.

B. Loftus's Employment with Horizon

In 1992, Loftus joined Horizon's predecessor (Sealand) and within one year, he was sailing as Master, Relief Master, and Chief Mate. TR at 147. In April of 2007, Loftus began sailing as Master of the Trader – an 813 foot long container ship operated by Horizon. ALJX-10; TR at 148. A container ship primarily carries dry cargo and relies on shore cranes to load and unload ISO containers, i.e., the boxes used for storing cargo. TR at 148. As Master of the Trader, Loftus spent half of the year sailing the Atlantic Ocean between Elizabeth New Jersey, Jacksonville, Florida, and San Juan, Puerto Rico. *See* TR at 152, 159, 169, 394-95.

1. ***March 2011 and Onward – MARPOL***

Beginning in March of 2011, Horizon started emphasizing to its employees the Importance of complying with MARPOL, an acronym for the International Convention for the Prevention of Pollution from Ships. CX-29 at 181-82; TR at 155, 374. MARPOL is the regulatory code controlling marine pollution, which the USCG and ABS are charged with enforcing. CX-38 at 289; TR at 150-51, 155, 478. MARPOL regulations applied to the Trader, and both Loftus, as Master, and Horizon were subject to personal civil and criminal liability for any violations. CX-38 at 289; TR at 159-60.

Enthusiasm for MARPOL compliance came on the heels of negotiations with the United States Department of Justice that resulted in Horizon pleading guilty to violating MARPOL pursuant to a plea agreement that was finalized in January of 2012. CX-29 at 181-82; CX-30 at 183; CX-47 at 302; TR at 374, 378-80, 446. In exchange for the Government's plea deal, Horizon paid a $1.5 million fine, agreed to adhere to a comprehensive Environmental Compliance Plan ("ECP"), and served three years of probation. CX-29 at 181-82; CX-30 at 183; CX-47 at 302; TR at 374, 378-80, 446. Both a summary of the ECP and the ECP itself indicated that noncompliance was cause for the Government to revoke or modify its plea agreement with Horizon, which would have had substantial financial and operational implications. CX-30 at 184; CX-47 at 303. Bobby Griffins, a member of Horizon's Board of Directors, likewise told Loftus that Horizon could not have withstood another MARPOL violation or it would have been forced to shut down. TR at 162.

As part of the ECP, Horizon was required to communicate to employees in the first quarter of every year its commitment to safety, quality, and the environment. CX-47 at 308. For example, on March 14, 2011, CEO Stephen Fraser sent an email to all relevant personnel, including Loftus, which read as follows:

> In addition to improving our current policies, we also want to stress that all Company personnel must familiarize themselves with, and follow, the requirements set forth in MARPOL and the SMS. All Company personnel, upon discovery of any issue which may bring into question a vessel's compliance with environmental (or any) laws, are to immediately bring the matter to the attention of senior management, or if preferred, utilize the Company's Ethics Hotline by calling 1-866-850-2115.

CX-29 at 181-82. Further, the ECP's instruction to Masters read: "[c]ompliance with such requirements will be incorporated as a positive factor in crew appraisals. Failure to comply with such requirements will be incorporated as a negative factor in crew appraisals and may lead to dismissal." CX-47 at 310.

2. *October 2011 – Loftus Complaint*

On October 15, 2011, Loftus emailed Fraser and Vice President of Operations, Bill Hamlin, indicating he reported to the USCG and ABS what he believed to be huge safety violations onboard the Trader including repeated power box fires. CX-1 at 1-7; TR at 149-51, 166-67. In the email, Loftus documented a long history of "derelict" equipment on the Trader and said he had contacted Horizon repeatedly over a ten year span to fix the problems, but to no avail. CX-1 at 1-7. Loftus concluded his email by saying "I have some major concerns about the safety, and crew, and I do not intend to compromise that for OTS, or anyone else." CX-1 at 2.

The USCG ultimately conducted an investigation in response to Loftus's complaints. TR at 152. Specifically, the USCG visited the Trader when it was docked in Jacksonville and again when it was docked in San Juan. *Id.* During both trips, the USCG condemned a substantial amount of equipment on the Trader. *Id.* In the aftermath, Horizon had to take hazardous power boxes out of service and rent power packs instead. *Id.*

3. *August 2012 – Loftus Complaint*

On August 25, 2012, Loftus emailed several people on Horizon's management team to report "a number of disturbing problems that need to be addressed." CX-2 at 8-10; TR at 155, 167-68, 253-54, 655, 710; *see also* CX-5 at 28-45; TR at 157, 333 656. Loftus's email

specifically listed thirteen items that he believed violated both Horizon's internal policies as well as the USCG safety regulations. CX-2 at 8-10; TR at 155, 167-68, 253-54, 655, 710; *see also* CX-5 at 28-45; TR at 157, 333 656. Before concluding his email, Loftus said "[t]his ship needs HELP, and GUIDANCE, in order to operate safely, stay within regulatory compliance, and follow the Horizon Lines requirements of the safety & Environmental Management System." CX-2 at 10.

Two days following Loftus's email, Vice President of Engineering, Ed Washburn, and Vice President of Operating Services and General Manager of Ocean Transportation Services, Pete Strohla, both flew to San Juan to inspect the Trader. CX-3 at 23; TR at 155, 319. Upon arrival, Washburn and Strohla went to Loftus's room unannounced, and Washburn immediately searched Loftus's refrigerator for alcohol. CX-3 at 23; TR at 155. During the visit, Loftus said that if Horizon did not contact either the USCG or ABS regarding his safety concerns, then he would contact the agencies himself. TR at 155-56, 319-20. Horizon contacted ABS and, after an inspection, the agency gave Horizon thirty days to fix equipment that was not in compliance with safety regulations. CX-3 at 24; TR at 155-56.

4. *February 2013 – Loftus Complaint*

In February of 2013, Loftus expressed safety concerns to Josh Dietrich from ABS who conducted the Trader's annual inspection. TR at 158-59. During Dietrich's visit, Loftus questioned how the ABS could "possibly let a ship go to sea in that condition with manholes open and valves that didn't work, fuel systems didn't work, bilge valves didn't work, fuel valves[,]" and so on. TR at 158-59. After the inspection, Strohla called Loftus to ask if he was the individual who contacted Dietrich about the Trader's condition, and Loftus acknowledge that he did contact Dietrich. TR at 159.

5. *March 2013 – The "Incident"*

On March 6, 2013, Loftus was sailing the Trader from San Juan to Elizabeth when Chief Mate Robert McCarthy, second in command, was severely injured while performing a task on deck. TR at 169, 180. Set forth below is a chronological timeline of the events leading up to McCarthy's injury and what followed in the aftermath.

a. <u>March 6 – Early Morning</u>

On the morning of March 6, 2013, Loftus awoke at approximately 5:15 a.m. under the belief that a severe storm was impending. TR at 169-70. At that time, Loftus described the sea

as being "relatively calm" but expected conditions to get a lot worse over the following twelve to twenty-four hours. *Id.* To prepare for the storm, Loftus had his crew start securing personal rooms and work areas at least two days prior. TR at 170. The day before, Loftus made five trips around the entire ship to monitor the crew's progress in getting ready for what was expected to be the storm of the century. *Id.*

By 6:30 a.m., Loftus notified the crew that the deck was secure – i.e., no one was allowed on deck without permission – by posting a notice prominently on the board by the galley. TR at 172. At around 8 a.m., Chief Mate McCarthy asked Loftus if he could go on deck to read the reefers, i.e., refrigerated containers – a task he performed every morning. TR at 172. Loftus permitted McCarthy to read the reefers but instructed a second man to accompany him. *Id.* A second man accompanied McCarthy, and they successfully maintenanced the reefers as usual. *See id.*

At some point before 9 a.m., Loftus had "a discussion" with McCarthy in the mess hall asking if the trash cans on the deck back aft had been removed pursuant to a conversation from the night before. TR at 171. McCarthy said that he was unsure if the cans had been removed, so Loftus decided to check the deck himself. *Id.* Upon checking the deck, Loftus found six-to-eight trash cans in the angle iron corral that were not tied down very well; one or two cans were flapping in the wind, and Loftus believed there was no way they would stay onboard during the expected storm. TR at 171-72.

Concerned about a possible MARPOL violation if any trash cans were to go overboard, Loftus asked McCarthy to supervise a crew and put a net over the cans in the corral to secure them. TR at 175. McCarthy suggested taking the cans off the deck and moving them inside, and Loftus agreed that moving the cans inside was a good idea. CX-19 at 128 (RX-16); TR at 175, 752-53. At this time, the ship was traveling at a high rate of speed of 20 knots, and the wind was also about 20 knots; the seas were short and choppy, but having little to no effect on the movement of the ship. CX-32 at 190; CX-33 at 207; TR at 126, 139-40, 176. No one expressed reservations about going on deck to secure the cans. TR at 178.

Upon arriving on deck to secure the cans, McCarthy noticed that the chain on a large swinging door had popped off the slip hook. CX-18 at 124 (RX-5); CX-19 at 127 (RX-16). McCarthy ordered one of his crew members to get a rope for securing the door because he "was afraid that it would pop off and that the door would slam shut." CX-19 at 129(RX-16). As

McCarthy waited for the rope, the door swung open and hit him, and he was thrown to the ground. CX-19 at 129 (RX-16); TR at 574-75.

Loftus learned of McCarthy's accident right after it occurred, at approximately 9:30 a.m., and immediately ran to his aid. TR at 180. The weather conditions were not much different than when Loftus initially made the decision to send a crew on deck to secure the cans. TR at 180-81. Approximately ten-to-twelve individuals assisted with caring for McCarthy after the accident; people repeatedly moved back and forth on the main deck getting a back board, neck brace, medical kit, blood pressure test, and so on. TR at 181. No other crew members had difficulty standing, carrying, or moving on deck, and no one else was injured while helping McCarthy. *Id.*

b. March 6 – Early Afternoon

At some time around noon or so, the Trader's shoreside Vessel Superintendent, John Hazel, instructed Loftus to perform drug and alcohol tests on all parties involved in the accident, and shortly thereafter, indicated a MEDEVAC would be airlifting McCarthy off the ship for hospital transport. CX-25 at 169; CX-25A; TR at 182, 184-85, 196. Loftus described the following regarding the ship's movement and the sea conditions as he prepared for McCarthy's evacuation, which is depicted in a video that was admitted as RX-7:

> I had to come left about 120 degrees, which put the swell on the port side of the ship, and then we started rolling to 35 degrees. And we rolled 35 degrees constantly until the time I got to the rendezvous point, and that's – that's what you see, is that bad weather in that video.

TR at 182. At 5:19 p.m., McCarthy was finally off the Trader and en route to Norfolk General Hospital – almost eight hours after the accident occurred. CX-25 at 168; TR at 182. Once the Trader was back on its normal course, it was only rolling seven degrees, which is what it was doing in the morning when McCarthy was initially injured. TR at 182-83.

After the evacuation, Loftus emailed Hazel to inform him that he had only tested McCarthy for alcohol because no one else had been directly involved in the accident. CX-25 at 167; CX-25A. The Bosun (also spelled Boatswain) and two daymen were in the vicinity at the time, but displayed no reasonable signs of intoxication having worked all day preparing for the MEDEVAC's arrival. CX-25 at 167; CX-25A. Upon Hazel's insistence, Loftus tested the Bosun and two daymen for alcohol and their tests all come back negative. CX-25 at 166; CX-25A; TR at 185.

c. March 6 – Early Evening/March 7 – Early Morning

At approximately 8:00 p.m., the weather deteriorated quickly. TR at 183. The ship was rolling to fifty degrees, the wind was 100 knots, and the main deck was under water. TR at 183-89. At one point, Loftus took the ship into a swell at a forty-five degree angle, and the Trader dropped into a hole. TR at 189. It was the worst weather Loftus had ever seen in his entire career, and at one point, he thought he might lose the ship. TR at 183, 189.

Loftus spent between thirty-six to forty-eight hours on the bridge with no sleep, trying to safely maneuver the Trader through the storm to its destination in Elizabeth, New Jersey. TR at 184. As Loftus described it, there is no comparison between the weather during the morning of March 6th, and the weather on the night of March 6th and early morning of March 7th. TR at 183. "It was like a calm lake compared – even at 1700 when they took him off, that weather there was nothing. That was like nothing compared to what we went through. It was the most horrendous and horrific thing I've ever been through." *Id*

As Loftus tried to safely navigate the Trader through this storm, Hazel continued demanding that Loftus get urine samples from the Bosun and two daymen to test them for drugs. CX-25 at 164-66; CX-25A. Loftus finally told Hazel, "I AM NOT LEAVING THE BRIDGE TO DO DRUG TEST. SAFETY OF THE SHIP FIRST." CX-25 at 164; CX-25A. Hazel responded to Loftus that drug testing the Bosun and two daymen "is a requirement and not an option." CX-25 at 164; CX-25A; TR at 615. In all, Hazel demanded that Loftus test the involved crewmembers for drugs and alcohol at least nine times. CX-25 at 164-69; CX-25A; TR at 184-85.

d. March 8 – Early Morning

At 8:00 a.m. on March 8, 2013, Loftus safely reached the Trader's destination in Elizabeth. TR at 186. The Trader was in good condition as it reached port. *Id.* There was no loss of life or cargo, and no damage to the hull or the containers on deck. *Id.* Other ships Loftus observed coming into port had "boxes hanging over the side, container sides knocked out, cargo strewn all about," and so on. TR at 190.

Immediately, Hazel demanded that Loftus administer drug tests on the Bosun and two daymen, reiterating that it was not an option. TR at 187. Loftus explained that the drug testing process was meticulous and took him at least fifteen minutes per person to complete. TR at 188.

At the time of this request for drug testing, Loftus had not slept for approximately two days. TR at 187.

6. *April 2013 – Loftus Complaint*

On April 2, 2013, Loftus emailed USCG Marine Inspector, Ralph Savercool, regarding the conflict between mandatory drug testing requirements and a Captain's duty and authority to do what is safe. CX-27 at 179. During his correspondence with the USCG, Loftus explained the circumstances of his experience in March of 2013, asking the following:

> Is a Master, who has been up for over 48 hours, safe to do testing after docking, and coming through weather as we came through[?] What about rest, so the Master can address the next emergency? What is the priority? Why can't this testing duty fall upon a shore side vendor? Is rest a reason to delay the testing? Should a Master, remove his mind from the safety of the vessel to meet a time deadline? Someone needs to address these questions. Otherwise, a more serious marine incident may be caused.

CX-27 at 177.

The USCG acknowledged Loftus's concerns as legitimate, but indicated Loftus had to speak with his shoreside managers – the agency could only intervene if Horizon actually violated the regulations. CX-27 at 176. Later that same day, Loftus emailed Horizon's Designated Person and Environmental Compliance Manager, Andrew Phillips, regarding his concerns, but did not disclose that he already contacted the USCG. CX-26 at 175; TR at 196, 297. Loftus also communicated his concerns to Josh Diedrich from ABS. CX-28 at 180; TR at 195, 493.

7. *April 2013 – Management Meeting With Loftus on the Trader*

On April 11, 2013, Loftus was scheduled to go on vacation as part of his normal rotation when Phillips and Gregory Hohm, Horizon's Chief Compliance Officer, unexpectedly boarded the Trader to meet with him. CX-15 at 99-100 (RX-26); CX-16 at 101-04 (RX-27); TR at 196-97, 202, 362, 368, 414, 665. The meeting, also attended by Vessel Superintendent Hazel and Loftus's Relief Master, John Nicoll, concerned the Environmental Compliance status of the Trader and Loftus's emails to Phillips regarding drug testing requirements and safety. CX-15 at 99-100 (RX-26); CX-16 at 101-04 (RX-27); TR at 196-97, 202, 362, 368, 414, 665. During the meeting, Loftus revealed that he had contacted the USCG and ABS regarding the concerns he expressed to Phillips on April 2nd. CX-15 at 99-100 (RX-26); CX-16 at 101-04 (RX-27); TR at 196-97, 202, 362, 368, 414, 665. Specifically, Loftus explained that while his focus on safely navigating the Trader was unaffected by Hazel's numerous drug testing demands, he was

worried that the persistent orders could have been distracting to less experienced Masters. TR at 200. In response, Phillips told Loftus that Hazel was merely following his legal obligations under the USCG regulations, and that he should contact Horizon before reaching out to regulatory agencies so that it looks like the company knows what it is doing. CX-15 at 99 (RX-26); TR at 198-99, 664, 667-70. Phillips did, however, tell Loftus that he "was the only one who could have made a determination about whether the request should have been ignored to ensure the safety of the crew and ship." CX-15 at 99 (RX-26).

After the April 11th meeting, Horizon formed a group charged with determining what, if any, discipline to impose on Loftus for the McCarthy incident – a "root cause" investigation team had already been formed at some point in March to determine the cause. RX-32 at 113; TR at 368-71, 445, 497, 715, 731. The "root cause" investigation team was comprised of Hazel, Horizon Consumer Master Mike Smith, Horizon Producer Master Mark Ruppert, and Manager of Safety, Security, and Environmental Health, Peter Sutton. RX-32 at 111; TR at 617. The disciplinary team formed after the April 11th meeting was comprised of the following people from Horizon's senior management: Strohla; Hohm; General Counsel and Secretary, Michael Zendan; Senior Vice President of Operations, Bill Hamlin; Vice President of Human Resources, Mark Blankenship; and Director of Safety, Security, and Environmental Health Captain, Timothy Close. RX-32 at 113; TR at 368-71, 445, 715.

8. ***May 2013 – Loftus Termination***

On May 28, 2013, Loftus received a letter from Strohla informing him that he was being removed from his position as Master, but could work as Chief Mate upon completing leadership and communication skills training. CX-8 at 49-50 (RX-3 & RX-22); TR at 196, 204, 373, 383, 445, 448. The reasons cited for Loftus's discipline were as follows:

> The HL Management Team was immediately drawn to the lack of good judgment demonstrated by the Master in deciding to send crew outside into heavy weather, after the deck had been secured, to address loose garbage can lids. It was commented in several personal statements that the weather was as bad as anyone had experienced in recent memory. The HL Investigating Team observed that 'the risks involved in going on deck in the weather described far outweighed the benefit of securing the garbage cans.' These observations, combined with the failure of the Senior Officer to require a Job Safety Analysis in these notably hazardous conditions, is a clear indication of poor decision making and an inadequate safety climate onboard the Horizon Trader while under your command. Horizon Lines has lost confidence in your ability to fulfill the

> responsibilities as Master of a Horizon Lines vessel, therefore you will not be rejoining the Horizon Trader as Master.

Id. (internal citation omitted); *see also* TR at 196, 204, 373, 383, 445, 448.

When he received the letter, Loftus had over six years of belongings stored on the Trader, but was not allowed to personally retrieve them. TR at 208-09. Crewmembers searched and packed Loftus's belongings for him, and the Bosun, Steward, and two apprentices delivered the items to him on the dock in a pickup truck, adjacent to his former ship, the Trader. *Id.* After receiving his belongings, while standing on the dock, Loftus had to unpack and go through everything because he could not fit it all in his car. TR at 209.

Horizon offered Loftus two different Chief Mate positions. RX-30 at 109; RX-33 at 115; TR at 740. On June 6, 2013, Horizon offered Loftus a Relief Chief Mate job on the Horizon Navigator, which was part of the Puerto Rico run. RX-30 at 109; TR at 740. On June 25, 2013, Horizon assigned Loftus to a Relief Chief Mate position on the Horizon Pacific, a West Coast ship docked in Oakland, California. RX-33 at 115; TR at 740. Loftus refused to accept these demoted positions and terminated his employment with Horizon, which ultimately led to the present case before me. RX-31 at 110; RX-34 at 116; TR at 213, 740.

VI. Discussion

A. Protected Activity and Horizon's Knowledge

1. *October 2011*

Loftus's reports to the USCG and ABS in October of 2011 satisfy the first two elements of his *prima facie* case. The parties stipulated that Loftus's conduct in October of 2011 was protected activity, and I accept the parties' stipulation. ALJX-10. Further, the uncontroverted evidence supports that on October 15, 2011, Loftus emailed Fraser and Hamlin indicating that he reported the safety concerns to the regulatory agencies. CX-1; TR at 149-51. Therefore, I find Horizon had knowledge of this protected activity when it disciplined Loftus.

2. *August 2012*

Similarly, Loftus has demonstrated that his internal complaint to Horizon in August 2012 constitutes protected activity that Horizon was aware of. Preliminarily, Horizon does not deny Loftus engaged in protected activity in August of 2012, but instead argues that his alleged protected activity, if any, was not a contributing factor in its decision to demote him. Resp. Br. at 18-19. Horizon admits in its brief that Loftus engaged in protected activity at some point in

2012, but does not cite to a specific time frame. Resp. Br. at 23 n.19. Accordingly, for completeness of the record, I will discuss below how the evidence supports my finding that Loftus engaged in protected activity in August of 2012, and how Horizon had knowledge of it.

The SPA affords seamen extensive protection against retaliation for threatening to report safety concerns to regulatory agencies. *See* 46 U.S.C. § 2114(a). Consistent with other Federal whistleblower statutes, the SPA's provisions defining protected activity should be interpreted broadly. *See, e.g.*, *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 20-21 (1st Cir. 1998) (construing STAA antiretaliation provisions broadly to facilitate policy goals of ensuring corporate compliance with safety regulations through accountability); *Passaic Valley Sewerage Comm'rs*, 992 F.2d at 478 (discussing "broad remedial purpose" of Clean Water Act in expansively interpreting its whistleblower provisions); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932 ("[I]t is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws."). This is especially true as it pertains to internal complaints so as to "leverage the government's limited enforcement resources" by encouraging seaman to report substandard working conditions to their employers thereby facilitating the SPA's goal of corporate compliance with safety regulations. *Clean Harbors Envtl. Servs., Inc.*, 146 F.3d at 19. "[F]ailure to protect internal complaints may have the perverse result of encouraging employers to fire employees who believe they have been treated illegally before they file a formal complaint." *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 437 (4th Cir. 2012).

Loftus informed Strohla and Washburn that he had safety concerns he would report to the USCG or ABS if Horizon did not, which is something he notably had a well-documented history of doing. CX-1 at 1-7; CX-2 at 8-10; TR at 155-56, 167-68, 253-54, 319-20, 655, 710; *see also* CX-5 at 28-45; TR at 157, 333, 656. At the time, Horizon had only served approximately eight months of its three year probationary term for similar safety violations. *See* CX-29 at 181-82; CX-30 at 183; CX-47 at 302; TR at 374, 378-80, 446. Given the practical implications of any additional infractions, it is doubtful Horizon would have voluntarily contacted the regulatory agencies absent Loftus's threat. *See* CX-30 at 184; CX-47 at 303; TR at 162. Considering the underlying purpose of the SPA is to ensure corporate compliance with safety regulations by encouraging employees to bring attention to possible violations, I find Loftus engaged in known protected activity in August of 2012.

3. *February and April 2013*

Finally, evidence concerning Loftus's communications with the USCG and ABS from February and April of 2013 similarly satisfy the first two prongs of his *prima facie* case. Horizon argues Loftus's contact with the regulatory agencies was not protected activity because he did not "report" any safety infractions – he merely inquired about the regulations. Resp. Br. at 19, 22. In support, Horizon relies on the Fifth Circuit's decision in *Garrie v. James L. Gray, Inc.*, 912 F.2d 808, 812 (5th Cir. 1990), which distinguished between "reports" and mere inquiries under the SPA. Resp. Br. at 19, 22.

The facts in *Garrie* are distinguishable from the case at Bench. In *Garrie*, the complainant, a skipper on a marine vessel, was required to work more than twelve hours a day, which he believed violated 46 U.S.C. § 8104(h). 912 F.2d at 809. For clarification, the complainant called the USCG and asked whether "the regulation regarding maximum working hours" was still effective. *Id.* (internal citation and quotation marks omitted). The complainant did not identify his employer, did not request that any action be taken against his employer, and expressly indicated that he did not wish to file a formal complaint. *Id.* Shortly thereafter, the complainant told his supervisor that "the Coast Guard had confirmed his understanding of the applicable maximum working hours and that it was . . . his intention to refuse to work more than twelve hours per day." *Id.* The complainant was subsequently laid off and he filed suit in Federal court alleging that he was unlawfully discharged in retaliation for reporting to the USCG what he believed to be a safety violation under 46 U.S.C. § 2114. *Id.* at 809-10.

The court ultimately held that the complainant had no claim for wrongful discharge under § 2114 because his communication with the USCG was not a "report" and was therefore not protected activity, nor did his communication facilitate the SPA's purpose. *Garrie*, 912 F.2d at 812-13. In reaching this conclusion, the court reasoned: "[h]e sought information, but did not provide it. He did not file a complaint, nor did he reveal the name of his employer or the vessel upon which he was employed – information without which the Coast Guard could not investigate or prosecute a violation." *Id.* at 812. Accordingly, the complainant "merely made an inquiry" as opposed to a "report" that would have afforded him protection from retaliatory discharge. *Id.*

a. <u>February 2013</u>

In February of 2013, Loftus's communications with the ABS went beyond mere inquiries. On direct examination, the following colloquy took place:

> Q. And what did you say to ABS Inspector Josh Dietrich about safety violations on the Horizon Trader?
>
> A. Well, I complained to him about the condition of the ship sailing from San – not from San Juan, from China, and I asked him how the ABS could possibly let a ship go to sea in that condition with manholes open and valves that didn't work, fuel systems didn't work, bilge valves didn't work, fuel valves. I gave him the whole thing.
>
> . . .
>
> Q. What happened next in relation to your complaint to ABS inspector Dietrich about the safety of the Trader?
>
> A. Pete Strohla called me . . . and he said that the ABS inspector in New York had mentioned to the port engineer, Mike Popovich, that one of the officers was complaining about the condition of the ship sailing from shipyard in China, and then he asked me if I was the person and I replied yes, I was.

TR at 158-59; *see also* TR at 254-255, 257-258, 346-348. Loftus made Dietrich aware of several safety concerns that were still outstanding from August 2012. TR at 255, 258, 346-348.

Loftus's testimony supports that he believed there had been numerous safety violations aboard the Trader when it sailed from China, and he conveyed this information to Dietrich with the hopes that it would facilitate bringing the ship into compliance; this interpretation is buttressed by the fact that Loftus's long history of complaints to Horizon alone often went unaddressed. *See* CX-1 at 1-7; CX-2 at 8-10; TR at 149-51, 158-59. Unlike in *Garrie*, Loftus did not ask Dietrich any questions, but instead expressed disbelief that the ABS allowed the Trader's problems to persist for as long as it had citing a long, detail-specific list of items that warranted immediate action. *See* TR at 158-59; *see also* CX-2 at 8-10; CX-5 at 28-45. Further, I credit Loftus's testimony that he told Strohla about his protected activity. *See* TR at 158-59.[6]

b. April 2013

In April of 2013, Loftus made more than mere inquiries to the USCG and ABS concerning drug testing requirements and safety. *See* CX-27 & 28. Upon a perfunctory review of his exchanges with the USCG, it appears that Loftus only sought clarification about the regulations by repeatedly saying "I have questions." CX-27 at 179. In analyzing his emails more deeply, however, it is clear that Loftus's communications are not limited to just inquiries as

[6] I recognize there is a discrepancy between Loftus and Strohla on this point. Strohla testified that he does not recall talking to Loftus about his communications with Dietrich. TR at 714; *see also* Resp. Br. at 20. Strohla's memory lapse is bit too convenient and unconvincing. Loftus testified credibly throughout this proceeding and I find Strohla's testimony to be less credible in general.

Horizon suggests. *See id.* In his first email to the USCG, Loftus discussed his experience surrounding McCarthy's accident, and said the following about Horizon: "In my case, I believe they lost sight of the overall safety of the ship and crew, in favor of a piece of paper certifying a test was done. To me this is a breach of the broader concepts of the ISM code." *Id.* In subsequent emails, Loftus demonstrated his firm understanding of the regulations by explaining "safety of the vessel and environment is paramount. I believe the ISM Code is specific in this area." *Id.* at 176.

Unlike in *Garrie*, Loftus tried to convince the USCG to take action against Horizon over the course of three emails. *See id.* at 176-79. In response, the USCG told Loftus that even if Horizon's drug testing policy itself violated the regulatory code, the agency could not do anything about it until actual conduct or inaction beyond the written policy that violated the regulations took place. *See id.* at 176. To be specific, in its final response to Loftus, the USCG stated as follows:

> I understand what you are saying, being a Master myself. But it comes down to what your company wants to do and how they wrote their policy on meeting the regulations. They are the ones responsible to get it done, not the USCG. We can't tell them how to do it, we tell them what's required. When and if they break any of the regulations about drug and alcohol testing is when we can have a say. All the tools for them are the regs I sent you. I really don't know what else to tell you.

CX-27 at 176. It seems as though if Horizon's drug testing policy led to an injury or damage because a master was distracted by the repeated unreasonable demands of Horizon to do drug testing, the USCG may have been more inclined to investigate. The exceptional judgment of Loftus to focus on the safety of his ship instead of yielding to Hazel's flawed demands essentially left Horizon's policy untested in circumstances involving a master with less experience.

Similarly, Loftus did more than just inquire about the regulations when he emailed the ABS. *See* CX-28 at 180. Specifically, Loftus's email to Dietrich disclosed that he had filed a Corrective Action Report with Horizon over what transpired following McCarthy's accident and explained how the company put the Trader at risk by demanding that drug tests be administered under the dangerous circumstances that existed at the time. *Id.* In concluding, Loftus said "I appreciate your formal follow up." *Id.* Loftus did not ask any questions. *Id.* Strohla and Hohm

admit that on April 11, 2013, Loftus disclosed the nature of his protected activity. CX-15 at 99 (RX-26); CX-16 at 104 (RX-27); TR at 197.

Horizon argues further that Loftus's communications with the USCG and ABS were not made in good faith because Loftus knew he exercised poor judgment when McCarthy was injured, and he needed a way to protect himself. Resp. Br. at 23-24. The evidence does not support Horizon's contention. Loftus had a long history of reporting safety violations to both Horizon and regulatory agencies for no other reason than to operate a safe ship. *See* CX-1 at 1-7; CX-2 at 8-10; CX-5 at 28-45; TR at 155-57, 167-68, 253-54, 319-20, 333, 655-56, 710. Loftus's actions in putting safety first is well documented throughout his career at Horizon. *See* CX-1 at 1-7; CX-2 at 8-10; CX-5 at 28-45; TR at 155-57, 167-68, 253-54, 319-20, 333, 655-56, 710. Moreover, the evidence supports that Loftus genuinely believed that Horizon's drug policy violated safety regulations, and he was worried that a less experienced Master would risk safety by heeding illogical shore side demands. CX-15 at 99-100 (RX-26); CX-16 at 101-04 (RX-27); TR at 196-97, 200, 202, 362, 368, 414, 665 Where Loftus's communications with the USCG and ABS in February and April of 2013 go beyond mere inquiries and facilitate the goals of the SPA, I find them to be protected activity under 46 U.S.C. § 2114(a); I likewise find that Horizon knew about Loftus's protected activity from February and April of 2013 when it demoted Loftus in May of 2013.

B. Adverse Action

The parties do not dispute that Loftus suffered an adverse action. Compl. Br. at 14; Resp. Br. at 26 n.22. Rather, the parties disagree as to the severity of the action taken against Loftus. *See* Compl. Br. at 29; Resp. Br. at 26 n.22. Horizon argues that Loftus was demoted, and Loftus argues that he was "constructively discharged." *See* Compl. Br. at 29; Resp. Br. at 26 n.22, 27-29. To make a *prima facie* case, however, Loftus need only prove that Horizon's action against him was adverse – the severity of the action is irrelevant. *See* 42 U.S.C§ 42121(b); *Bechtel Constr. Co.*, 710 F.3d at 447; *Allen*, 514 F.3d at 475-76; *Harp*, 558 F.3d at 723; *Hutton*, ARB No. 11-091, slip op. at 5. I find Loftus's disciplinary letter dated May 28, 2013, where Horizon removed him from his position as Master is sufficient to satisfy the third prong of his *prima facie* case. CX-8 at 49 (RX-3 & RX-22).

C. Contributing Factor

Loftus's protected activity contributed to Horizon's decision to discipline him. Under the contributing factor standard, Loftus need not prove that his protected activity was the only reason for Horizon's adverse action against him. The ARB has repeatedly emphasized that "a contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011) (internal quotation and citation omitted). *See also Araujo*, 708 F.3d at 158; *Hutton*, ARB No. 11-091, slip op. at 8; *Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan 30, 2008). The goal of the contributing factor standard is to ensure that whistleblowers need not prove protected activity was a substantial, significant, predominant, or motivating factor in an adverse action taken against them. *Araujo*, 708 F.3d at 158. Hence, Loftus need only prove that Horizon's adverse action against him was motivated, at least in part, by his protected activity. *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007).

Loftus may demonstrate his protected activity was a contributing factor in Horizon's adverse action against him through either direct or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7 (ARB Feb. 29, 2012). The types of circumstantial evidence Loftus may use to prove a contributing factor include but are not limited to the following:

> temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

Id. at 7. Importantly, Loftus's evidence need not directly imply that Horizon had any discriminatory motive or animus toward him; irrespective of Horizon's motives, adverse actions against employees cannot be based on protected activities, such as whistleblowing. *Araujo*, 708 F.3d at 158; *Peterson v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, slip op. at 3 (ARB Nov. 20, 2013); *Hutton*, ARB No. 11-091, slip op. at 7; *Menendez v. Halliburton, Inc.*, ARB No. 12-026, ALJ No. 2007-SOX-005, slip op. at 13-14 (ARB Mar. 15, 2013) (reissued Mar. 20, 2013); *DeFrancesco*, ARB No. 10-114, slip op. at 6. As discussed below, based on the totality of the circumstances, I find that Loftus has satisfied his burden of proving, by a

preponderance of the evidence, that his protected activity contributed to Horizon's decision to demote him.

1. *Temporal Proximity*

While temporal proximity alone is insufficient to establish causation, the time between the protected activity and the adverse action can support a finding that the protected activity contributed to the adverse action. To be probative, the temporal proximity of the adverse action must be reasonably close in time to the protected activity. *Lally v. Tyco Electronics,* 2010-ERA-00004, slip op. at 10 (ALJ May 10, 2010) (*citing Clark County School District v. Breeden*, 532 U.S. 268, 273-74 (2001) (concluding that 20 months is too remote in time to show causation); *Keener v. Duke Energy Corp.*, ARB No. 04-091 (ARB. July 31, 2006) (13-month gap too long to infer causation); *Evans v. Washington Public Power Supply Sys.*, ARB No. 96-065 (ARB July 30, 1996) (one year gap too long). However, in whistleblower cases, "[j]udges have drawn inferences of causation when the adverse action happened . . . as much as about one year later." *Halloum v. Intel Corp.,* 2003-SOX-7 HTML at 12 (ALJ Mar. 4, 2004) (*citing Thomas v. Ariz. Pub. Serv. Co.,* 1989-ERA-13 (Sec'y Sept. 17, 1993)).

Loftus's conversations in February of 2013 with ABS Inspector Dietrich regarding the Trader's condition and Loftus's communications with USCG and ABS in April of 2013 concerning Horizon's drug testing policy all occurred within sixteen weeks of the May 28, 2013 adverse action. The close temporal proximity of these events support an inference that Loftus's protected activity was a contributing factor in Horizon's adverse action against him.

2. *Hostility Toward Loftus's Protected Activity*

The evidence similarly supports that Horizon displayed hostility towards Loftus's protected activity. William Barclay, Horizon's Manager of Safety and Designated Person, confirmed that "it did not always bode well shore side" when Loftus reported safety concerns to the regulatory agencies. CX-40 at 291; *see also* Compl. Br. at 15. Walcott Becker, Jr., the Trader's Vessel Superintendent until September of 2012, testified that his immediate supervisor, Vice President and General Manager of Ocean Transportation Services, Joe Breglia, twice attempted to terminate Loftus in 2012 for reporting safety concerns to the USCG and ABS. Breglia was not successful in terminating Loftus because Becker correctly advised him that doing so would be improper given Horizon's internal policy of encouraging employees to report safety concerns. TR at 353-54.

While Breglia was replaced by Strohla and therefore no longer employed by Horizon at the time of Loftus's discipline, Breglia's sentiments are illustrative of management's attitude toward his protected activity. Becker admits that even he once told Loftus, out of frustration, that he should be fired over his frequent communications with the regulatory agencies. TR at 355. Additionally, Phillips testified that Horizon's informal policy was for employees to exhaust internal procedures before contacting regulatory agencies. TR at 669-70. This preference was further exhibited during Strohla's meeting with Loftus in April of 2013, when Loftus informed Strohla that he contacted the USCG and ABS regarding Horizon's drug testing policy and Strohla responded as follows: "Please contact us first so it at least looks like we know what we're doing." TR at 198; *see also* CX-15 at 99-100 (RX-26); CX-16 at 101-04 (RX-27). Interestingly, Strohla is also the individual ultimately responsible for Loftus's discipline. TR at 715.

3. *Disparate Treatment*

Horizon treated Loftus differently than it did other employees who violated Horizon's objective policies and procedures. CX-9 at 51; CX-10 at 52; TR at 395, 397, 491. For example, one Captain violated Horizon's Zero Tolerance Policy concerning the possession and use of alcohol on ships. CX-9 at 51. Acknowledging the Captain's serious lack of judgment, Horizon only suspended him from May to August, at which time he was given "another chance as a Master." *Id.*

On another occasion, a First Assistant Engineer was reprimanded for inadequately supervising maintenance work on his ship. CX-10 at 52. The Engineer's reprimand letter read as follows:

> The on-going failure to address the poor mechanical condition of the Ship's Service Diesel Generator's lube oil strainer; to ensure system pressure gauges were properly calibrated and to ensure adequate supervision of planned maintenance activities all were directly causal in the failure of the Ship's Service Diesel Generator and the damages to the generator crankshaft bearing and crankshaft . . . Your actions reflect a disregard of the company's Safety and Environmental Management System, existing regulations and good engineering practices.

Id. Yet, the Engineer was only suspended without pay for one month. *Id.*

Horizon's argument that Loftus's disparate treatment results from a change in management is unconvincing. *See* TR at 398-99, 490, 709, 747. Preliminarily, Hazel was

involved with both the Engineer's discipline and the investigation leading to Loftus's discipline. CX-10 at 51; TR at 617. Despite the composition of Horizon's "new" management team, the uncontroverted evidence is that demoting a master to chief mate was unprecedented. *See* TR at 208, 747. It would have been practically impossible for Loftus to operate effectively as Chief Mate because the position is not only more physically demanding than a Master, but he also would have received little to no respect from his crew. CX-32 at 197-98; CX-33 at 209; TR at 213. Strohla himself admitted that no captain has ever been demoted or terminated based on the subjective decision of a senior management team, as occurred here. TR at 747.

Further, Loftus was denied an opportunity to personally retrieve six years' worth of belongings aboard the Trader despite Horizon's past practice of allowing other disciplined employees to do the same. TR at 209. Loftus did not pose a serious threat as demonstrated by his continued employment for three months following the McCarthy incident, and I am hard pressed to see a reasonable justification for Horizon's actions as it relates to new management or accountability. CX-8 at 49 (RX-3 & RX-22); TR at 196. According to Loftus, Horizon fired people "on ships for alcohol abuse, fighting, knife fighting, whatever; I've never seen anybody treated like this where they couldn't come back and get their gear." TR at 209. Horizon's argument that it hoped to save Loftus from the humiliation of retrieving his belongings himself is unavailing because he was not given an option either way. In fact, their actions proved to be more humiliating by leaving Captain Loftus on an open dock next to his former ship to collect six years-worth of personal belongings.

Even more disconcerting about Loftus's treatment is Horizon's argument that he was not terminated – it is Horizon's position that he was only demoted. Resp. Br. at 26 n.22, 27-29. If Horizon thought it would be too humiliating for Loftus to simply obtain his own belongings from the ship, then it is nonsensical for it to also argue that Loftus could have worked effectively in a demoted Chief Mate position. I accept and credit Loftus's testimony that such a demotion created an untenable situation vis-à-vis his ability to command any respect in the demoted position.

Finally, regardless of who comprised the management team, the investigation into the McCarthy accident did not comport with Horizon's objective policies. *See* TR at 450. Horizon's objective procedures required that McCarthy's accident be investigated by a team consisting of the following: one or two shipmates, the supervisor over the person involved, and an Officer or

Vessel Superintendent. *See id.* Horizon alleges that because Loftus was directly involved in the incident, it was in its best interests to have an investigation team comprised of different people than called for in the procedures. TR at 450, 495-96. The team included Vessel Superintendent Hazel, Captain Mike Smith, Captain Mark Rupert, and Manager of Safety, Security, and Environmental Compliance, Peter Sutton. TR at 617. Significantly, Hazel was also sufficiently involved with the McCarthy incident so as to raise suspicion of his possible bias; yet, Horizon assigned him to the investigation team anyways. *See* CX-25 at 164-74; CX-25A; TR at 617. Based on all of the foregoing, I find that Loftus proved the fourth and final element of his *prima facie* case.

C. Horizon's Affirmative Defense

Horizon did not prove by clear and convincing evidence that it would have demoted Loftus irrespective of his protected activity. "The 'clear and convincing evidence' standard is the intermediate burden of proof, in between 'a preponderance of the evidence' and 'proof beyond a reasonable doubt.'" *Araujo*, 708 F.3d at 159 (internal citation omitted). This means that Horizon must prove it "is highly probable or reasonably certain" that it would have taken adverse action against Loftus irrespective of his protected activity. *Williams*, ARB No. 09-092, slip op. at 6, *quoting Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (internal quotations omitted). In its brief, Horizon argues that Loftus "was demoted **solely** as the result of his 'serious lapse of judgment,' which led directly to McCarthy's severe injury." Resp. Br. at 26 (internal citation omitted) (emphasis in original).[7] In Loftus's disciplinary letter, however, Horizon cites poor decision making and an inadequate safety climate onboard the Trader as the primary factors justifying Loftus's discipline; the letter specifically references the horrific weather conditions that existed when McCarthy was injured as well as "the failure of the Senior Officer to require a Job Safety

[7] This argument is concerning given the testimony of Horizon's Chief Compliance Officer, Greg Hohm. He testified that after meeting with Loftus on April 11, 2013, he knew Loftus needed to be terminated or demoted and this was before any investigation concerning the McCarty incident was completed. TR at 368-369, 407-410, 438. Hohm reported directly to the Board of Directors of Horizon and he informed the Board that discipline was required here. TR at 359, 371. He carried significant authority with the board and claims he was responsible for the decision to hire Pete Strohla, the person who signed the May 28, 2013 letter demoting (terminating) Loftus. TR at 359, 371, 400. He was also responsible for forming (and serving on) the senior management team that was charged with determining the ultimate discipline Loftus was to receive. TR at 367-369. In testimony, Hohm conceded there was at least one additional reason beyond the McCarthy incident as to why Loftus was terminated. TR at 428. All of this contradicts counsel's argument that Loftus was demoted solely because of a serious lapse in judgment leading to McCarthy's injury.

Analysis." CX-8 at 49 (RX-3 & RX-22). For the reasons discussed below, I find that it is highly unlikely that Horizon would have demoted Loftus absent his protected activity. There is virtually no evidentiary basis to support any of the reasons advanced by Horizon to justify its adverse action.

1. *The Weather*

According to the demotion letter authored by Strohla, Horizon disciplined Loftus because he exercised poor judgment in sending a crew on deck in weather "as bad as anyone had experienced in recent memory." CX-8 at 49-50 (RX-3 & RX-22). However, the uncontroverted evidence establishes that at the time of McCarthy's accident, the weather conditions were fairly common and described as "moderate" in the Trader's log book. CX-8 at 49 (RX-3 & RX-22); CX-32 at 190-91; CX-33 at 205-06; CX-34 at 241, 249; CX-35 at 255, 258, 260; TR at 133, 139, 176-77. The following four expert witnesses testified in this case: Kevin O'Halloran, Walcott Becker, James Staples, and Mark Bisnette. CX-32 through CX-35; TR at 48, 74, 112, 254. All four experts agree that the weather was not bad when McCarthy was injured. CX-32 at 190-91; CX-33 at 205-06; CX-34 at 241, 249; CX-35 at 255, 258, 260; TR at 133, 139. For one, the wind force was only seven to eight knots, which is not out of the ordinary. CX-32 at 191; CX-33 at 206; CX-34 at 241; CX-35 at 255; TR at 66, 126-27, 139. The seas were rough, but the Trader was only rolling and pitching moderately with no water spray splashing over the bow or on deck, and no one else was injured while assisting McCarthy. CX-32 at 190-91; CX-33 at 206-07; CX-35 at 259; TR at 181. Lastly, the Trader was travelling at its maximum service speed of 20 knots, which it could not do without sustaining serious damage to the ship if the seas were very rough; the fastest any ship could travel in rough seas without sustaining damage is approximately 14 knots. CX-32 at 190; CX-35 at 258; TR at 66. The Trader did sail through what some may consider the storm of the century, but that did not occur until well after McCarthy was injured and removed from the ship over 8-10 hours later. TR at 133, 136, 139, 179-81, 183.

Horizon made no effort to verify the actual weather at the time of McCarthy's accident. The Senior Management Team responsible for determining Loftus's discipline did not review any official weather data nor consult with any weather experts. TR at 387, 455-56. Not a single person on Loftus's disciplinary team had any maritime experience to make any independent conclusions about the weather based on the evidence presented alone. RX-32 at 113; TR at 368-71, 443-45, 474. The disciplinary team's inexperience in maritime matters is obvious from its

failure to consider the Trader's rolling, how many knots it was making, and what the true and apparent wind speeds were at the time of the accident. TR at 386-87, 455-56, 724. The only evidence that the disciplinary team relied on concerning the weather was the investigation team's report. TR at 386-87, 455-56, 724. The disciplinary team did not use any objective criteria to define the "heavy weather" it cited in Loftus's disciplinary letter and completely disregarded any inconsistencies concerning the weather on March 6th. TR at 432, 525. The weather could not have been a real factor in assessing discipline to Loftus.

2. *Job Safety Analysis ("JSA")*

According to Horizon policy, a JSA was not required before sending a team out to secure the trash cans because it is considered a routine task. CX-32 at 193, 199; CX-33 at 208; TR at 54, 59, 67, 88, 250-51. The disciplinary team never made a determination as to whether a JSA was actually required under the circumstances, yet cites the lack of a JSA as a reason supporting Loftus's discipline. CX-8 at 49 (RX-3 & RX-22). As a member of Loftus's disciplinary team, Close testified that there was an inadequate assessment of risk "because [Loftus] failed to conduct or require the job safety analysis." TR at 510-11. Contrary to Close's testimony, however, Loftus testified that his standing orders required a JSA any time a job was started or assigned. TR at 250-251. He further clarified that because McCarthy was assigned the task of securing the trash cans, McCarthy was responsible for completing the JSA under the standing order. TR 250. If McCarthy thought the job was a repetitive, routine task, pursuant to Horizon policy, he could have dispensed with the formality of a JSA. TR at 250-251.

Loftus went above and beyond what was actually required of him when it came to JSAs. *See* TR at 250-51. He discussed JSAs at every drill and even bought small plastic holders to attach to the bulkheads in every room so that JSA books were always available. TR at 250. Even if a JSA was required under the circumstances, it was Chief Mate McCarthy's job to do it; immediate supervisors conduct JSAs – not assigning Masters. CX-33 at 208; TR at 177. Strikingly, Horizon did not discipline McCarthy for failing to conduct a JSA. The fact that Horizon cited the lack of a JSA as grounds for disciplining Loftus before even determining whether Loftus was required to perform one, demonstrates the superficial nature of Horizon's investigation. Horizon appears to be manufacturing reasons to justify its illegal behavior of retaliating against Captain Loftus.

3. *Applicable Standard of Care for a Master*

The experts who testified were uniform in their opinion that Loftus acted consistent with the standard of care of an experienced Master, using good judgment by sending a crew on deck to secure the trash cans with the approaching storm. CX-32 at 198; CX-33 at 205-06; CX-34 at 249. For one, the weather was not severe enough to prevent crew members from going on deck, despite the deck being secured. CX-33 at 205-06; TR at 126-27, 173-74. It is common for seamen to work on a secured deck, and if anything, Loftus securing the decks as early as he did is an indication of the safe atmosphere he promoted on his ship. CX-32 at 191; CX-34 at 250; TR at 66-67, 126-27, 173-74. Loftus also only sent experienced mariners on deck to perform the task of securing the trash cans, and no one expressed any reservations about it. CX-35 at 258; TR at 140, 178. In fact, it was actually McCarthy's idea to bring the trash cans inside; Loftus initially only asked that a net be placed over the cans. CX-35 at 258; TR at 98-99, 104, 109-10, 175. Additionally, while McCarthy began securing the cans in the container, he realized the chain and latch used to secure the container door was not adequate to hold the door open and instructed another crew member to get some rope to better secure the door. RX 16 at 58. While McCarthy was waiting for the rope and standing in the way of the door, the latch failed (as he expected), and the door knocked him to the ground. *Id.* McCarthy's standard of care in this entire investigation was never questioned by Horizon.

Furthermore, Loftus's efforts to avoid a MARPOL violation were reasonable under the circumstances. CX-35 at 255; CX-38 at 289; TR at 107, 177, 494. The applicable MARPOL provision reads as follows: "No person on board any ship may discharge into the sea, or into the navigable waters of the United States, plastic or garbage mixed with plastic, including, but not limited to, synthetic ropes, synthetic fishing nets, and plastic garbage cans." 33 C.F.R. § 151.67; *see also* CX-38. It was Loftus's duty as Master to ensure MARPOL compliance. *See* 33 C.F.R. § 151.63; *see also* CX-38 at 289; TR at 435, 446, 449, 482, 494, 624. Any MARPOL violation could have personally subjected Loftus to a civil penalty, but a knowing violation could have resulted in conviction of a class D felony. *See* 33 C.F.R. § 151.04; *see also* CX-38 at 289; TR at 108. While there is an accidental loss exception to § 151.67 of MARPOL, it applies only if "all reasonable precautions have been taken before and after the occurrence of the damage, to prevent or minimize the accidental loss." 33 C.F.R. § 151.77; *see also* CX-38 at 289.

Given the weather conditions that existed several hours after the accident, there was a good chance that any trash cans left on deck would have been washed overboard by the storm. TR at 108-09, 189-90. As Captain James Staples opined in his report: "In today's world of regulations a Master must be diligent when it comes to all regulations whether it SOLAS, MARPOL or ISPS. The Master must have the foresight to keep the vessel safe and in compliance which is always a balancing act." CX-35 at 255. Where the weather was not sufficiently severe to preclude experienced seamen from going on deck to secure the trash cans, it is unlikely the USCG would conclude that the accidental loss exception applied in the likely event of a violation. *See* CX-32 at 190-91; CX-33 at 205-06; CX-34 at 241, 249; CX-35 at 255, 258, 260; TR at 133-34, 139.

In light of its vulnerability at the time during which the McCarthy accident occurred, it is unbelievable that Horizon would not have considered MARPOL as part of its investigation. *See* CX-29 at 181-82; CX-30 at 183; CX-47 at 302-03; TR at 162, 374, 378-80, 435, 446, 449, 482, 494, 624. Horizon had been stressing MARPOL compliance since early March of 2011, and even stated in its ECP and ECP summary that noncompliance with MARPOL regulations was cause for termination. CX-29 at 181-82; CX-30 at 183; CX-47 at 302-03; TR at 162, 374, 378-80, 446. On March 6, 2013, Horizon was serving probation and could not afford any MARPOL infractions or it very likely would have gone out of business. CX-29 at 181-82; CX-30 at 183; CX-47 at 302-03; TR at 162, 374, 378-80, 446. The fact that Horizon failed to consider MARPOL as part of its investigation of Loftus is further evidence that the investigation was merely window dressing used to disguise its true motives for disciplining Loftus.

4. *Loftus's Reputation for Safety*

Horizon's contention that Loftus's decision-making on March 6, 2013, highlighted "an inadequate safety climate onboard the Horizon Trader" is overwhelmingly unsupported by the record and is rejected as a fabrication. CX-8 at 49 (RX-3 & RX-22); *see also* CX-1 at 1-7; CX-2 at 8-10; CX-4 at 26-27; CX-5 at 28-45; CX-32 at 193; CX-40 at 291; CX-44 at 296; CX-42 at 294; CX-34 at 250; TR at 206, 461, 558. In addition to the reasons discussed above, no one ever questioned the safety culture of Loftus on any vessel before the McCarthy incident nor did he have any prior record of discipline. TR at 206, 461, 633, 643. Hazel admitted that he frequently visited the Trader for inspections and never saw anything to raise safety concerns. TR at 633,

643. To the contrary, Hazel confirmed that a strong safety culture existed aboard the Trader and the vessel was in very good condition under Loftus's command. TR at 633, 643.

All of the experts in this case are unanimous that Loftus was at the top of his game when it came to safety concerns. CX-32 at 193, 199; CX-33 at 205; CX-34 at 250; CX-35 at 259. Becker, who conducted several audits of the Trader while Loftus was master stated: "Captain Loftus, in my experience and opinion, was the most safety conscientious Master in the entire Horizon Lines fleet." CX-32 at 199. Staples opined, "Captain Loftus has always put the safety of the vessel and crew first . . . ." CX-35 at 259. Bisnette characterized Loftus's commitment to safety as "unflinching," and said that he was nothing "but a competent, professional mariner with an unusually strong commitment to the safety of his vessel and crew." CX-34 at 249-50.

We need look no further than to the events of March 2013 to discern the kind of Master John Loftus was. Phillips admits that Loftus did a very good job sailing the Trader back to port in such extreme conditions. TR at 688. A Maersk ship sailing into New York lost eighty containers over the side of the ship during the storm, and Loftus observed "other ships coming in [and] out of the pilot station, boxes hanging over the side, container sides knocked out, cargo strewn all about." TR at 189-90. Yet, Loftus sailed the Trader out of the storm without any loss of life, cargo, or heavy damage to the vessel. TR at 186, 364. In his conclusion, Captain Staples writes "Captain Loftus should have been given an award [for sailing the Trader out of the storm as he did] . . . I would sail with or under Captain Loftus anytime and have complete faith that he would have my safety his main concern." CX-35 at 261.

In addition to his safe handling of the Trader in March of 2013, Loftus's commitment to safety is evident from the numerous Corrective Action Requests he submitted to Horizon over the years, as well as his repeated communications with regulatory agencies regarding his safety concerns. CX-1 at 1-7; CX-2 at 8-10; CX-4 at 26-27; CX-5 at 28-45; CX-32 at 193; CX-40 at 291; CX-44 at 296; CX-42 at 294; CX-34 at 250; TR at 206, 461, 558. Becker, for example, articulated the following in his report:

> Over the twenty-three years that I have been in the marine industry and in the US Coast Guard Marine Inspection before that, other than Captain Loftus, I can recall no other Captain who reported to the regulatory agencies in lieu of resolving the safety issues within their companies . . . Under Captain Loftus, Safety Ride deficiencies were corrected quickly and Safety Meeting Minutes were detailed and any outstanding items were followed up and corrected. Maintenance Meeting notes were found to be complete and contained several comments on the status of

> the equipment and planned correction/completion dates. Horizon Lines instituted a program to reduce personal injuries fleetwide and the HORIZON TRADER had reduced personal injuries, compared to previous years.

CX-32 at 193; *see also* CX-12 at 54-57. In fact, there was a corresponding Corrective Action Request submitted to Horizon for all of Loftus's protected activity. CX-1 at 1-7; CX-2 at 8-10; CX-4 at 26-27; CX-5 at 28-45; CX-32 at 193; CX-40 at 291; CX-44 at 296; CX-42 at 294; CX-34 at 250; TR at 155, 157, 167-68, 191-92, 206, 253, 333, 362, 461, 558, 655-56, 710. More often than not, Loftus resorted to reporting safety concerns to the regulatory agencies because of Horizon's consistent failure to correct hazardous conditions aboard the Trader. *See* CX-1 at 1-7; CX-2 at 8-10; CX-4 at 26-27; CX-5 at 28-45; CX-32 at 193; CX-40 at 291; CX-44 at 296; CX-42 at 294; CX-34 at 250; TR at 155, 157, 167-68, 191-92, 206, 253, 333, 362, 461, 558, 655-56, 710. Loftus was clearly a thorn in Horizon's side.

In metering out its punishment, the disciplinary team used no objective criteria to reach the conclusion that it lost confidence in Loftus. TR at 461. Hohm testified that he lost confidence in Loftus because Loftus did not safely manage the Trader and was unsure of his authority as Master which was demonstrated by his communications with the USCG and ABS in April of 2013. TR at 428. Conversely, Close stated that Loftus's continual communication with the regulatory agencies did not bother him, rather he lost confidence in Loftus due to his failure to conduct a JSA. TR at 510-12, 531. Strohla testified that he barely put any weight on whether Loftus was distracted by Hazel's emails after the McCarthy incident. TR at 737. Rather, Strohla blamed his loss of confidence in Loftus on sending a crew on deck in extremely poor weather conditions. TR at 766.

The term "disciplinary team" seems to be a misnomer as there was clearly no consensus on why the "team" was disciplining Loftus. Horizon engaged in these machinations of forming a disciplinary team and a root cause investigation team to mask the true reasons for its actions – to discipline Loftus for his protected activity. As Greg Hohm testified, he knew after his surprise meeting to the Trader on April 11, 2013 that Loftus needed to be fired or demoted. TR 368-369. The disciplinary decision was made before any investigation was complete, and Horizon put forth a lot of smoke and mirrors to justify the course forged by Hohm. If Horizon truly wanted to conduct a root cause investigation, why did it not consider the following: (1) Why were containers placed onboard the Trader with inferior latching mechanisms?; or (2) The extent of Chief Mate McCarthy's culpability in causing his own injuries by failing to do a JSA and for

standing in front of a container door that he knew was not secure? Had Horizon considered these other issues in its root cause analysis, its sights would not have been trained on Loftus.

Based on the foregoing, it is an easy call to find that Horizon did not satisfy its burden of proving it "is highly probable or reasonably certain" that it would have demoted Loftus absent his protected activity.

VII. Damages

Loftus is entitled to damages. A successful whistleblower complainant under the SPA is entitled to "compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination . . . ." 49 U.S.C. § 31105(b)(3)(A)(iii); *see also* 29 C.F.R. § 1986.100(a). Further, relief "may include punitive damages in an amount not to exceed $250,000." 49 U.S.C. § 31105(b)(3)(C).

Preliminarily, neither party discusses how the existence of a successor-in-interest, Matson Alaska, Inc., changes my analysis in awarding damages here. Given Matson's knowledge of this litigation prior to its purchase of Horizon and its post-hearing participation in this proceeding by seeking an amendment to the case caption, I find that any arguments against imposing liability on Matson have been waived. All liability is imposed jointly and severally against Horizon and Matson.

I. Back Pay

Loftus is entitled to $655,198.90 in back pay. CX-37A; TR at 323. Under the SPA, successful whistleblower complainants are automatically entitled to an award of back pay. *Assist. Sec. of Labor for Occupational Safety & Health, & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36, slip op. at 5 (ARB June 30, 2005); *Assistant Sec'y & Moravec v. H.C. & M Transp., Inc.*, 90-STA-44, slip op. at 10 (Jan. 6, 1992). It is well settled that the purpose of back pay is to make Loftus whole by restoring him to the position he would have been in absent Horizon's unlawful discrimination. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Blackburn v. Martin*, 982 F.2d 125, 129 (4th Cir. 1992); *Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 5; *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002); *McCafferty v. Centerior Energy*, ARB No. 96-144; ALJ No. 96-ERA-6, slip op. at 17 (ARB Sept. 24, 1997).

Loftus's back pay must be "calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988)."

Mendenhall Acquisition Corp., ARB No. 04-014, slip op. at 5; *see also Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 760 (6th Cir. 2004); *Polgar v. Florida Stage Lines*, ARB No. 97-056, ALJ No. 94-STA-46, slip op. at 3 (ARB Mar. 31, 1997). If applicable, back pay generally runs from the date of discriminatory discharge until the date of reinstatement, but there is no fixed method for determining an appropriate award. *Pettway v. Am. Cast Iron Pipe Co., Inc.*, 494 F.2d 211, 260-61 (5th Cir. 1974); *Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 6; *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-005, ALJ No. 95-STA-43, slip op. at 14 n.12 (ARB May 30, 1997); *Polewsky v. B&L Lines, Inc.*, 90-STA-21, slip op. at 5 (May 29, 1991). "Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, 'unrealistic exactitude is not required' in calculating back pay, and 'uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party].'" *McCafferty*, ARB No. 96-144, slip op. at 18 (internal quotation marks omitted), *quoting EEOC v. Enterprise Assn. Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d. Cir. 1976), *quoting Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975). *See also NLRB v. Browne*, 890 F.2d 605, 608 (2d Cir. 1989) (holding once successful plaintiff establishes gross amount due, burden shifts to defendant to prove facts mitigating liability). Loftus's back pay calculation need only be reasonable and supported by the evidence. *See Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 6; *Cook*, ARB No. 97-005, slip op. at 14 n.12; *Pettway*, 494 F.2d at 260-61.

Horizon argues that, if anything, Loftus is only entitled to $61,406.07 – the difference between a Master's total annual income equaling $307,030.32, and a Chief Mate's total annual income equaling $245,624.25. Resp. Br. at 26-27 n.24. In support, Horizon argues that Loftus was not "constructively discharged," so he had an ongoing duty to mitigate his damages by accepting one of the Chief Mate positions he was offered. Resp. Br. at 27-32. Alternatively, Horizon argues that Loftus should have made reasonable efforts to secure other employment, which he did not. Resp. Br. at 32.

In its brief, Horizon cites *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 118-19 (1st Cir. 1997) and *Serrano-Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23 (1st Cir. 1997) – two cases involving employees who resigned – to bolster its argument that Loftus is only entitled to the difference in income between Master and Chief Mate. Resp. Br. at 30-31. In *Rosado*, the plaintiff worked for the Commonwealth of Puerto Rico for almost twenty years, and from 1965

to 1975 was the District Director of the Barranquitas Office of the Department of Social Services but classified as a Social Worker V. 562 F.2d at 116. In 1974, Puerto Rico began participating in the federal food stamp program, and the plaintiff's location was selected as one of the first distribution sites. *Id.* The food stamp program did not operate as well as planned, and the plaintiff was asked by his regional supervisor to explain why. *Id.* In response, the plaintiff wrote a letter outlining his criticisms of how the program was being run locally suggesting "irregularities" existed in the program, and he concluded by suggesting a number of possible remedies. *Id.* Copies of the plaintiff's letter were sent to his immediate supervisors, including the defendant.

Upon receiving a copy of the letter, the defendant called the plaintiff in for a meeting on June 20, 1975. *Id.* During the meeting, the defendant expressed dissatisfaction with the program "irregularities" described in the plaintiff's letter to the regional supervisor and cautioned him to be more conscientious of his choice of words moving forward. *Id.* Thereafter, a heated discussion between the plaintiff and the defendant ensued. *Rosado*, 562 F.2d at 116.

Approximately one month after the meeting, the plaintiff received a letter from the defendant transferring him to a different location to handle adoption matters effective August 1, 1975. *Id.* The plaintiff's commute to his original location was fifteen minutes, and his commute to the new location may have taken almost two hours each way in heavy rush hour traffic. *Id.* at 120. The plaintiff never reported to his new location. *Id.* at 116. Around one month after he was scheduled to report to his new location, the plaintiff filed suit alleging the defendant violated his First and Fourteenth Amendment rights. *Id.*

Before ultimately remanding the case, the First Circuit Court of Appeals discussed the legal standard to be applied in evaluating whether a plaintiff has been constructively discharged. *Id.* at 119. The court said "[b]efore a 'constructive discharge' may be found, entitling the employee to quit working altogether . . . the trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Rosado*, 562 F.2d at 119. In other words, the transferred position must "have been significantly more demanding." *Id.* at 120 n.4. Mere loss of prestige is not reason enough to justify quitting – a more severe reduction in the quality of working conditions is required. *Id.* "Doubtless a drastic increase in commuting time and

unreimbursed costs might at some point become sufficiently onerous to justify an employee in quitting." *Id.* at 120. The court wrapped up its discussion by instructing as follows:

> Should it be found that Alicea's transfer did not amount to a constructive discharge, he would not be entitled to recover damages for lost wages as he had a duty to remain on the job collecting his regular pay until relief from the [new] assignment was afforded by legal process. We remand the case on the issue of damages for lost wages so that the district court can address itself specifically to this issue, and especially to the commuting burdens imposed by the transfer and whether they would have led a reasonable person to resign until relief was secured.

Id.

Likewise, in *Serrano-Cruz*, the plaintiff worked as a comptroller, and her duties included managing the security system for the defendant's stores, supervising employees and scheduling vacations, handling the keys to the stores, and attending security and employee management meetings. 109 F.3d at 24. As comptroller, the plaintiff also assumed accounting responsibilities such as maintaining payroll accounts and preparing quarterly reports. *Id.*

In February of 1994, the plaintiff's supervisors gradually started to reduce her responsibilities. *Id.* The plaintiff lost managerial control over the store keys, the security system, personnel selection, and she was excluded from meetings she had formerly attended. *Id.* By June 1994, the plaintiff received a letter saying she was on a ninety day probationary period for negligently handling rent payments. *Id.*

In July, before the end of her probationary period, the defendant sent a letter transferring her to a newly created position as "retail manager," which entitled her to the same salary and benefits as her comptroller role. *Id.* As a retail manager, the plaintiff would have supervised and been responsible for the retail operation of the defendant's San Juan International Airport stores. *Id.* at 25. The plaintiff did not accept the transfer and formally resigned in August of 1994. *Id.* Thereafter, the plaintiff filed suit alleging age discrimination. *Serrano-Cruz*, 109 F.3d at 24.

The First Circuit affirmed the district court's grant of summary judgment in favor of the defendant, concluding the plaintiff did not demonstrate a *prima facie* case of constructive discharge. *Id.* at 27-28. To be specific, "Serrano considers the move from comptroller to 'retail manager' to be a devastating change in status, but cannot point to specific problems that would arise, other than the fact that she is unqualified to 'push' merchandise." *Id.* at 27. The court

quoted its definition of "constructive discharge" from *Rosado*, and said that loss of prestige alone is insufficient to constitute a "constructive discharge." *Id.*

Both *Rosado* and *Serrano-Cruz* actually strengthen Loftus's argument that he was "constructively discharged." Loftus not only felt humiliated and intimidated by the transfer to Chief Mate, but testified that it would have been impractical for him to operate effectively in that role. TR at 213. For one, Loftus said that the transfer would have prevented him from gaining respect from his crew, which is a critical component of operating effectively as Chief Mate considering he would have been the primary safety officer on the ship. *Id.* Further, a Chief Mate's responsibilities are much more physically demanding than a Master's, which is why the position is generally filled by young people. *Id.* Loftus is sixty-six-years-old and would have physically struggled to carry out the duties essential to the Chief Mate's role. *See id.* Finally, Loftus testified it would have been challenging and uncomfortable to work second in command to another Master given he was one of the most senior Masters in the Horizon fleet preceding his discipline. *Id.*

The record supports Loftus's argument that it would have been difficult for him to perform successfully as Chief Mate. Becker, for example, opined as follows:

> Demoting Captain Loftus from a Master to a Chief Mate would be devastating. He would be looked upon as a failure by his peers, he would be subjected to more physical labor than he has experienced in several years, and he would lose the respect of the seaman working under him and have a difficult time getting them to carry out their assigned duties.

CX-32 at 197. A Master, for example, administers the vessel, and Chief Mate, among other physically demanding tasks, stands watch for eight hours, oversees the Deck Gang, reads the reefers, and is called out for vessel arrivals and departures. CX-32 at 197-98. Captain O'Halloran explained that the Chief Mate is second in command on the vessel and needs complete respect from the entire crew to promote and maintain a superior safety climate, which Loftus would never achieve after being removed from his position as Master. CX-33 at 209.

Further, the Chief Mate positions offered to Loftus would have transferred him to nonpermanent positions on completely different runs. One job was to serve as temporary relief Chief Mate on the Horizon Navigator, which traveled to Puerto Rico. RX-30; TR at 739-40. The second job was a similar position on the Horizon Pacific – a West Coast ship also in an alternative trade lane. RX-33; TR at 740. Horizon acknowledged that it offered the West Coast

position to Loftus because his unfamiliarity with the crew could ease the transition into the demoted position. TR at 740-741. Additionally, Loftus accepting either position would have resulted in him taking a significant pay cut.

For the foregoing reasons, I find that Loftus was constructively discharged when offered the Chief Mate positions because his new duties as Chief Mate would have been so difficult and demanding that a reasonable person in his shoes would have felt compelled to resign. Loftus's salary and benefits at the time of his discipline totaled $313,708.32 per year. CX-37 at 288; CX-37A; TR at 210-13. Horizon ceased operations on January 15, 2015. TR at 217-18, 394-95, 464. If Loftus continued working as Master and chose to retire when Horizon stopped operating in January of 2015, he would have received $100,000 as a severance payment. TR at 323, 744. Because I do not find that Loftus is entitled to front pay for reasons discussed later in this opinion, I find that he should be awarded $655,198.90 plus interest compounded on a daily basis, which represents the following: $555,198.90 in lost wages and benefits from his removal as Master on May 28, 2013 up until Horizon ceased operations on January 15, 2015, plus a severance payment of $100,000. CX-37 at 288; CX-37A.

Horizon argues further that even if Loftus is entitled to back pay, the amount should be reduced because he failed to mitigate his damages. An unlawfully discharged employee is burdened with mitigating damages by seeking suitable alternative employment. *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727, 735 (8th Cir. 1996); *Abdur-Rahman v. Dekalb Cty.*, ARB Nos. 12-064, -067, ALJ Nos. 2006-WPC-2 & 3 (ARB Oct. 9, 2014). It is Horizon's burden to demonstrate that the back pay award should be reduced for Loftus's failure to mitigate his damages. *Johnson*, ARB No. 99-111, slip op. at 14.

Horizon has not satisfied its burden of demonstrating that Loftus failed to mitigate his damages. Loftus testified that he has been unemployed since Horizon demoted him on May 28, 2013. TR at 214-15. Since then, Loftus has flown to Houston and visited nine drilling companies in an attempt to get involved with the oil and gas industry. TR at 214. Loftus explains that he had some productive discussions with Nobel Drilling. *Id.* Likewise, Loftus says he developed a good rapport with individuals at Hornbeck Marine and Edison Chouest. *Id.* Loftus even took a week long course at the Kongsberg School for Dynamic Positioning that cost him approximately $6,000. TR at 214-15. While none of Loftus's leads ultimately panned out, I

find that he satisfied his duty to mitigate damages, and therefore, no amount will be deducted from his backpay award. TR at 215.

II. Front Pay

Loftus is not entitled to front pay. Front pay is an appropriate remedy under the SPA when reinstatement is impossible or impractical. *Williams*, ARB No. 09-092, slip op. at 10; *Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 8. "The person discriminated against should only recover damages for the period of time he would have worked but for wrongful termination; he should not recover damages for the time after which his employment would have ended for a nondiscriminatory reason." *Blackburn*, 982 F.2d at 129; *see also Bartek v. Urban Redevelopment Auth.*, 882 F.2d 739, 747 (3d Cir. 1989) ("Since . . . [the plaintiff] was not precluded from a position that he was entitled to at the time of judgment, the district court correctly denied him front pay damages."); *Martinez v. El Paso Cty.*, 710 F.2d 1102, 1106 (5th Cir. 1983) (affirming reduction of back pay award where job at issue was eliminated). Furthermore, front pay awards cannot be unduly speculative. *Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 10. Litigants seeking front pay must provide the trier of fact "with the essential data necessary to calculate a reasonably certain front pay award" including the amount, length of time, and applicable discount rate of the award. *Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 9-10, *quoting McKnight v. Gen. Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992) (internal quotations omitted).

Here, no position exists for which Loftus is being unlawfully denied. It is uncontroverted that Loftus's position was eliminated in January of 2015 when Horizon ceased operations. TR at 212, 744. Loftus contends that the Master position existed at the *time of the retaliatory action*; however, the critical period I must consider in determining whether a front pay award is appropriate is at the *time of trial*. Where Horizon stopped operating in January of 2015, Loftus's position no longer existed at the time of trial in May of 2015. TR at 212, 323, 744. An award of front pay is intended to make Loftus whole – not to put him in a better position than he would have been in had Horizon not unlawfully retaliated against him. *See Blackburn*, 982 F.2d at 129. Even had Horizon not retaliated against Loftus, he would have only maintained his employment with Horizon until January of 2015. *See* TR at 212, 323, 744.

Even if Horizon still had a position for Loftus which was being unlawfully denied at the time of trial, his claim for front pay is still unduly speculative. Loftus argues that he planned on

working until approximately 2024, which is when he will turn seventy-five years old. Compl. Br. at 30. During trial, however, Loftus testified that he has Parkinson's disease. TR at 348. Loftus admits that Parkinson's is a progressive degenerative disease that can affect the mobility of various body parts. TR at 348-49. At the time of trial, Loftus was already experiencing tremors in his right hand and foot. TR at 349. While Loftus claims he has "20 good years" left, he is not a medical expert. TR at 350. Without a medical expert opinion supporting his claim to twenty good years, an award of front pay here would be too speculative. Accordingly, I find that an award of front pay is not appropriate here.

III. Compensatory Damages

Loftus is entitled to $10,000 in compensatory damages for emotional harm. The STAA, and in turn the SPA, does not define "compensatory damages." *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035, slip op. at 7 (ARB Jan. 31, 2008). Consequently, the ARB has looked to BLACK'S LAW DICTIONARY for guidance, which defines the term as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered." *Id.* (internal quotation marks omitted), *quoting* BLACK'S LAW DICTIONARY 416 (8th ed. 2004). "Compensatory damages" is synonymous with "actual damages," which is money awarded to "compensate for a proven injury or loss; damages that repay actual losses." *Id.* (internal quotation marks omitted), *quoting* BLACK'S LAW DICTIONARY 416 (8th ed. 2004). The underlying goal of compensatory damages is to compensate individuals for not only pecuniary losses, but also for harms including emotional distress, personal humiliation, mental anguish, and loss of reputation. *See, e.g., Rosado*, 562 F.2d at 120-21; *Hobson*, ARB Nos. 06-016, -053, slip op. at 7; *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-040, slip op. at 8 (ARB Nov. 30, 2007); *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-30, slip op. at 30 (ARB Feb. 9, 2001).

It is Loftus's burden to demonstrate by a preponderance of the evidence that he suffered emotional harm caused by Horizon's unlawful retaliation against him. *See Simon*, ARB Nos. 06-039, -088, slip op. at 8. Awards for emotional damages "generally require that a plaintiff demonstrate both (1) objective manifestation of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress." *Simon*, ARB Nos. 06-039, -088, slip op. at 8, *quoting Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993-SWD-001, slip

op. at 17 (ARB July 30, 1999) (internal quotations omitted). Reasonable compensatory awards for emotional distress can be based upon Loftus's testimony alone, and there is no fixed limit on the amount that can be awarded. *See Hobson*, ARB No. 06-016, -053, slip op. at 8; *Hobby*, ARB No. 98-166, slip op. at 31.

In establishing an appropriate amount of compensatory damages, it is instructive to compare awards issued in similar cases including those issued under alternative discrimination or discrimination-related statutes. *Hobby*, ARB No. 98-166, slip op. at 31. In *Hobson*, for example, an ALJ awarded an STAA whistleblower $5,000 for the anxiety and stress he experienced as a result of his unlawful discharge. ARB No. 06-016, -053, slip op. at 8. The ARB upheld the ALJ's award by reasoning it was supported by substantial evidence where "Hobson testified that he suffered emotional distress. And although Hobson's testimony was unsupported by medical evidence, it was also unrefuted and, according to the ALJ, credible." *Id.* at 8-9.

Conversely, in *Simon*, an ALJ awarded a successful STAA whistleblower $5,000 for emotional harm and the ARB reversed the award. ARB Nos. 06-039, -088, slip op. at 8. The ARB determined that the award was not supported by substantial evidence considering the plaintiff did not testify about any emotional distress or humiliation he suffered nor was there any documentary evidence supporting mental anguish or loss of reputation. *Id.* Similarly, in *Rosado*, the district court found that the plaintiff was constructively discharged and awarded $10,000 in compensatory damages for emotional harm. 562 F.2d at 120-21. Before ultimately remanding the case, the First Circuit Court of Appeals suggested the award was clearly excessive based on the evidence presented, which merely showed that the plaintiff experienced some pressure and embarrassment. *Id.*

The record as a whole supports awarding Loftus compensatory damages for emotional distress.[8] Loftus testified credibly that after Horizon removed him as Master he suffered from anxiety, sleeplessness, and humiliation. TR at 215. Additionally, Loftus said that his situation with Horizon weighs on his mind constantly, in part, because he would like to clear his name. TR at 216. As he put it, "I've had an unblemished career, and they've slandered my name horribly." TR at 216. Before Horizon's adverse action toward him, Loftus had a well-supported reputation for being a Master who always put his crew and safety first. CX-35 at 255. Captain James Staples wrote in his report, "I have never sailed with Captain Loftus, but have heard of his exemplary care and attitude towards the safety of his crew and vessel." CX-35 at 255. Loftus's concerns about his tarnished reputation are legitimate considering how small the U.S. Flag marine industry is, and how quickly word travels within it. *See* CX-32 at 197; TR at 215. Marine experts Becker, O'Halloran, and Staples unanimously agreed that Loftus's discipline would have made it very difficult for him to function effectively as Chief Mate given the inherent lack of respect he would garnish from his crew. CX-32 at 197; CX-33 at 209; CX-35 at 255.

Horizon only exacerbated Loftus's humiliation and emotional distress through the method by which it imposed the adverse action against him. After his demotion, Horizon refused to allow Loftus to personally obtain his belongings from the Trader. TR at 209. Instead, Horizon directed the crew of the Trader to search, pack, and deliver six years' worth of Loftus's

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[8] I acknowledge that Loftus spent approximately $6,000 in an effort to secure alternative employment; however, the evidence does not support awarding him a compensatory award for pecuniary losses in that amount. In *Hobson*, for example, in addition to awarding compensatory damages for emotional distress, the ALJ awarded the complainant $20,000 for money he spent to buy a tractor in securing alternative employment. *Hobson*, ARB No. 06-016, -053, slip op. at 8. The ARB reversed the pecuniary award based on the following:

> Hobson did not prove that he suffered the actual loss of a $20,000 tractor as a result of being unlawfully discharged. Rather, he chose to buy the $20,000 tractor to go to work for Moore Freight in June 2005. Awarding Hobson $20,000 for the tractor does not restore Hobson to the same position he would have had but for the discharge. Instead, it amounts to a windfall.

Id. Here, Loftus traveled to Houston to speak with representatives from gas and oil companies, and also took a week long course at his own expense. TR at 214. Similar to *Hobson*, however, Loftus did not prove that he suffered the foregoing losses as a direct result of his constructive discharge from Horizon. Instead, the evidence supports that Loftus flew to Houston and took a week long course so that he could secure a position working in the oil industry. *Id.* In *Hobson*, the ARB was unpersuaded by the plaintiff's argument that "but for" his unlawful discharge he would not have been put in a position where it was necessary to buy a $20,000 tractor. *See Hobson*, ARB No. 06-016, slip op. at 8. Where I am bound by the ARB's decision in *Hobson*, I too must find that Loftus's testimony that he spent $6,000 to take a week long course in seeking alternative employment is insufficient by itself to warrant a pecuniary damages award for that amount. Awarding Loftus $6,000 for the course will not restore him to the same position he would have been in but for his discharge.

personal belongings to him while he waited on the dock. *Id.* Loftus testified, "I had to unpack it, open up all the boxes, throw out stuff on the dock. I couldn't possibly get it all in my car. It was just a big humiliation and intimidation scene for everybody to see." *Id.* Given the totality of the evidence on this score, I find that Loftus is entitled to $10,000 for his emotional harm.

IV. Punitive Damages

Loftus is entitled to $225,000 in punitive damages. It is well-established that there are both procedural and substantive limitations on the amount of punitive damages that I can award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 434-35 (2001); *BMW of N. Am. v. Gore*, 517 U.S. 559, 559, 575 (1996). "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty" that may be imposed. *Campbell*, 538 U.S. at 417. A grossly excessive punitive damages award, for example, bolsters no legitimate purpose and serves as an arbitrary deprivation of property. *Id.*; *Pacific Mut. Life Insur. Co. v. Haslip*, 499 U.S. 1, 42 (1991). Hence, I must consider the following three guideposts in determining the appropriateness of a punitive damages award in this case:

> (1) the degree of reprehensibility of the defendant's misconduct;
> (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
> (3) the difference between the punitive damages awarded . . . and the civil penalties authorized or imposed in comparable cases.

Campbell, 538 U.S. at 418. *See also Cooper*, 532 U.S. at 424; *Gore*, 517 U.S. at 559, 575.

Neither the SPA nor its corresponding regulations contain any guidance on when awarding punitive damages is warranted or how to calculate an equitable amount. *Youngermann v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 4 (ARB Feb. 27, 2013). Likewise, U.S. Department of Labor jurisprudence concerning punitive damages awards in whistleblower cases, and the SPA in particular, is limited. In light of the foregoing, Title VII precedent is a valuable source of guidance. *Id.* Specifically, the ARB highlighted the following in *Youngermann*:

> Recourse to Title VII case law to assist in our adjudication of punitive damage awards under whistleblower statutes is particularly instructive given the similar purposes of promoting prevention and remediation in the two Acts, coupled with the fact that Title VII punitive damage provisions, like those under STAA, contain statutory caps on punitive damage awards.

Id. I do acknowledge, however, that significant differences exist between whistleblower statutes and other antidiscrimination laws, so I will not adopt such principles absent "careful and critical examination." *Id.* (internal quotations omitted), *quoting Williams*, ARB No. 09-018, slip op. at 12-13 n.59, *quoting Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 393 (2008). With all of the preceding considerations in mind, I address the critical guideposts in determining an appropriate punitive damages award.

1. ***Reprehensibility***

Horizon's conduct was reprehensible. "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575. The United States Supreme Court has instructed courts to consider the following in establishing reprehensibility: whether the harm suffered by the plaintiff was economic or physical; whether the defendant's conduct demonstrated a reckless disregard or indifference to the safety or health of others; whether the plaintiff was financially vulnerable; whether the defendant's conduct was habitual as opposed to an isolated incident; and whether the defendant acted with intentional malice, deceit, trickery, or mere accident. *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 576-77. The mere existence of one of the foregoing factors does not necessarily warrant a punitive damages award, and the absence of all of the preceding factors renders a punitive damages award suspect. *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575. It is presumed that Loftus is made whole for the harm he has suffered by compensatory damages, so punitive damages should only be awarded if Horizon's conduct is so reprehensible as to justify imposing further sanctions to achieve punishment or deterrence. *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575.

I find that Horizon's persistent indifference to Loftus's safety concerns was unreasonable. Over the course of several years, Loftus made repeated attempts to have Horizon address safety issues on board the Trader, but to no avail; as a result, he was forced to contact regulatory agencies as a last ditch effort to bring the ship into compliance with regulations. *See* CX-1 at 1-7; CX-2 at 8-10; TR at 149-51, 158-59. Loftus's final contact with the USCG and ABS concerned a conflict between drug testing requirements and safety as it pertained to the McCarthy incident. CX-15 at 99-100 (RX-26); CX-16 at 101-04 (RX-27); TR at 196-97, 202, 362, 368, 414, 665. Horizon personnel admitted that Loftus was in the best position to evaluate whether it was safe to perform drug tests at the time and he ultimately determined that it was not.

CX-15 at 99 (RX-26). Yet, shoreside personnel nevertheless demanded at least nine times that Loftus perform drug tests – all of which occurred while he sailed through what many people deemed the storm of the century. CX-25 at 164-69; CX-25A; TR at 183, 189.

Contrary to what Horizon argues, there is no question that Loftus was well aware of his authority and responsibilities as Master, which is clear from his clean track record and stellar reputation. Rather, Loftus was worried about an inexperienced Master getting distracted by shore side personnel's unreasonable demands to perform drug testing when it was not safe to do so. *See* CX-25 at 164-69; CX-25A; CX-15 at 99-100 (RX-26); CX-16 at 101-04 (RX-27); TR at 200. Instead of focusing on the real issue at hand – namely, the conflict between drug testing requirements and safety – Horizon latched onto the McCarthy incident as pretext for Loftus's termination. *See* CX-8 at 49 (RX-3 & RX-22). Additionally, the manner in which Horizon arranged to deliver Captain Loftus's personal belongings after his demotion (termination) was calculated to inflict further harm and humiliation to him. Having the crew he once directed pack and deliver six years' worth of belongings to Captain Loftus on the dock adjacent to the ship he once commanded, exhibits extreme disregard for Loftus's emotional well-being.

The need to deter others from engaging in similar conduct is uniquely critical in the SPA whistleblower context given such claims involve public safety, and an adverse outcome "may have a chilling effect on the willingness of other seamen to report a violation." *Gaffney*, 451 F.3d at 464-65. This is especially true considering how small the marine industry is, and how quickly word travels within it. CX-32 at 197; TR at 215. Horizon's retaliation against Loftus is exceptionally troublesome considering his reputation for being an exemplar of safety, which is exactly what the SPA is designed to promote. CX-40 at 291.

Horizon went to great lengths to cloak its wrongful actions with the appearance of legitimacy, adding to the reprehensibility of its conduct. Its decision to engage in adverse conduct was cast well before any investigation was complete. The investigations distorted the facts to hide the true reasons for Horizon's adverse actions. By admission of former Horizon employee, Walcott Becker, Horizon was out to fire Captain Loftus because of all the CARs he filed as well as his repeated reports to regulatory authorities. Indeed, Andrew Phillips reprimanded Loftus for reporting safety concerns to regulatory agencies instructing him to contact Horizon first so that it looks like the company knows what it is doing. Such a policy is

contrary to the intent of the SPA and is further evidence of why Horizon's conduct is reprehensible.

2. ***Disparity Between Compensatory Award and Punitive Damages***

The ratio between compensatory and punitive damages here is reasonable. The Supreme Court has refused to develop any bright lined rule concerning the permissible ratio between compensatory and punitive damages, but has nevertheless indicated awards exceeding a single-digit ratio might be subject to constitutional challenge. *Campbell*, 538 U.S. at 425, 429 (reversing and remanding $145 million punitive damages award where compensatory damages were only $100 million). There was a 2.35:1 punitive to compensatory damages ratio in *Gaffney*, and a 2.89:1 ratio in *Polek v. Grand River Navigation*, 872 F. Supp. 2d 582, 590 (E. Dist. of Mich. 2012) – two comparable SPA whistleblower cases. *Gaffney*, 451 F.3d at 440 n.16; *see also Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 520-21 (6th Cir. 2005) (affirming punitive damages award in Title VII case that was almost seven times the back pay award). Here, the damages for back pay and emotional distress equal $665,198, yielding a 1:2.95 ratio of punitive to compensatory damages. Based on precedent as well as the Supreme Court's guidance that ratios not exceed single digits, I find that the ratio here is reasonable.

3. ***Comparable Cases***

Awarding Loftus $225,000 in punitive damages is within the bounds of reasonableness based on comparable cases. There is minimal SPA precedent and even fewer SPA cases analyzing punitive damages awards; however, the jurisprudence that does exist supports such an award in this case. In *Gaffney*, for example, ten licensed merchant marine officers of a large 2,803 gross ton gaming vessel, the *M/V Showboat*, alleged that they were terminated in retaliation for reporting safety concerns to the USCG. 451 F.3d at 431-32. Specifically, the officers wrote a letter expressing concern that "the relaxation of licensing requirements for the engineers on the *M/V Showboat* . . . substantially reduces passenger safety by not requiring experienced personnel to crew the vessel." *Id.* at 433. The named plaintiff testified that the letter was sent to the USCG for clarification on licensing requirements. *Id.* There was additional correspondence with the USCG following the initial contact, but the focus of the appeal was the last letter sent where the plaintiffs requested a thirty-day extension to file an appeal that challenged the relaxation of the *M/V Showboat's* licensing requirements. *Id.* at 433. At some point, the plaintiffs discussed their concerns with management, and Riverboat was made aware

of the plaintiffs' protected activity. *Id.* at 435. Thereafter, the defendant sent the plaintiffs termination letters – some of which listed the plaintiffs' protected activity as the reason for termination. *Id.* at 436.

The Seventh Circuit affirmed a punitive damages award totaling $200,000 – $25,000 for each of the prevailing plaintiffs. *Gaffney*, 451 F.3d at 465. The court said that the award was within the bounds of reason because the lower court did not abuse its discretion by finding the defendant acted willfully and wantonly in terminating the plaintiffs. *Id.* at 464-65. One finding, for example, was that the defendant did not reconsider its adverse action against the plaintiffs upon learning that it was unlawful to terminate employees for reporting safety concerns to the USCG. *Id.* at 463-64. Moreover, the defendant specifically removed the offending language from some of the termination letters suggesting it knew its conduct was seriously wrong, but terminated the plaintiffs anyways. *Id.*

Similarly, in *Polek*, the plaintiff alleged that he was terminated in retaliation for his good faith report to the USCG regarding safety concerns. 872 F. Supp. 2d at 583. Specifically, the plaintiff reported a hull fracture to the USCG where "[d]espite Plaintiff repeatedly expressing his concern not only for his own safety, but the safety of his fellow shipmates, Defendant disregarded his legitimate concerns." *Id.* at 589. The defendant did not try to ascertain the nature and extent of the hull fracture yet continued to operate the vessel. *Id.* Instead, the defendant ignored the plaintiff's concerns deeming them the "non-sensical ravings of a junior engineer," and encouraged him to quit if he did not feel safe. *Id.* (internal citation omitted). After reporting to the USCG, the defendant fired the plaintiff and he took an out-of-state job working in oil fields. *Id.*

The court ultimately upheld a $100,000 punitive damages award. *Id.* at 591. In doing so, the court reasoned that despite securing new employment within three months, the defendant put the plaintiff in a financially vulnerable position by forcing him to find a new job during a recession with a termination on his record. *Id.* Moreover, the event leading to the plaintiff's termination was not an isolated incident, and conversations with and concerning the plaintiff could have been interpreted as malicious. *Polek*, 872 F. Supp. 2d at 589. Lastly, the defendant blatantly disregarded the plaintiff's safety concerns. *Id.*

This case is comparable to *Gaffney* and *Polek*. For example, a member of Loftus's disciplinary team was Horizon's General Counsel, Michael Zenden, who should have known that

it was unlawful to terminate Loftus for reporting safety concerns to the USCG and ABS. *See* RX-32 at 113; TR at 368-71. This is further supported by Becker's testimony that he knew Loftus could not be fired for reporting safety concerns to the USCG and ABS; while Becker played no disciplinary role, his awareness of this prohibition highlights how likely it is that Horizon's management was also aware of the illegality of disciplining Loftus for his protected activity. *See* TR at 353-54. Nevertheless, Horizon constructively discharged Loftus for engaging in protected activity and attempted to conceal the true nature of its retaliation. *See* CX-8 at 49 (RX-3 & RX-22).

Further, the events leading up to Loftus's termination were not isolated. *See* CX-1 at 1-7; CX-2 at 8-10; CX-5 at 28-45. Horizon's inaction in addressing Loftus's safety concerns was an ongoing occurrence dating back as far as the early 2000s. *See* CX-1 at 1-7; CX-2 at 7-10; CX-5 at 28-45. Horizon repeatedly ignored Loftus's requests for corrective action aboard the Trader until it had to act because of regulatory agency interference. *See* CX-1 at 1-7; CX-2 at 7-10; CX-5 at 28-45. Finally, Horizon put Loftus in a particularly vulnerable position financially where he is not only sixty-six-years-old, but also has Parkinson's disease. TR at 147-48, 348-49. Wherefore, I find that awarding Loftus $225,000 in punitive damages is reasonable under the circumstances of this case.

V. Interest

Loftus is entitled to interest on his back pay award. Under 29 C.F.R. § 20.58(a), the Secretary of Labor instructs that "[t]he rate of interest prescribed in section 6621 of the Internal Revenue Code shall be sought for backwages recovered in litigation by the Department." *See also Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 10; *Drew v. Alpine, Inc.*, ARB No. 02-044, 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003). In turn, 26 U.S.C. § 6621(a) provides that "[t]he underpayment rate established under this section shall be the sum of . . . the Federal short-term rate determined under subsection (b), plus . . . 3 percentage points." Moreover, the interest accrues, compounded daily, until Horizon pays Loftus the damages award. *See Jackson Hosp. Corp. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 356 NLRB No. 8, 2010 WL 4318371, at *3-4 (2010); *see also* 78 Fed. Reg. 8390, 8404 (Feb. 6, 2013).

VI. Costs and Attorney Fees

Loftus is entitled to reasonable litigation costs including attorney fees. Under 49 U.S.C. § 31105, "the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint." On July 31, 2015, Loftus filed a fee application. Horizon has thirty days from the date of this order to file any opposition to the fee requested.

VIII. Order

Based upon the foregoing, I find that Horizon violated Loftus's right to be free from retaliation under the Seaman's Protection Act. *See* 46 U.S.C. § 2114(a). Loftus proved by a preponderance of the evidence that he engaged in protected activity in October of 2011, August of 2012, and February and April of 2013, by reporting and threatening to report to the regulatory agencies what he believed to be safety violations aboard the Horizon Trader. I also find that Horizon knew of Loftus's protected activity and that his protected activity was a contributing factor in Horizon's decision to take adverse action against him. Horizon did not prove by clear and convincing evidence that it would have disciplined Loftus notwithstanding his protected activity. Accordingly, it is hereby ORDERED that:

1. Horizon Lines, Inc. and Matson Alaska, Inc. shall pay John R. Loftus $655,198.90 in back pay plus interest compounded on a daily basis.
2. Horizon Lines, Inc. and Matson Alaska, Inc. shall pay John R. Loftus compensatory damages in the amount of $10,000 for his emotional distress resulting from Horizon's adverse action against him;
3. Horizon Lines, Inc. and Matson Alaska, Inc. shall pay John R. Loftus punitive damages in the amount of $225,000; and
4. Horizon Lines, Inc. and Matson Alaska, Inc. shall pay John R. Loftus's reasonable attorney's fees and costs. Should the Respondent object to any fees or costs requested in the pending fee application, the parties shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Respondent's objection shall be filed not later than **30 days** following service of this Decision and Order. **Any objection must be accompanied by a certification that the objecting party**

made a good faith effort to resolve the issues with the Complainant prior to the filing of the objection.

SO ORDERED.

Digitally signed by JONATHAN CALIANOS
DN: CN=JONATHAN CALIANOS, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Washington DC

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).