U.S. Department of Labor

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Issue Date: 18 March 2016

Case No.: 2014-AIR-00017

In the Matter of

JEFFREY A. SOBHANI
Complainant

v.

BOMBARDIER AEROSPACE
Respondent

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ORDER DENYING IN PART AND GRANTING IN PART COMPLAINANT'S MOTION FOR DISCOVERY SANCTIONS

This matter involves a dispute concerning alleged violations by the Respondent of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act"), 49 U.S.C. § 42121 (2000). The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are located at 29 C.F.R. Part 1979. A hearing in this matter is currently scheduled for the week of May 9, 2016.

I. Procedural Posture[1]

On August 26, 2014, this Tribunal issued a "Notice of Hearing and Pre-hearing Order," which scheduled the hearing for January 21, 2015 through January 22, 2015[2] in Burlington, Vermont. This Order also set the discovery deadline for November 7, 2014; set the deadline to submit a pre-hearing statement for November 21, 2014; and set October 3, 2014 as the deadline for the filing of any dispositive motions.

On October 23, 2014, this Tribunal held a conference call between the Parties to discuss concerns this Tribunal had regarding the Stipulated Protective Order, dated October 13, 2014, as well as Respondent's "Motion for Summary Decision."

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[1] To summarize the one and half year-long procedural posture: this Tribunal has held seven teleconferences; continued the case numerous times, including a period of over six months to allow for Respondent to attempt to enjoin the Department of Labor from continuing to adjudicate this case; issued at least eight substantive orders; and changed the hearing date and pre-hearing deadlines three times.

[2] This Tribunal notes with displeasure that the close of discovery – January 29, 2016 – occurred almost one year after the initially scheduled hearing date. *See* 49 U.S.C. § 42121(b)(2) ("Such hearings shall be conducted expeditiously.").

On October 27, 2014, this Tribunal issued an Order that set forth the terms of a proposed protective order. This Tribunal based these terms on the Parties' "Proposed Protective Order" filed with this Tribunal on October 13, 2014. There, this Tribunal ordered the Parties to respond "with any objections to this Proposed Order by November 10, 2014. [This Tribunal] will interpret the absence of a timely response as the party having no objection to the proposed order." Having received no response from either Party, this Tribunal considered the Protective Order in effect. Nevertheless, to allay any confusion amongst the Parties, this Tribunal issued an Order on May 1, 2015, which formally executed the Protective Order, per the October 27, 2014 Order.

On November 4, 2014, this Tribunal issued an Order denying Respondent's Motion for Summary Decision.[3] In that Order, this Tribunal concluded that AIR 21's whistleblower protection does not have extraterritorial reach, but that the Complainant's allegations warrant a domestic application of the Act and therefore are not circumscribed by the presumption against extending American laws abroad. This Tribunal found that the Complainant's complaint deserved a full and fair development prior to any final adjudication and that there remained genuine issues of material fact suitable for continued litigation.

On November 17, 2014, Respondent filed a Motion for Certification or, Alternatively, Reconsideration. There, Respondent sought leave to file an interlocutory appeal to the Administrative Review Board ("ARB" or "the Board") asserting, essentially, that this is a case of first impression and that the purported contacts relied upon in this Tribunal's Order are not supported by the record. The Respondent further requested that the discovery process be stayed pending the ARB's decision. Alternatively, the Respondent asked this Tribunal to reconsider its earlier decision. The Complainant timely responded in opposition to the Motion on November 20, 2014.

On December 4, 2014, this Tribunal issued an Order denying Respondent's Motion for Certification or, Alternatively, Reconsideration.

On December 17, 2014, this Tribunal received Complainant's Motion to Continue the Hearing. Respondent did not object to Complainant's Motion.

On December 22, 2014, this Tribunal convened a teleconference with the Parties to discuss such a continuance and to resolve outstanding discovery issues. **As a result of this teleconference, this Tribunal issued an Order on December 30, 2014 continuing the hearing and moving its location.**[4] There, this Tribunal moved the hearing from Burlington, Vermont for dates January 21 through January 22, 2015 to Buffalo, New York for dates April 21, 2015 through April 23, 2015. This Tribunal, accordingly, enlarged the deadlines for filing pre-hearing statements and to conclude discovery.

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[3] On November 6, 2014, the Respondent faxed a Motion to Supplement the Summary Judgment Record. As the Order had already been issued, this motion was moot. Nevertheless, this Tribunal reviewed that Motion and found no reason to disturb the contents of its Order as issued.

[4] This Tribunal notes that this was the first of three times in which the hearing date was moved.

On February 26, 2015, this Tribunal received Complainant's Initial Motion to Compel. On the same day, this Tribunal received Respondent's Motion to Stay Proceedings Pending Mediation. In that Motion, Respondent averred that Complainant had filed an action concurrent to the instant claim with the Human Rights Tribunal of Ontario, Canada ("HRT"); and that the HRT had scheduled a mediation in that claim for April 1, 2015. Respondent "intends to approach this upcoming mediation in good faith and believes that a global settlement is possible by which the parties will resolve all of the claims in both this action and the Canadian action." Respondent argued that a stay would promote judicial efficiency and curtail waste.

On March 6, 2015, this Tribunal received Complainant's response in opposition to the Respondent's Motion to Stay the Proceedings. Complainant averred that this Tribunal should oppose Respondent's Motion because Respondent has not answered Complainant's document request and that the "production of those documents will help facilitate settlement."

On March 17, 2015, this Tribunal issued an Order denying Respondent's Motion to Stay Proceedings Pending Mediation.

On March 20, 2015, this Tribunal convened a lengthy teleconference with the Parties to discuss and to resolve outstanding discovery issues.[5] On page 53 of the 56 page transcript, this Tribunal made its intentions known to the Parties that, in lieu of a written Discovery Order, the transcript would serve as the Parties' directive on the numerous and varied discovery issues discussed therein.

On April 3, 2015, this Tribunal received a joint motion from the Parties requesting the hearing to be rescheduled until June 2, 2015 and moved to Buffalo, New York. **Accordingly, on April 8, 2015, this Tribunal granted the Parties' joint motion and reset the hearing for June 2, 2015.**

On April 23, 2015, this Tribunal received a facsimile with subject line "Sobhani v. Bombardier – Notice of Filing and Motion to Stay", which enclosed, *inter alia*: (1) "Employer's Complaint" filed in the United States District Court for the District of Columbia (hereinafter "D.D.C."); (2) "Plaintiff's Motion for Preliminary Injunction" filed in the D.D.C.; (3) a "[Proposed] Order" corresponding to "Plaintiff's Motion for Preliminary Injunction" filed in the D.D.C.; and (4) a "Memorandum in Support of Plaintiff's Motion for Preliminary Injunction." The last document attached to Respondent's fifty-five page April 23, 2015 facsimile was Respondent's 1.5 page "Notice of Filing and Motion to Stay Proceedings" before this Tribunal.

On May 4, 2015, Complainant responded to the Respondent's "Notice of Filing and Motion to Stay Proceedings." There, Complainant consented to "a temporary stay, pending the decision of the federal court on Bombardier's motion for a temporary injunction." However, Complainant also filed a separate Motion for Sanctions, wherein it requested that this Tribunal should deem that Respondent has "conceded liability on some or all issues." In its response Complainant recounted the ongoing difficulties it had experienced obtaining discovery responses from the Respondent.

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[5] The transcript reflects that the conference call went on the record at 11:08 AM and concluded at 12:52 PM.

On May 7, 2015, this Tribunal issued an Order denying Respondent's Motion to Stay Proceedings, but Granting a Continuance. In this Order the Parties were notified that the hearing in this matter would be "continued until, at the earliest, October 2015, and at the latest, until the District Court issues a dispositive ruling on the Respondent's petition before it." **In addition, this Order notified the Parties that nothing was to preclude the Parties from executing as expeditiously as possible their respective discovery obligations.** Finally, this Order notified the parties of this Tribunal's intention to address the issues contained in Claimant's Motion for Sanctions, if necessary, following the District Court's decision on Respondent's petition.

On June 19, 2015, this Tribunal notified the Parties of the enactment of the new Rules of Practice and Procedure at 29 C.F.R. Part 18 and placed them on notice that these new rules would govern would henceforth govern these proceedings.

On September 10, 2015, this Tribunal reminded the Parties that the Act intended for an "expeditious[]" hearing, *see* 49 U.S.C. § 42121(b)(2), and set a teleconference for October 1, 2015. The purpose of this teleconference was twofold: first, to reset the hearing date; and, second, to reestablish deadlines for motion practice and discovery.

During the October 1, 2015 teleconference, this Tribunal addressed the hiatus in its adjudication of Complainant's case, **and set the hearing for the week of May 9, 2016 in Buffalo, New York. This Tribunal also set the discovery deadline for January 29, 2016 and set the deadline for dispositive motions for February 5, 2016.** I furthermore asked the Parties to update this Tribunal on the status of discovery "within the next thirty days;" and reminded the Parties of the amended rules of practice and procedure, which afford an ALJ heightened powers to sanction a litigant that is not in compliance with its discovery obligations.

On November 12, 2015, District Judge Rudolph Contreras for the United States District Court for the District of Columbia issued its "Memorandum Opinion." There, Judge Contreras granted the United States Department of Labor's Motion to Dismiss and denied as moot Bombardier's Motion for Preliminary Injunction. Judge Contreras's Opinion effectively allowed this Tribunal to continue its adjudication of Complainant's claim.

Subsequently, on November 13, 2015, this Tribunal received Complainant's "Motion for Sanctions Against Bombardier for Discovery Abuse." There, Complainant averred that emails were exchanged between the Parties in October of 2015; however, Respondent "still had not produced any more documents." Complainant's counsel then requested this Tribunal to sanction the Respondent for its alleged failure to comply with this Tribunal's discovery orders. Specifically, Complainant requested default judgement, under 29 C.F.R. § 18.57(b)(1)(vi).

On November 20, 2015, Respondent faxed this Tribunal its "Opposition to Motion for Sanctions." Respondent stated that Complainant's Motion did "not fairly present the interactions between counsel . . . to reflect [Respondent's] good faith efforts to comply with outstanding discovery, which it fully intends to do." Specifically, Respondent alleged that it had sent an email to Complainant's counsel discussing the manner in which Complainant's counsel could

review the "highly proprietary" data responsive to Complainant's discovery requests. It further alleged that this email had gone unanswered.

On November 25, 2015 Complainant replied to Respondent's "Opposition to Motion for Sanctions."[6] There, Complainant's counsel characterized Respondent's November 20, 2015 "Opposition to Motion for Sanctions" as merely showing how Respondent "has been discussing various options for producing certain documents with [Complainant's] counsel." Nevertheless, Complainant argued that Respondent had yet to produce any documents, even documents responsive to requests that this Tribunal had directed Respondent to act on to during the March 20, 2015 teleconference. Essentially, Complainant averred that Respondent had not produced any documents responsive to its discovery requests. Complainant then voiced its concerns that Respondent intended to "dump the voluminous documents" at or around the January 29, 2016 discovery deadline "to avoid giving [Complainant's counsel] adequate opportunity to digest them in preparation for any further discovery and in preparation for the hearing." Complainant's counsel concluded its November 25, 2015 response with a restatement of its request for discovery sanctions.

On December 17, 2015, this Tribunal held a telephonic conference call. There, the Parties discussed the status of discovery, as well as Complainant's outstanding Motion for Sanctions. Generally, Complainant's counsel stated that he was still not satisfied – and still felt prejudiced – over Respondent's discovery disclosures. *See* December 17, 2015 teleconference transcript at 5. Nevertheless, Complainant's counsel did state that Respondent had exchanged some documents the day before the teleconference. Specifically, Respondent had allegedly provided Complainant with only part of a contract (relating to its business with American customers). Respondent replied with a promise to give the omitted sections to Complainant "today;" and stated that it planned to give information regarding the Respondent's corporate structure "in the next couple of days." *See id.* at 7-8. Respondent felt as though the Parties have made "substantial progress" concerning discovery, and was confident that Complainant would have time to review Respondent's discovery responses, and so Respondent would not prejudice Complainant through the submission of its responsive documents at the eve of the discovery deadline. *Id.* at 8. Nevertheless, Respondent averred that it did not have a "willing partner" in its proposal that Complainant should inspect the "the voluminous technical documents" at a facility owned by the Respondent. *Id.* In response to the Parties' statements, this Tribunal expressed its general frustration with the "glacial pace" at which this case has progressed, and reminded the Parties that it would not move the hearing again. *Id.* at 10-11 ("I'm going to hold [Respondent] to that deadline, period."). This Tribunal also gave Complainant's counsel leave to re-raise its request for sanctions if it still felt prejudiced after the close of discovery; and stated its current inclination to make adverse inference should Complainant be unable to prove its prima facie case due to the Respondent's conduct throughout the discovery period. *Id.* at 11 ("[Complainant's counsel] has leave immediately after [January] 29th, if you're not satisfied given your request, I'm going to rule if sanctions are still warranted . . . . I think the parties just

[6] Complainant replied without leave to do so. *See* 29 C.F.R. § 18.33(d) ("Unless the judge directs otherwise, no further reply [to an outstanding motion] is permitted . . . ."). Although filed without leave, due to the lengthy and continuous nature of the Parties' ongoing discovery disputes, Complainant's November 24, 2015 reply has been entered into the record.

need to know that."). Respondent's counsel affirmatively acknowledged this Tribunal's notice. *Id.* at 12.

On February 5, 2016, Respondent filed a Motion for Summary Decision and Notice and Alternative Motion for Protective Order. On February 9, 2016 – pursuant to an Order dated January 22, 2016 – this Tribunal convened a teleconference where the parties were afforded adequate opportunity to be heard on outstanding discovery issues and Respondent's two pending Motions. On February 10, 2016, this Tribunal issued an Order memorializing the contents of the February 9, 2016 teleconference. The February 10, 2016 Order denied Respondent's Motion for Summary Decision, as well as Respondent's Alternative Motion for Protective Order. This Tribunal also afforded Complainant until February 16, 2016 to file a brief regarding his proposed sanctions, and gave Respondent until February 19, 2016 to file a response. **The February 10, 2016 Order also permitted Complainant to testify at the hearing, which the parties agreed to attend beginning May 9, 2016 in Cherry Hill, New Jersey.** Finally, the February 10, 2016 Order directed the parties to participate in a teleconference on March 3, 2016.

On February 16, 2016, this Tribunal received Complainant's "Memorandum Regarding Sanctions Against Bombardier for Discovery Abuse." This Tribunal notes that Complainant filed his initial motion for sanctions on May 4, 2015, and filed his second motion for sanctions on November 16, 2015.[7]

On February 22, 2016, this Office received "Respondent's Opposition to Complainant's Memorandum Regarding Sanctions Against Bombardier for Discovery Abuse." There, Respondent argued that "there is no basis for imposing sanctions 'for discovery abuse;'" and structured its response in terms of the various "misrepresentations" that Complainant allegedly made in his February 16, 2016 Motion.

On March 3, 2016, this Tribunal held a teleconference with the parties to address outstanding issues. Complainant renewed his concerns about prejudice in the discovery process and requested leave to file additional discovery in response to and because of Respondent's discovery conduct. This Tribunal agreed to give Complainant the opportunity to brief what discovery it would have pursued but for Respondent's discovery approach. Based on the leave afforded to it during the March 3, 2016 teleconference, Complainant filed a Motion for Additional Limited Discovery on March 7, 2016. On March 11, 2016, Respondent replied to Complainant's Motion for Additional Limited Discovery.

[7] As expressed to the parties in prior communications, this Tribunal has never issued a decision on Complainant's motions for sanctions for various reasons.

II. Summary of the Parties' Arguments On the Issue of Discovery Sanctions

A. Complainant's February 16, 2016 Memorandum Regarding Sanctions Against Bombardier For Discovery Abuse

Complainant incorporated the contents of his prior Motions for Sanctions within the current Motion. He added the following "specific additional examples" of alleged "discovery abuse and their impact on [Complainant's] ability to prepare [for hearing]."

First, Complainant noted that he had attempted in his first two document requests to adduce Respondent's "safety related activities within the United States,"[8] because Respondent has asserted that it is not an "Air Carrier" or "Contractor" under AIR 21. Complainant stated that after "more than a year of delay" and a motion to compel, Bombardier had produced in mid-December 2015 a sample contract. However, Complainant alleged that this contract was incomplete and "missing the pertinent annex documents relating to delivery and warranty." Complainant continued, saying that he did not received Annex A and Annex B until January 29, 2016. Complainant then summarized the contents of these documents and alleged that "[Respondent's] delay in producing these documents has greatly impaired [Complainant's] ability to fully investigate the parameters of how [Respondent] actually meets its contractual obligations with respect to . . . work within the United States." Complainant argued that Respondent has prejudiced Complainant due to its intentional delay, and so sanctions are warranted.

Second, Complainant averred that Respondent had produced only eight pages of documents relating to Item 12 of Complainant's First Request for Production. Complainant included emailed statements from Respondent's counsel dated January 27, 2016. Moreover, Complainant questioned Respondent's counsel's assertions that Respondent had generated no documents setting out the criteria for laying off Complainant. Complainant alleged that the Respondent's actions delayed Complainant from obtaining "important information relevant to this case so as to impair his ability to prepare for hearing."

Third, Complainant argued that Respondent's decision to allow Complainant to inspect the various requested technical documents was also "designed to delay and obstruct." Complainant noted that Respondent did not raise this method of production when the parties entered into the original protective order.

Finally, Complainant recognized that the "issue in this litigation is whether [Respondent] functions as a contractor, or as a subcontractor, to an air carrier." Complainant requested this Tribunal to employ its sanction powers to deem Respondent "a contractor of its Air Carrier customers in the United Sates for purposes of AIR 21" and asked for $7,500.00 in attorney's fees.

[8] Item 13 of his initial request and items 2 and 3 of his second request.

B. Respondent's February 19, 2016 Opposition to Complainant's Memorandum Regarding Sanctions Against Bombardier For Discovery Abuse[9]

Respondent structured its reply to Complainant's request for sanctions in terms of Complainant's alleged "continued mischaracterization of [Respondent's] efforts to meet its discovery obligations in this matter." Respondent argued that its actions could not constitute discovery abuse, because it had produced documents within this Tribunal's discovery windows, and made "voluminous amounts of technical data available for inspection." The technical data, Respondent continued, was not "pertinent" to the issue of whether OALJ has subject matter jurisdiction over this matter, so "any evidentiary sanction that could be imposed in relation to the production of these technical documents is limited to an adverse inference that a regulatory violation existed." According to Respondent, the information contained in the technical documents would not help Complainant prove his prima facie case, because it "had nominal evidentiary value." Respondent then claimed that this Tribunal does not have the authority to impose a sanction that would establish a finding of subject matter jurisdiction. Finally, Respondent felt that an award of attorney's fees was inappropriate "in light of Complainant's own role in any alleged discovery impasse."

Respondent averred that it had produced "a substantial volume of documents on a rolling basis since November 2014 . . . ." Specifically, Respondent wrote that it had produced in total 2,355 pages: it produced 574 pages in November and December of 2014; 1,081 pages in December of 2015; 512 pages in January on January 28, 2016; and 187 pages on January 29, 2016. Respondent also noted that it had made "all of the technical information" pertaining to Complainant's discovery requests available since November 3, 2015. Respondent also drafted and provided explanations concerning those pieces of requested information that did not exist. Respondent stated that it had provided responsive documents in file-types that Complainant's discovery software was capable of processing. Respondent, therefore, argued that it was in "full compl[iance] with its discovery obligations" and that Complainant had misrepresented Respondent "as an obstructionist engaging in allegedly harmful discovery tactics intended to prejudice [Complainant]."

Respondent then cast a skeptical light on Complainant's own alleged actions. According to Respondent, Complainant had lost Respondent's discovery production from December 2014 and did not realize it until January 25, 2016. According to Respondent, this allegation showed that Complainant had not reviewed Respondent's discovery responses until the close of discovery; it therefore argued that Complainant had suffered from his own delay. Respondent felt that its lawsuit against the Department of Labor, to enjoin this Tribunal's continued adjudication over this matter, was "taken in good faith" and that Respondent had "promptly worked to complete its production [of Complainant's requested discovery] after dismissal of its case."

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[9] Respondent's reply contained six exhibits. Exhibit A contained "discovery related emails;" Exhibit B was a "production key" from December 17, 2015; Exhibit C was an "email from J. Nyman to D. Peterson regarding production of Annex A and Annex B to the purchase agreements; Exhibit D was the declaration of Michelle Rolf-Banks; Exhibit E was a supplemental declaration of Alexander Dolapo; and Exhibit F was the declaration of Leila Batson. Although this Tribunal has only summarized those exhibits that were discussed within this analysis, it has reviewed and considered each of the foregoing exhibits.

Respondent stated that Complainant's assertion that it had waited until January 29, 2016 to produce Annex A and B to the purchase agreements that Respondent provided to Complainant on December 23, 2015 was "simply not true." It produced as Exhibit C a December 23, 2015 email from Respondent's counsel to Complainant's counsel that purported to provide Complainant with the missing annexes. Therefore, Respondent argued, Complainant could not show prejudice based on the "inadvertent omission of these annex documents."

Moreover, Respondent felt that "none of the documents [contained in the annexes] are 'pertinent' to the claim that [Respondent] is a 'contractor' under AIR 21." Respondent then explained the Act's definition of an "air carrier" and argued that "Complainant has not and cannot explain how the provision of a start-up support team or defective parts replacement qualifies as 'perform[ance] of safety-sensitive functions.'" Rather, Respondent paraphrased the declaration of Michelle Rolfe-Banks – provided as Exhibit D – that: "the documents show that [Respondent] provides initial support and maintenance training and arranges for replacement of defective parts under a parts pricing agreement with a wholly owned subsidiary (Learjet); and Learjet, [or] Bombardier Services corporation (another wholly owned subsidiary), or other authorized service facilities performs the actual warranty and/or repair work for purchasers of [Respondent's] air craft."

Respondent then alleged that Complainant had misrepresented Respondent's efforts to produce underlying purchase agreements "only after [Complainant] filed a motion to compel and after more than year of delay." Respondent replied that it had taken nine months (until December of 2015) – "not a year" – after the March 20, 2015 discovery hearing to produce the purchase agreements. Respondent argued that during the March 20, 2015 discovery hearing, the "scope of Complainant's purchase agreement requests was significantly limited . . ." so Respondent had committed no discovery abuse related to its alleged delay in producing the requested purchase agreements. Moreover, Respondent felt it had committed no discovery abuse, because Respondent's federal lawsuit had occupied the nine-month interval between the discovery hearing and its production of the purchase agreements. Respondent then acknowledged that "its discovery obligations were not stayed during the pendency of that complaint." Respondent noted, however, that it had "promptly" produced the purchase agreements in December following the dismissal of its federal lawsuit: more than a month prior to the January 29, 2016 discovery deadline. As Respondent had provided Complainant with the requested service agreements "well before the discovery deadline," Respondent argued that sanctions were not warranted, because Complainant could not assert a prejudice that was due to Respondent's discovery conduct.

Respondent averred that "Complainant's third major misrepresentation" was that Respondent had only produced eight pages relating to Complainant's layoff. Respondent replied that it had produced 400 pages on this topic and had provided declarations to explain the layoff process to Complainant's counsel. The fact that Complainant's counsel could not "'believe'" that Complainant was an "obvious candidate" for termination, Respondent argued, "does not merit sanctions." Respondent then stated that it had provided to Complainant "many of the relevant termination documents more than a year ago" and alleged that Complainant's counsel had "failed to review those documents for over a year, and then somehow lost them."

Respondent also noted that this Tribunal ultimately found Complainant "not entitled to everything he requested in 2014: as with his warranty and repair related document requests, [Complainant's] request for documents relating to the reduction in force were significantly narrowed in March of 2015."

Respondent then turned to the issue of its offer to make the requested technical documents available for inspection. Respondent stated that it had already produced some technical documents, and averred that "the subset of technical data that [Complainant] requested is complex and voluminous, and is not easily reproduced." Instead, Respondent wrote that on November 3, 2015, it had offered to make the requested technical documents available for Complainant[10] to review at Respondent's Toronto facility. It continued that other third parties, such as its customers and certain Canadian regulatory agencies, had routinely inspected such data on site. Indeed, Respondent asserted that "even Transport Canada and [Respondent's customers] are permitted only to conduct onsite inspection . . . ." Respondent included various legal authorities that purported to demonstrate its assertion. Respondent alleged that Claimant had failed to voice its opposition to Respondent's offer of inspection in its November motions for sanctions; and had waited until January 24, 2016 "to oppose this proposed method of production." Respondent felt that Complainant had "sat on" its offer for three months before objecting to the on-site inspection on January 25, 2016. Complainant's objection, according to Respondent, had prompted it to file an additional protective order on February 5, 2016. Respondent noted that this Tribunal had dismissed Respondent's motion for protective order as "untimely."

Respondent then told of a meeting between Respondent's in-house counsel and Complainant[11] in Montreal. Respondent's reply is silent as to the date when this meeting occurred. The subject of the meeting was to discuss possible solutions to the production of the requested technical information. According to Respondent, "the parties seemed to have resolved all disputes with respect to the First Request for Production." Complainant apparently also clarified and narrowed certain requests from his second document request. Respondent then averred that it was "currently working to satisfy these narrowed requests."

Respondent next argued that OALJ is not authorized to utilize its sanctions power to establish subject matter jurisdiction. Unlike personal jurisdiction, Respondent stated that subject matter jurisdiction was non-waivable and that a federal court must, *sua sponte*, deny its own jurisdiction over a case when appropriate. Respondent recalled that it had already conceded personal jurisdiction. Moreover, Respondent attempted to distinguish the facts of its own discovery practice from the one featured in *Ins. Corp. Of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), because, quoting that case, Respondent did not show "continued delay [or] obvious disregard of [this Tribunal's] orders."

Finally, Respondent disputed an ALJ's ability to impose monetary sanctions. Neither the Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges nor the Federal Rules of Civil Procedure, Respondent contended, permitted a judge to sanction parties monetarily for the failure to conduct discovery. Respondent

[10] Not Complainant's counsel.
[11] Not Complainant's counsel.

concluded that without statutory authorization, OALJ does not have the authority to impose sanctions and penalties. *See Windhauser v. Trane*, WL 7139497, at *2-3 (ARB 31 Oct. 2007). Respondent urged this Tribunal to, therefore, deny Complainant's request for monetary sanctions.

C. Complainant's Surreply Memorandum Supporting Sanctions against Bombardier for Discovery Abuse

On February 23, 2016, this Tribunal ordered Complainant's counsel to provide surrebuttal to the statements made in Respondent's reply. Complainant's counsel submitted such surrebuttal on March 3, 2016. There, Complainant provided a summary of Respondent's alleged discovery conduct. Specifically, it noted that this Tribunal granted Complainant's March 2015 Motion to Compel; however, "[d]espite being ordered to produce documents, [Respondent] produced no further documents for 9 months." Moreover, Complainant averred that seventy-five percent of Respondent's document production was made in December 2015 and January of 2016. Notably, Respondent had produced Annex A and Annex B of the requested purchase agreement more than nine-months after this Tribunal ordered such production and six weeks after Respondent's federal lawsuit was dismissed. Because Respondent had failed to produce in a timely fashion the ordered documents, Complainant felt that this Tribunal should sanction Respondent for its discovery abuse.

D. The March 3, 2016 Teleconference

On March 3, 2016, this Tribunal held a teleconference between the parties. Of specific relevance to this Order, this Tribunal allowed Complainant to file a motion to move this Tribunal to compel Respondent to provide Complainant with further discovery responses.

E. Complainant's March 7, 2016 Motion for Additional Limited Discovery

In response to the leave granted to Complainant during the March 3, 2016 teleconference, Complainant requested, in part, leave to conduct certain depositions concerning Respondent's contractual obligations as reflected in Annex A and B to the contract that Complainant on January 29, 2016. Complainant also requested depositions regarding the process Respondent used to terminate Complainant's employment, as expressed in certain affidavits and declarations that Respondent provided in its discovery responses. Finally, Complainant requested production of specifically identified documents; and production of, or an affidavit concerning, the "REDINST400" computer program.

F. Respondent's March 11, 2016 Reply to Complainant's Motion for Additional Limited Discovery

In its reply, Respondent asserted that Complainant had provided no explanation as to why he had waited to request depositions of Respondent's corporate representatives on topics that were already contemplated in his earlier requests for production. Second, Respondent asserted that the additional requests for production have already been addressed by Respondent. Respondent also objected to Respondent's request to take the requested depositions in Wichita,

Kansas. Finally, Respondent opposed any request concerning the REDINST400 computer program.

III. Discussion

A. History of Motion Practice for Sanctions and Other Relevant Discovery Practice

In summary, Complainant maintains that the manner in which Respondent has engaged in discovery merits a grant of discovery sanctions. The foregoing ten-page procedural posture documents well Respondent's actions, Complainant's sanctions-requests, and this Tribunal's responses. Notably, Complainant first alleged discovery abuse within its **February 26, 2015** Motion to Compel. On March 20, 2015, this Tribunal convened a lengthy teleconference with the Parties to discuss and to resolve outstanding discovery issues.[12] Less than two months after this teleconference, on May 4, 2015, Claimant felt compelled to file its Motion for Sanctions. There, Complainant continued to allege that Respondent had engaged in a "campaign of stall tactics" in relation to its discovery obligations. On May 7, 2015, this Tribunal continued the hearing in light of Respondent's petition before the District Courts to grant a preliminary injunction. There, this Tribunal specifically wrote that **"Nothing in this Order is intended to preclude the Parties from executing as expeditiously as possible their respective discovery obligations."** *Emphasis added.* Moreover, on October 1, 2015, shortly after the District Court denied Respondent's injunction-petition, this Tribunal held an extensive teleconference between the parties on the issue of Respondent's discovery conduct. On page eleven of the teleconference transcript, this Tribunal stated that "I think it would be fair to give [Respondent] an opportunity to correct any deficiencies in discovery . . ." and Ordered the discovery deadline moved to January 29. 2016. This Tribunal further directed Complainant to "identify with particularity [discovery that Respondent has yet to exchange due to noncompliance] and what you propose." On November 13, 2015 Complainant raised again its "Motion for Sanctions Against [Respondent] for Discovery Abuse." This Tribunal held another teleconference between the Parties on December 17, 2015. On page eleven of the transcript, this Tribunal told the Parties that if Complainant is still unsatisfied with Respondent's discovery exchange, "I'm going to rule if sanctions are still warranted." Finally, on February 16, 2016, Complainant submitted his "Memorandum Regarding Sanctions Against [Respondent] for Discovery Abuse." Respondent replied on February 19, 2016. In light of Respondent's reply brief, this Tribunal Ordered Complainant's counsel to submit a surrebuttal, which he timely filed on March 2, 2016.

B. Applicable Legal Standard for the Imposition of Sanctions

The Administrative Procedure Act authorizes administrative law judges to regulate adjudicatory proceedings and to dispose of procedural matters. 5 U.S.C. § 556(c)(5) & (9). The Secretary of Labor's procedural regulations delegate "all powers necessary to conduct fair and impartial proceedings," including regulating the course of a proceeding and compel the production of documents. 29 C.F.R. § 18.12. Furthermore, the governing regulations allow for an administrative law judge to apply sanctions when a party "fails to obey an order to provide or permit discovery." § 18.57(b). The regulatory mandate includes six non-exhaustive types of

[12] The transcript reflects that the conference call went on the record at 11:08 AM and concluded at 12:52 PM.

sanctions; including deeming factual matters admitted, excluding evidence, or entering a decision against the non-complying party. *Id; see generally Federal Maritime Comm. v. S.C. State Ports Auth.* 535 U.S. 743, 756-757 (2002) (cataloguing the many similarities that makes administrative law judges functionally comparable, although not identical, to Article III trial judges). Article III courts general employ a two-part test to determine appropriate sanctions. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982) (interpreting the analogous grant of sanctions authority at FRCP 37(b)(2)). First, any sanction must be "just." *Id.*; *see also* § 18.57(b). Second, any sanction must relate to the specific "claim" at issue when a tribunal issued its discovery order. *Bauxites de Guinee*, at 707. Although Complainant has repeatedly argued that Respondent's discovery conduct merited an adverse inference that this Tribunal has jurisdiction over Complainant's claim, it has provided no authority to inform this Tribunal regarding the circumstances when such a finding is warranted. In other words, Complainant has not shown this Tribunal that his requested sanctions are "just." *See* § 18.57(b).

C. Complainant has not proven that the requested sanctions are warranted at this time; however, this Tribunal reserves the right to impose sanctions related to Respondent's discovery conduct, on Complainant's request, as the evidence continues to develop throughout the remainder of this litigation.

Complainant requests this Tribunal to make a finding that Respondent is deemed a "contractor" for the purposes of AIR 21. *See* page 7 of Complainant's February 16, 2016 "Memorandum Regarding Sanctions Against Bombardier for Discovery Abuse." Complainant's request is hereby **DENIED** at this time.[13] Complainant's sanctions request is tantamount to a finding that Complainant is covered under the Act: a factual matter that is still in dispute. *See, e.g.,* this Tribunal's November 4, 2014 Order denying Respondent's Motion for Summary Decision.

As Respondent noted in its Memorandum, the *Bauxites de Guinee* case refers to the related, but fundamentally separate, prerequisite that a court must have subject matter jurisdiction over a defendant. Unlike personal jurisdiction, subject matter jurisdiction is never waivable.[14] *See Bauxites de Guinee*, 456 U.S., at 500-501. Because the *Bauxites de Guinee* case was concerned with a finding of personal jurisdiction, it is inapplicable to the issues that may be outstanding here: whether this Tribunal has subject matter jurisdiction, or whether the Respondent is a covered Employer under the Act, or both. Respondent has already conceded personal jurisdiction. *See* Respondent's February 19, 2016 Opposition to Complainant's

[13] Complainant's request for this Tribunal to sanction Respondent for the attorney's fees it expended as a result of Respondent's discovery conduct is furthermore **DENIED**. Complainant has proffered no authority to demonstrate that this Tribunal has the ability to impose monetary sanctions. Moreover, the Act provides a ready remedy to Complainant's concerns: it allows for the award of attorneys' fees, should Complainant succeed in his claim. *See generally*, 49 U.S.C. § 42121(b)(6)(B) ("The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.").

[14] Here, Respondent has already stipulated that this Tribunal has personal jurisdiction over it with respect to Complainant's complaint. *See* Respondent's February 22, 2016, "Opposition to Complainant's Memorandum Regarding Sanctions Against Bombardier for Discovery Abuse" at 16.

Memorandum Regarding Sanctions Against Bombardier For Discovery Abuse. However, it has not conceded subject matter jurisdiction or that it is a covered Employer. To be clear, there is a distinction between subject matter jurisdiction and coverage under the Act. It is this Tribunal's belief that what Respondent is really asserting is the latter not the former, to wit: that Respondent is not covered by the Act.

Whether this Tribunal has the statutory authority to decide the topic in dispute is the central question of any subject matter jurisdiction-dispute. In contrast to the issue of whether Respondent is covered under the Act – which requires a factual determination – the issue of subject matter jurisdiction is a purely legal question. Here, the Complainant asserts a claim under the Act. Title 49 U.S.C. § 42121(b) imbues the Department of Labor with the authority and the responsibility to implement the whistleblower protections contemplated under the Act. Of note, unlike other whistleblower provisions, the Act does not permit a party to remove the matter to U.S. District Court, prior to an ALJ's issuance of a final decision.[15] AIR 21 provides at § 42121(b)(2)(A) that "[n]ot later than 30 days after the date of notification of findings under this paragraph [i.e., the Secretary's findings rendered by OSHA], either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request **a hearing on the record.**" (emphasis added). When Congress provides for a hearing "on the record," such wording generally means that Congress requires the agency to provide an opportunity for a formal hearing before an ALJ, as provided by the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*. *See* Bellis, *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges* (Federal Judicial Center 2008), http://oaljnet.oalj.dol.gov/Administrative/Procedure/draftcon.pdf; *see also* 5 U.S.C. § 554(a) (stating that formal hearing procedures apply to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . .").

Based on Congress's grant of authority to the Department of Labor to execute the Act, the Secretary promulgated the regulations contained in 29 C.F.R. Part 1979. Here, Complainant exercised his right under 29 C.F.R. § 1979.106, to object to the Secretary's findings and to request a hearing. Complainant did so in a timely fashion. This case was then referred to the Chief Administrative Law Judge who declined to dismiss Complainant for failure to state a claim,[16] and consequently assigned this matter to this Tribunal. 29 C.F.R. § 1979.107(b). Thus, there is no question that this Tribunal has the subject matter jurisdiction required to address matters, such as Complainant's, that are brought under the Act. Accordingly, this Tribunal finds that it has subject matter jurisdiction over Complainant's claim. What remains is the factual question of whether the parties are covered entities under the Act.

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[15] *See, e.g.,* Sarbanes-Oxley Act, codified at 18 U.S.C. § 1514A(b)(1)(B), which permits removal to U.S. District Court if the Secretary has not issued a final decision within 180 days of filing of the complaint.

[16] *See* Chief Administrative Law Judge Stephen L. Purcell's July 31, 2014 "Order Denying Dismissal of Complaint for Failure to State a Claim" ("To the extent further development of the evidentiary record prior to trial shows that [Complainant's] allegations are untrue, Respondent is entitled to seek summary judgment under the provisions of 29 C.F.R. § 18.41. Until that time, however, [Complainant's] complaint meets the minimal pleading requirements elucidated by the ARB and dismissal of the complaint for failure to state a claim is thus inappropriate.").

Although certainly within its power to do so, this Tribunal is hesitant to find such an important disputed fact through an exercise of its sanctions power. This natural skepticism is heightened here, because Complainant's various Motions for Sanctions and their attendant memoranda have not provided this Tribunal with the requisite nexus between Respondent's discovery conduct and the requested finding. In other words, Complainant's motions fail to draw a nexus between Respondent's discovery conduct and the resulting prejudice, if any, that such behavior has had on Complainant's ability to litigate his case. Accordingly, Complainant's request for a finding, through the exercise of this Tribunal's sanctions power, that Respondent is a contractor as defined under the Act is hereby **DENIED (at this time)**.

NEVERTHELESS, Respondent's actions throughout the entirety of the discovery period serve to broadcast its ongoing reticence to engage fully in discovery with Complainant. This, despite Complainant's February 2015 Motion to Compel and this Tribunal's March 20, 2015 teleconference where it painstakingly addressed Respondent's objections to Complainant's document requests, and often Ordered Respondent to provide such responsive documents. As late as March 3, 2016 – a year after this Tribunal Ordered Respondent to comply with Complainant's discovery requests – this Tribunal heard argument from Complainant's counsel that Respondent's discovery responses were less than adequate.

Indeed, a pattern of seeming indifference toward its ongoing discovery obligations has characterized Respondent's behavior throughout the discovery period. Respondent continuously waited until the eleventh hour to respond to Complainant's discovery requests, in disregard to this Tribunal's direct orders, the Rules of Practice and Procedure before this Tribunal, the Federal Rules of Civil Procedure, and the bounds of professional courtesy. For example, this Tribunal extended the discovery deadline for the third and final time during the December 17, 2015 teleconference. *See* Tr. at 11. This extension was in no way meant to excuse eighteen-months of Respondent's noncompliance with its ongoing discovery duties. *See also* Order of May 7, 2015 (continuing the hearing – not staying litigation – in light of Respondent's petition for injunctive relief; and making explicit that such a continuance did not excuse the parties from engaging in their respective and ongoing discovery obligations). The extension was to accord the parties with the opportunity to engage in discovery, and for Complainant to ascertain whether it had received the documentation it required to prove, *inter alia*, that this Tribunal has jurisdiction over Complainant's complaint: *i.e.* whether the parties are covered under the Act. If Complainant felt that Respondent's discovery exchange was non-responsive in any way,[17] the extension provided Complainant time in which to file further document requests or further motions to compel.

Notably, during the **March 20, 2015** telephonic hearing, the parties agreed to provide Complainant with a sample contract concerning Respondent's "warranty[,] repair or other safety sensitive type functions" that Respondent provides to its customers. *See* Tr. at 36. Respondent

[17] For example, Respondent included as Exhibit B to its February 19, 2016 "Respondent's Opposition to Complainant's Memorandum Regarding Sanctions Against Bombardier for Discovery Abuse" its objections and responses to Complainant's discovery. That document seemingly shows that Complainant did not receive responsive discovery documents relating to eight of his requests. Indeed, five of the eight responses (concerning Claimant's requests Nos. 10, 13, 15, 17 and 18) lacked any sort of reasoning for Respondent's failure to respond.

did not provide a document responsive to Complainant's request until **December 2015**, and even then Complainant's counsel had to ask specifically for the two appendices which were not provided with Respondent's original proffer. On page six of Respondent's February 19, 2016 "Opposition to Complainant's Memorandum Regarding Sanctions Against Bombardier for Discovery Abuse" Respondent's counsel averred that the Annexes provided in December of 2015 were not "*pertinent* to the claim that [Respondent] is a 'contractor' under AIR 21." *Emphasis added.*

If Respondent understood its discovery obligations to require only that it need reply with "pertinent" documents, then that might explain its conduct on discovery. Respondent would also be sorely mistaken. The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges is clear that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . Relevant information need not be admissible at the hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." 29 C.F.R. § 18.51(b); *see also* § 18.401 ("*Relevant evidence* means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). The word "pertinent" appears nowhere in the rules and it is elementary that relevance is a determination within the purview of the trier of fact; not the party attempting to engage in discovery seemingly on its own terms.

A further example of Respondent's willingness to shirk its long outstanding discovery duties was Respondent's offer to allow Complainant to inspect certain technical documents at its Toronto facility. *See* Complainant's February 16, 2016 "Memorandum Regarding Sanctions Against Bombardier for Discovery Abuse." Contrary to its reply, Respondent's "offer [to Complainant] to make the [technical] documents available for inspection and review" was neither reasonable nor was it the intention of this Tribunal when it extended the discovery deadline until January 29, 2016. *See* Fed. R. Civ.P. 34(a) (permitting a *requesting* party the opportunity to request the inspection of documents; not permitting a party with the obligation to provide such documents the ability to provide responsive documents through inspection). Because Respondent has seemingly attempted to engage in discovery on its own terms – despite its obligations under the governing regulations as well as this Tribunal's repeated orders – it has engaged in sanctionable discovery behavior.

For further example, this Tribunal finds it simply inexcusable that Respondent failed to exchange the requested contracts until December 2015. As of December 2014, Respondent had provided **574 pages** of documents responsive to Complainant's discovery requests.[18] Respondent then waited – without leave or explanation – another year before producing more documents subject to Complainant's initial discovery request. When it did "comply" with its discovery obligations, it produced an additional **1,780 pages** of documents in December 2015 and January 2016.[19] This tactic is inconsistent with a party's *ongoing* obligation to supplement

[18] Complainant served his initial discovery request on August 29, 2014. Respondent first produced documents on November 26, 2014, although most of its responses were objections to the discovery requests. **So even the initial responses to discovery were untimely.** *See* § 18.61(b)(2) ("The party to whom the request is directed must respond in writing within 30 days after being served.").

[19] *See* Respondent's Reply at 3.

its discovery responses. § 18.53(a); *see also* Order dated May 7, 2015. This year-long delay can hardly be considered timely.[20] Only after this Tribunal actively re-engaged in the substance of Complainant's Motions for Sanctions did Respondent begin to comply with its ongoing discovery obligations. This behavior is inexcusable. Respondent's assertion in its reply to Complainant's Motion for Additional Limited Discovery that Complainant should have requested depositions sooner, is tantamount to a request to profit from its own inexcusable discovery conduct. Throughout the discovery period, Respondent has impaired Complainant's right to discovery in this matter; not the other way around.

Furthermore, Respondent has been under Order to respond to Complainant's outstanding discovery requests since at least March 2015. *See* transcript of March 20, 2015 teleconference at 22-32. There, Complainant compromised and accepted Respondent's offer to provide exemplars of the requested contracts, rather than all such contracts. *See id.* at 35. Respondent well knows that a key piece that Complainant must establish to prevail in this matter is the nexus between Respondent and an American air carrier or that Respondent is a contractor of an American air carrier. This has been the epicenter of Respondent's litigation strategy since the very beginning and to obstruct the Complainant's opportunity to attempt to demonstrate that nexus appears purposeful. Complainant's requests for this information have been proportional to the needs of its case, and its requests are of unquestionable importance to further its purpose of establishing facts necessary to the success or failure of its claim. *See* FRCP 26(b)(1). A protective order has been in place since at least October of 2014. Respondent has provided no valid reason for its failure to produce to Complainant in a timely fashion– based on Complainant's compromise – a complete set of these basic and essential documents through the intervening nine months. Further this Tribunal's Order in October 2015 was to cure any lingering discovery issues, not to cure or condone any discovery violations that had already occurred. This Tribunal made it crystal clear that the parties were to continue with their respective discovery obligations when it denied Respondent's motion to stay but granted a continuance on **May 7, 2015**. To then wait until **December 2015** – as Respondent did – to provide responsive documents is simply unacceptable.[21] A party that ignores a Tribunal's discovery order on at least two occasions does so at its peril: "Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and often time has every incentive to refuse to comply." *Atlantic Richfield Co. v. U.S. Dep't of Energy,* 769 F.2d 771, 796 (D.C. Cir. 1984).

In the most recent motion practice to appear before this Tribunal, Respondent has continued to assert that many of Complainant's discovery requests "have [no] bearing on whether OALJ has subject matter jurisdiction over this matter." *See* Respondent's February 19, 2016 Opposition to Complainant's Memorandum Regarding Sanctions Against Bombardier For

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[20] As noted above and emphasized herein, this Tribunal acknowledges that Respondent attempted to resolve this matter by use of another forum. This Tribunal granted a *continuance*, not a stay, of these proceedings to afford Respondent the opportunity to pursue that matter. In this Tribunal's grant of a *continuance* it placed the parties on notice that it expected the parties to continue with their respective and ongoing discovery obligations.

[21] As late as December 17, 2015 teleconference, Respondent's counsel was claiming "we've made substantial process" on documents that the Complainant had been seeking since August and October 2014. *See* Transcript of Dec. 17, 2015 teleconference at 8.

Discovery Abuse at 1. This is true. But that logic, in turn, has no bearing on Respondent's obligation to comply with discovery on the remaining disputed issues in this matter. Respondent seems to desire a piecemeal approach to the discovery process. It is attempting to dictate to Complainant what is or is not relevant to Complainant's claim when it is the Complainant that bears the initial burden to make out a prima facie case. If Respondent was willing to stipulate that Complainant was a covered employee, engaged in protected activity, was subject to an adverse action, the protected activity was a contributing factor in the adverse action, and that it could not establish by clear and convincing evidence that discrimination did not occur, its argument would have merit. However, with the exception of whether an adverse action occurred, it is this Tribunal's understanding that Respondent continues to contest the remaining elements of this whistleblower claim. Therefore, Complainant has every right to continue to seek information that may lead to information that supports each element of his claim. Respondent cannot be allowed to thwart Complainant's right to the opportunity for discovery on issues it is not willing to concede. Further Respondent notes in its reply that "any evidentiary sanction that could be imposed in relation to the production of these technical documents is limited to an adverse inference that a regulatory violation existed." *Id.* at 2. This is incorrect. Although an ALJ should issue tailored sanctions, "just" sanctions – as contemplated under the Rules of Practice and Procedure – need not be so limited. A just sanction could include, for example, not only a finding that a regulatory violation occurred, but that Complainant's reporting of the violation was subjectively and objectively reasonable.

Respondent continues to insist that certain technical data not be produced other than for purposes of inspection. *Id.* at 11. Rule 18.61 sets forth the procedures for inspection and these procedures extend to electronically stored information. *See* § 18.61(a)(1)(i). Respondent maintains that the data requested is voluminous, not readily transportable, highly proprietary and asserts that inspection – rather than production – of this data is therefore warranted. Respondent's counsel has also represented that in other matters, entities such as Transport Canada, have traveled to its facilities to review this information in lieu of production. However, Respondent has never defined what it means by the term "voluminous." It simultaneously argued that such data was not readily transportable; while also offering Complainant to review such information in either Montreal or Wichita. Respondent's offer appears to undercut its argument both as to volume and mobility. It further asserted that this data is of great value, worth somewhere in the vicinity of over $500,000, but has offered no proof of that representation. This Tribunal appreciates that this data may be of value, but that fact is not dispositive on whether the information should be released during discovery. There is protective order in place. Moreover, Respondent knew about Complainant's request for this information long before the protective order – which the parties themselves developed and stipulated to – was issued. *Compare* Complainant's First and Second document requests, sent in August and early October of 2014, respectively; *with* the October 27, 2014 protective Order. Respondent is presumed to have contemplated the manner of disclosure of such data when it entered into the protective order. *See, e.g.*, Order of October 27, 2014 (where this Tribunal issued the protective order and directed the parties to provide "any objections to this Proposed Order by November 10, 2014. [This Tribunal] will interpret the absence of a timely response as the party having no objection to the proposed order." Respondent did not respond to the foregoing Order.) Therefore, this Tribunal finds that Respondent has presented no good cause to compel Complainant to inspect such data at its Montreal or Wichita facilities.

Finally, Respondent objects not only to the taking of the depositions, but also their location. However, based on the foregoing, it appears to this Tribunal that the inconvenience of requiring Respondent's witnesses to travel to Wichita is an inconvenience of Respondent's own doing. Had it cooperated in the discovery process in a more timely, forthright, and collaborative manner, Respondent would not find itself in a position where it must now overcome the burdens on its time associated with the pending hearing.

THEREFORE, in light of Respondent's ongoing discovery behavior, as exhaustively outlined in this document, this Tribunal finds that sanctions are warranted; just not in the manner in which Complainant has requested. **Respondent's sanctions are as follow:**

(1) from the issuing date of this Order until the close of the hearing, Complainant will receive wide latitude to re-raise its requests for discovery sanctions based on specific and articulable instances where he is unable to make out his case in chief[22] due to deficiencies in Respondent's discovery practice. This Tribunal will look with a keen eye toward Complainant's requests, but will stop short of imposing a presumption that a deficiency in Complainant's case was due to Respondent's discovery conduct.

(2) Complainant **only** is given leave to continue in discovery. Complainant shall have until April 22, 2016 to submit any additional discovery requests.[23] In particular:

a. Complainant's March 7, 2016, request to conduct the depositions of certain employees of Respondent (paragraphs one through four) is **GRANTED.** Such depositions shall occur in Wichita, Kansas at a Bombardier facility. If such facility is not available, they shall occur at a location at or near Wichita, Kansas of Complainant's choosing and shall occur within twenty-one (21) days of this Order.

b. Complainant's March 7, 2016 document request is **GRANTED in part.** Respondent shall produce the documents contained in paragraph 5 of Complainant's Motion for Additional Limited Discovery and shall do so within fourteen (14) days from the date of this Order. Respondent shall not merely allow Complainant to inspect the documents or data. Respondent's failure to respond to these discovery requests within the foregoing time frame – without extremely good cause shown – shall result in this Tribunal providing Complainant the opportunity to argue that an adverse inference exists pertaining to the information requested. In such case, Complainant will have leave – and will be given wide latitude – to characterize the nature of such an inference.

[22] Or otherwise unable to prepare adequately for hearing, including but not limited to preparing for the cross-examination of Respondent's witnesses.

[23] Respondent shall respond to any additional discovery requests within 14 days of service.

c. Regarding Complainant's request for Respondent to produce the computer program REDINST400, Respondent is hereby accorded the right to choose from the following options:

i. Within fourteen (14) days of the issuance of this Order, Respondent may stipulate, as Complainant has requested, "that the [REDINST400] program only used one of the five inputs for installation loss, and adjusted for differences in power between Flight Test and Card Deck rather than difference in Installation loss;"[24] or

ii. Within fourteen (14) days of the issuance of this Order. Respondent may produce – rather than allow Complainant to inspect – that program to Complainant,[25]

iii. If Respondent chooses not to follow either one of the foregoing options – or is untimely in doing so – it shall face the following sanction:

> Complainant **only** shall be permitted to explain how the REDINST400 program functions and how its function relates to his claim (be it by his testimony or the testimony of another witness). Respondent shall **not be permitted** to present any lay or expert witness to impeach Complainant's assertions concerning how this program was used, or the significance of the data that Complainant relied on within the certification process of the Q400.[26]

Nothing in this document will have the effect of moving the hearing date (but the parties' various pre-hearing responsibilities may change due to Complainant's desired actions, based on this Order).

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[24] It is the intention of this Tribunal that such a stipulation would be protected from disclosure based on the protective order and also limited in applicability and extent to the current adjudication.

[25] Any exchange of the REDINST400 program would, of course, fall under the protections of the protective Order, entered into in October of 2014.

[26] For example, should Respondent not proffer REDINST400 to Complainant, Respondent will be precluded from using any data derived from the computer program REDINST400 to impeach Complainant's credibility. Respondent's counsel has noted that Complainant "does not need to prove an underlying safety violation to prove his allegations of retaliation." March 20, 2015 teleconference transcript at 8; *see also Sylvester v. Parexel Int'l, LLC*, ARB No. 07-12, slip. op. at 19 ("[T]he focus [of SOX] is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law . . . .)" (emphasis added).

Finally, to the extent that Respondent should request a Motion to Reconsider this ruling, that request is hereby **DENIED** due to the parties' obligations as discussed herein in proximity to the hearing date. However, both Claimant and Respondent may make requests for clarification of their respective obligations, as instructed herein.

SO ORDERED.

Digitally signed by Scott R. Morris
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Administrative Law Judge

Cherry Hill, New Jersey

SERVICE SHEET

Case Name: **SOBHANI_JEFFREY_A_v_BOMBARDIER_AEROSPACE_**

Case Number: **2014AIR00017**

Document Title: **ORDER DENYING IN PART AND GRANTING IN PART COMPLAINANT'S MOTION FOR DISCOVERY SANCTIONS**

I hereby certify that a copy of the above-referenced document was sent to the following this 18th day of March, 2016:

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