

Issue Date: 23 September 2011

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

CASE NO.: 2010-AIR-00016

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*In the Matter of:*

**CHARLES MCLEAN**  
*Complainant*

v.

**AMERICAN EAGLE AIRLINES, INC.,**  
*Respondent*

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Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

Jed Kurzban, Esq., Kurzban Kurzban Weigner & Tetzeli, PA, Miami, FL for Complainant

Donn Meindersma, Esq., Conner & Winters, LLP, Washington, D.C. and Vincent S. Carter, Esq., American Airlines, Inc., Fort Worth, TX for Respondent

**DECISION AND ORDER DISMISSING COMPLAINT**

**I. Statement of the Case**

This case arises from a claim for whistleblower protection filed by Charles McLean (“Complainant”) against his employer, American Eagle Airlines, Inc. (“American Eagle” or “Respondent”), under the employee protection provisions of section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21” or the “Act”), 49 U.S.C. § 42121 (2006). After an investigation, the Occupational Safety and Health Administration (“OSHA”) found the Complainant’s allegations to be without merit. The Complainant objected to OSHA’s findings and requested a formal hearing before the Office of Administrative Law Judges (“OALJ”) pursuant to 29 C.F.R. § 1979.106 (2010).

A hearing was held before the undersigned Administrative Law Judge in Miami, Florida on July 13-15, 2010, at which time all parties were afforded the opportunity to present evidence and oral argument. Both parties appeared at the hearing represented by counsel. The Hearing Transcript is referred to herein as "TR". Documentary evidence was admitted as Joint Exhibits ("JX") 1-42, 44-49. TR 9, 54, 572, 645, 941-42. The Complainant, Sandra McLean, Nestor Pedraza, Roberto Del Rio, Orlando Vasquez, Rafael Perez, Tim Griffin and Luis Reyes testified at hearing. The testimony of Luis Reyes was completed by post-hearing deposition on November 19, 2010, and his deposition is hereby marked as JX 50 and admitted.<sup>1</sup> The parties submitted post-hearing briefs. The record is now closed.

## **II. Issues**

The issues in dispute are: (1) whether the Complainant engaged in protected activity; (2) whether protected activity was a contributing factor in Respondent's decision to terminate Complainant; and (3) whether American Eagle would have terminated the Complainant for cause irrespective of the existence of protected activity by the Complainant.<sup>2</sup>

## **III. Summary of Decision**

The Complainant failed to establish that he engaged in protected activity under the AIR21 statute. Even assuming Complainant had established protected activity, American Eagle demonstrated that it would have taken the same unfavorable personnel action in the absence of any protected activity.

## **IV. Stipulations**

The parties submitted a Joint Pre-Trial Stipulation ("Stip.") of Facts. The stipulated facts are as follows:

1. American Eagle is an air carrier within the meaning of AIR21.
2. Charles McLean, the Complainant, was an employee within the meaning of AIR21.
3. The incident in question involves Aircraft N399AT.
4. Robert Del Rio, a Quality Control ("QC") inspector, performed a borescope inspection on one of the Pratt & Whitney manufactured engines on the N399AT aircraft on August 2, 2008 and discovered what he categorized as a "Category 1" nick in area C on the impeller blade.

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<sup>1</sup> Although Mr. Reyes post-hearing deposition to complete his testimony is admitted as JX 50, the document continued the sequence of pagination from the hearing transcript. References to Mr. Reyes post-hearing testimony will use the TR reference.

<sup>2</sup> I decline Respondent's invitation to revisit my decision according the arbitration decision little weight and finding that collateral estoppel does not apply. R. Br. at 21 n.12.

5. The Complainant, who is a QC inspector, conducted a borescope inspection on the same engine as Del Rio on August 16, 2008 and found what he categorized as a “Category 3” nick in the Cc area of the impeller.
6. Orlando Vasquez, a crew chief and acting maintenance supervisor on August 16, 2008, entered Complainant’s borescope inspection findings on a KVA entry on the SABRE computer program for Complainant.
7. Complainant recorded inspection information on the non-routine work card on August 16, 2008 after his inspection.
8. Complainant recorded inspection information on the aircraft log book, including the aircraft log’s Maintenance Item Control (MIC) sheet on August 16, 2008 after his inspection.
9. Complainant updated the maintenance share drive on August 16, 2008 after his inspection.
10. Aircraft N399AT was grounded in Savannah on the morning of August 20, 2008.
11. On September 12, 2008, Nestor Pedraza recommended to his superior that a Career Decision Day Advisory be issued to Complainant, for, among other things, his failure to notify MOC<sup>3</sup> of the change in the time constraint.
12. Complainant did not sign an airworthiness release for aircraft N399AT on September 19, 2008.
13. On September 24, 2008, Complainant was suspended.
14. Nestor Pedraza issued a Career Decision Day Advisory to the Complainant on October 22, 2008.
15. The Career Decision Day Advisory stated “failure to select one of the options as specified above will result in the termination of your employment (Option #3). Option 3 was “termination of employment with the option to grieve.”
16. Nestor Pedraza issued a Final Advisory to McLean signifying the termination of his employment on October 24, 2008.

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<sup>3</sup> MOC refers to Maintenance Operations Control. TR 111.

## V. Summary of the Evidence

### A. Background

The Complainant had worked for American Eagle for seventeen years at the time of his discharge. TR 50. He worked the third-shift from 9:00 p.m. to 7:00 a.m. at American Eagle's maintenance facility in Miami, Florida, initially as an aircraft mechanic, and at the time of the events at issue here, he was a Maintenance Quality Control (QC) inspector. TR 51-52, 55-56.<sup>4</sup> Complainant is the only QC inspector working on the third shift. TR 72-73. The QC department and the maintenance department work together as a team, but perform two separate functions. TR 59-63; 534. Quality Control inspectors oversee maintenance work to ensure the work is performed in compliance with procedures, and they release aircraft back to service. TR 63-64.

Tim Griffin, the regional manager for aircraft maintenance stated that mechanics make the repairs or perform a scheduled task on the aircraft, and if a repair requires an inspection, the QC inspector will review the mechanic's action. TR 533-35. He described the QC inspector's role as "the extra set of eyes...the final step to the release of an airplane or a task after the mechanic has completed it." TR 535. Griffin explained the process for maintenance on aircraft at the Miami facility. He said that the first and second shift line maintenance schedules do primarily the daily maintenance on aircraft such as oil checks or checking any discrepancies the pilots may have noted. The primary task of the first and second shift maintenance employees is to address these issues and get the aircraft back in service. TR 535-536. The night shift maintenance shift is primarily there to do the heavier scheduled overnight maintenance which is usually items that are not done on the flight line because these are items which would potentially delay a flight. TR 536.<sup>5</sup> Mr. Griffin explained that a separate department, the Planning Department, evaluates what work is coming due on an aircraft and schedules the work on a Bill of Works, which could include both maintenance activities and quality control activities. The third shift supervisor assigns the Bill of Works for work scheduled on each evening shift. TR 536-37. Griffin pointed out that maintenance items are handled through a time control system, and every item has a time assigned to it, when it is due, and how much time is remaining in which to complete the specific maintenance or QC item. The time limits may be driven by calendar events, such as a month, or by hours depending upon flight hours, or by a cycle event, such as the number of take-offs and landings. TR 537.

Mr. Griffin described a Time Deferred Maintenance Item (TDMI) as a process whereby some required maintenance tasks or repairs that do not involve the airworthiness of the aircraft can be deferred to a later time. TR 537-38. In order to defer an item there must be a maintenance manual reference permitting a deferral. TR 538. Griffin reported that if an item already has a TDMI and is in maintenance for that work, the maintenance department may defer the item again, if they do not have the time or manpower to complete the item. TR 539-40. Each Bill of Work has a priority code and a time remaining on each item. TR 539. If the item being deferred is a Priority 2 item with less than 100 hours remaining on the TDMI, the Planning Department must be called so that Planning is informed the item is being deferred, and they can

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<sup>4</sup> The first shift began at 6:00 a.m. TR 911. There are three shifts with an overlap of staff between each of the shifts. TR 689-90.

<sup>5</sup> The flight line is the line operation where daily inbound and outbound flights from the hub originate. TR 538.

schedule the item again before the time remaining to address the specific issue or item expires. TR 540-41.

Griffin stated that the SABRE system is an automated system the company uses to control time-controlled items. He said maintenance mechanics enter information into SABRE and he acknowledged that supervisors sometimes enter information into the SABRE for mechanics. TR 543. Griffin stated that the company's General Procedures Manual is approved by the FAA. TR 547-48.

Griffin noted that Pratt & Whitney manufactured the engine on the aircraft at issue, and that Pratt & Whitney continues to own the engine and leases it to American Eagle. TR 556. Pratt & Whitney has established inspection protocols for the engine and one of these is the borescope inspection which looks at the impeller blade to assess whether there are any nicks or dents in the blade. TR 551-52. Griffin explained that the impellers are located behind the propellers and will pick up sand, rocks, and other debris during operation which may cause nicks, tears or dents in the impeller blade. TR 549-50, 552.

Griffin asserted that safety is an important factor for Respondent. He disputed the assertion that an employee would be punished for reporting violations to the FAA. TR 568. He recalled that Complainant had gone to FAA at an earlier time because he did not agree with Griffin's interpretation of the manual. Griffin gave the FAA his explanation and the FAA agreed with him in that case. Griffin took no action against Complainant for having gone to the FAA with that concern. TR 568-69.

Griffin reported that American Eagle manages employee performance through a Peak Performance Through Commitment policy which is intended to have employees learn from mistakes. TR 569. It is a system of progressive discipline or corrective action. TR 569-70.

#### *B. August 16 Borescope Inspection by Complainant*

On August 16, 2008, Complainant was assigned to conduct a borescope inspection of the engine on Aircraft N399AT. Stip; TR 56-57; JX14.<sup>6</sup> Complainant used the borescope machine to conduct his borescope inspection that evening. TR 68. The borescope machine is a specialized piece of equipment which allows one to visually look at and take photographs of parts of the engine which are inside the engine and not readily accessible. TR 68-71. A borescope inspection is done using a borescope machine and the inspection is completed by inserting or threading a camera tipped cable through the engine housing to see internal parts of the engine. TR 70-71. Photos of the inspection are taken and recorded on the borescope machine's hard drive. TR 71-72, 77-78.

Complainant explained that when assigned to perform a borescope inspection, he reviews the non-routine work card and goes into the KVA entry in the SABRE computer database system and pulls up information that is there on the specific engine. TR 56. As a result, when assigned to perform the borescope inspection of aircraft N399AT on August 16, Complainant knew that on a previous inspection done on August 2, Del Rio noted that there was a category 1 nick on the

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<sup>6</sup> This was the subsequent inspection required and scheduled as a consequence of Del Rio's finding a Category 1 nick during his August 2 borescope inspection of the same engine.

impeller blade of the left engine and the engine had a time-deferred maintenance item (“TDMI”) meaning a re-inspection of the engine was required within 200 hours of the prior inspection. TR 65-67.<sup>7</sup> However, Complainant had not looked at the photographs from Del Rio’s inspection. The Complainant did the borescope inspection on August 16th, obtained a photograph and he determined that the size of the nick on the impeller blade had increased to .109 and the nick was in the Cc location rather than the C location. TR 72, 76-77, 84-85, 105-106. In determining the measurement on his inspection, Complainant testified he measured the depth of the nick. TR 85, 89. Complainant said that when he did his inspection on August 16 the borescope machine froze before he could add the measurement he obtained to the photograph. TR 72, 86. The Complainant stated that he used the comparison or comparator method in making his inspection measurement. TR 79. In using that method to measure the nick, Complainant explained that he took the known measurement of the C and Cc areas of the blade and used that to take his measurement of the size of the nick. TR 79-85, 185-89. Complainant’s co-workers all testified that they do not use the comparator method to measure the dimension of a nick, but rather use the stereo tip on the borescope machine to obtain a measurement. TR 308, 911, 958.<sup>8</sup>

Complainant determined the nick had increased in size and he believed it was now into the Cc area of the impeller blade. The Pratt and Whitney maintenance manual he consulted indicated that nicks in the Cc area required the aircraft engine to be scheduled for removal within 10 hours. JX 6 at 72-73; TR 107, 788.<sup>9</sup> Although Complainant testified he used the comparison method to measure the nick dimension, Complainant also said that he decided to place the location of the nick in the Cc area as an “extra margin” and that he erred “on the side of safety.” TR 202; *See also* TR 199-200, 267.<sup>10</sup> Complainant understood that his decision to locate the nick in the Cc area of the blade meant the damage was a Category 3 damage and very serious. TR 202-04. He conceded that this was the first time he had ever found Category 3 damage on an impeller blade. TR 202.

Complainant noted his borescope inspection findings and the 10 hour time constraint on the non-routine work card, entered it in the log book kept in the aircraft, on the maintenance item control (MIC) sheet, on the turn-over log for the next shift, and he told the acting maintenance supervisor, Orlando Vasquez, who entered the finding into a KVA entry in the SABRE

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<sup>7</sup> Based upon his August 2 inspection findings, QC inspector Del Rio faxed a TDMI form to MOC and he also sent an e-mail to MOC and to his supervisor Nestor Pedraza informing them of the nick he found in the impeller blade. TR 313, 701; JX 5- at 59. MOC updated the SABRE with the re-inspection dates and American Eagle’s Planning Department scheduled the required follow-up or subsequent inspection for August 15-16. JX 14 at 119.

<sup>8</sup> Rafael Perez, a co-worker of Complainant’s described operation of the borescope machine using the stereo method for borescope inspections. TR 449. Using the stereo method, the computer assists in taking the actual measurement. TR 449-451. Del Rio, another co-worker, used the stereo method in making his August 2nd borescope inspection of this same engine. TR 308.

<sup>9</sup> Complainant’s borescope inspection findings changed the time constraint to 10 hours. He also released the aircraft for flight, which was legal. Perez another QC inspector questioned the wisdom of releasing an aircraft with a 10 hour time constraint because an engine replacement would be performed in Miami, 10 hours is not much time, and the aircraft could be stranded in an outlying location. TR 419, 501.

<sup>10</sup> Complainant also stated that in locating the nick on the impeller blade, he did not actually measure where the “Cc” area stops and starts, but rather he made a “judgment call” and he deduced the nick was in “area ‘Cc’ just by a ballpark and a judgment call, which was fair enough to me.” TR 195-196, 199.

automated data system. TR 108-115, 159; JX8; JX 10 at 101; JX 14.<sup>11</sup> Complainant stated he told Vasquez to call MOC. TR 111, 271.<sup>12</sup> Complainant maintains the KVA entry was notification to MOC and he believed MOC would correct the flight time to reflect the 10 hour restriction resulting from his borescope inspection. TR 118, 164-66, 169. Complainant understood it was important to get the word out on his findings and to notify MOC. TR 114-115, 205.<sup>13</sup> Complainant asserts that he complied with the requirement to notify MOC because the maintenance supervisor entered the borescope results into a KVA entry in the SABRE system. TR 168-170.<sup>14</sup> He stated he did not tell the QC inspectors who arrived for the morning shift at 6:00 a.m. of his 10 hour time constraint either because they clocked in and then went to breakfast or because he could not stay over after his shift to talk with day shift QC inspectors because the Company would not authorize overtime. TR 911. The next three days were the Complainant's normal days off and he returned to work on August 20th. TR 119-120. Complainant agreed he did not e-mail or call his supervisor Pedraza to tell him there was a 10 hour flight restriction on the aircraft prior to leaving work on August 16th. TR 160-61.

### *C. Supervisor Override of Complainant's Borescope Inspection Results*

Pedraza testified that he first learned of Complainant's August 16th borescope inspection result and 10 hour engine restriction when he received a phone call from his boss Santiago Ortiz, director of Quality Control located in San Juan on August 20th. TR 797. Ortiz had grounded the plane in Savannah, Georgia as it had overflowed the 10 hour flight limit associated with Complainant's borescope inspection measurement and conclusion. TR 797-98. Pedraza then pulled the KVA entry in the SABRE and saw the inputs from both Del Rio's August 2 inspection and Complainant's August 16th inspection and then looked at the borescope photographs taken by Del Rio on August 2nd and those taken by Complainant on August 16th. TR 705-06. Pedraza noted that Del Rio's photographs had measurements on them and Complainant's did not. TR 706; *see also* TR 558. In looking at the two photographs, Pedraza believed the two were alike and that the impeller blade damage was in area C and not area Cc. TR 706. He spoke with two quality control inspectors on duty at the time, Luis Reyes and Ralph Perez, and said that after reviewing the photographs and consulting the manufacturer's manual from Pratt and Whitney, they all agreed the damage was in the C area. TR 706-07.<sup>15</sup>

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<sup>11</sup> The evidence presented established that it was not uncommon for the maintenance supervisor to enter the borescope information into the SABRE computer system for a QC inspector. JX 22; TR 391, 776-77.

<sup>12</sup> Vasquez testified that Complainant told him of his borescope inspection findings but he did not state Complainant asked him to call MOC and he did not call MOC. TR 349.

<sup>13</sup> MOC is located in San Juan, Puerto Rico. TR 170-71, 296. Griffin and Pedraza stated that MOC is not open and staffed after midnight, but it is staffed again early in the morning so there is some overlap with the third shift in Miami. TR 603, 736.

<sup>14</sup> Mr. Vasquez who was maintenance crew chief and acting maintenance supervisor on third shift on August 16th, credibly testified that in addition to entering Complainant's borescope inspection results into the KVA/SABRE system, he prepared his turn-over sheet report which included the borescope inspection and e-mailed it to Mr. Griffin, maintenance supervisor, Pedraza, the QC supervisor, and Terry Sadiki. TR 349-50, 361, 363-64.

<sup>15</sup> Reyes and Perez stated that on August 20, 2008, Pedraza asked them to look at the borescope photographs taken by Del Rio on August 2 and the photographs taken by Complainant on August 16. TR 370-371, 379-80, 912. Perez testified that Pedraza overrode Complainant's findings based upon Pedraza's review of the two sets of photographs

During this same period, Pedraza sent the photographs to and also spoke by phone with Ortiz, with Terry Pentecost, the director of maintenance, JJ Cruz, director of technical services and with Victor Moreno, Pratt and Whitney's technical representative, who is also an instructor for the borescope. TR 707-10; JX 23 at 164. Pedraza stated all of these individuals agreed that the damage to the impeller blade had not progressed from that noted by Del Rio on August 2, 2008. TR 709; JX 19; JX 23. Pratt and Whitney's Moreno e-mailed Pedraza stating that he agrees the photographs show no progression in damage to the impeller blade between the August 2 and August 16 borescope inspections, and the absence of any progression in damage operates to terminate action on this TDMI and the requirement to re-inspect the engine again. JX 23 at 164; TR 709, 711.<sup>16</sup> By determining the impeller blade damage had not progressed between August 2 and August 16th, Pedraza in consultation with other highly trained and senior individuals, concluded Complainant's August 16th borescope inspection result was inaccurate and he overrode Complainant's finding. TR 714-15, 717. Complainant acknowledged Pedraza had authority to countermand his inspection findings.

On the afternoon of August 20th, prior to the start of Complainant's evening shift that day, which was also Complainant's first day back at work since August 16, Pedraza forwarded Moreno's e-mail to Complainant as well as to the other QC inspectors Pedraza supervised. JX 23. Pedraza testified he did this so they knew what happened with the aircraft, that the manufacturer Pratt and Whitney had been consulted, and that because no further damage was present based on his review of Complainant's August 16 inspection findings, the TDMI was terminated. TR 711-15; JX 23 at 163. Pedraza testified that according to the Pratt and Whitney manual when the second inspection (Complainant's August 16th inspection) is completed showing no further damage, the requirement to re-inspect the engine again is terminated. TR 711. Rather than terminate the TDMI on this aircraft as permitted, Pedraza entered his override of Complainant's inspection on a KVA in the SABRE system and indicated the engine was to be scheduled for re-inspection at next 100 hours, not more than 200 hours. TR 711, 713; JX 3. He said he did this to do another inspection of the engine to be sure the borescope information relayed by the technical expert was corroborated one time thereafter. TR 713-16. Pedraza then telephoned MOC to be sure that MOC changed the time when due requirement for this next borescope inspection that he requested. TR 767-68. Pedraza acknowledged that he did not do an inspection on August 20th when he overrode Complainant's inspection conclusions.

Upon his return to work on the evening of August 20th, Complainant learned for the first time that the aircraft had overflowed the 10 hour restriction associated with his borescope inspection on August 16th, resulting in the aircraft being grounded in Savannah, Georgia, and that Nestor Pedraza, his QC supervisor, had countermanded his borescope inspection findings.

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and consultations with the manufacturer. TR 379-80. Reyes stated that after he compared the photographs and consulted the Pratt & Whitney manual he was convinced the damage to the impeller blade was in the C area. TR 912, 914-15.

<sup>16</sup> This is consistent with the Pratt and Whitney Maintenance Manual. The manual contains a chart identifying necessary actions based upon borescope findings of the size and location of nicks found on impeller blades. The manual indicates that for nicks classified as Category 1 a subsequent borescope inspection is to be done in the next 100 to 200 hours. If the subsequent inspection reveals no change in the condition of the damage from the initial inspection, no more action is required. If any crack is seen to grow in size or propagate from the damaged area, or if material is missing since the last inspection, the engine must be scheduled for removal in less than 10 hours. JX 6 at 70-73.

TR 119-120. When Complainant opened his work e-mail on August 20, he saw an e-mail from Pedraza asking him to explain how he measured the damage on the impeller blade, noting there were no measurements on the Complainant's inspection photograph, and Pedraza asked him to look at the pictures taken by Del Rio during Del Rio's borescope inspection of this engine on August 2, 2008. TR 121-122, 305; JX 23. Complainant replied by e-mail that he thought they ought to take another look at the engine, again noting his findings of August 16, and offering an explanation of how he reached his conclusion. *Id.*

On August 21, the Complainant re-called the photographs from his August 16th borescope inspection from the machine's hard drive and re-measured the depth of the nick at .105, essentially the same measurement he initially obtained on August 16th, and that .105 measurement appears on the recalled photograph dated August 21, 2008, the date Complainant recalled his photograph originally taken on August 16th. TR 124-33; JX 4 at 25.<sup>17</sup> Complainant sent the recalled photographs dated August 21 with the measurement to Pedraza. *Id.* Complainant stated that he attempted to talk with Pedraza about his results and the re-called photograph, but Pedraza did not want to speak with him. TR 123-124, 134, 227. Pedraza did not recall Complainant trying to talk with him.<sup>18</sup> Pedraza acknowledged that by August 21, when Complainant sent him the recalled photos of his August 16th inspection, which were dated August 21 and now included measurements, he was convinced the Complainant was simply trying to justify his August 16th findings. TR 728.

Complainant said he then spoke with Tim Griffin the maintenance manager supervisor, who was coming into work that morning. Complainant recalled Griffin telling him that Griffin was not sure borescope measurements could be taken the way Complainant did on August 16th, and that in response to Complainant's concern that they needed to look at the engine again, Griffin assured him they would take care of it. TR 220-22.<sup>19</sup> Complainant also sent an e-mail to Pedraza's boss, Ortiz, suggesting they look at the engine again. TR 134-35. Complainant explained that he wanted the company to look at the engine again after Pedraza countermanded his August 16th inspection findings, because Pedraza's August 20th action, overriding Complainant's inspection finding, was not an inspection of the engine. TR 120, 216, 230-32, 257-58. Complainant testified that he thought Pedraza's override of his inspection findings meant his inspection was null. TR 242-43. Complainant wanted another physical inspection of the engine impeller blade. TR 291, 298-99.

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<sup>17</sup> On August 16th, Complainant measured the nick at .109 and recorded this measurement.

<sup>18</sup> Complainant's suggestion that Pedraza was unwilling to discuss the issue with him is at odds with the opinions of his colleagues, the other QC inspectors, who all viewed Pedraza as accessible and willing to talk with them about safety concerns. TR 468-69, 647-49, 908-09.

<sup>19</sup> Griffin testified that Complainant did speak with him about the borescope inspection and grounding of the aircraft in Savannah on or about the morning of August 21st or 22nd. TR 558. Griffin recalled that when he asked the Complainant why there were no measurements on his borescope photographs from August 16th, Complainant replied that the piece broke and he could not get it to work. TR 559. Complainant also told Griffin he used the comparator method to measure the nick and compared the nick to the full length of the blade. *Id.* Griffin stated he did not understand how Complainant used the full blade as a comparator because he did not see a picture of the full length of the blade in any photographs Complainant took on August 16th. *Id.*

#### *D. Board of Inquiry Investigation*

In the days after the aircraft was grounded in Savannah, Pedraza conducted a Board of Inquiry investigation at the request of his boss, Santiago Ortiz, in an effort to determine how the plane was grounded when there are checks and balances to prevent such an event. TR 729-30.<sup>20</sup> The investigation included among other actions, e-mail questions to Complainant and Orlando Vasquez from Pedraza and/or Ortiz. TR 730-32; JX 22; JX 19. In response to an August 24 intemperate e-mail from Complainant which questioned Pedraza's action and suggested it was not in compliance with the manufacturer's manual, Ortiz responded in an August 27 e-mail. Ortiz told Complainant that Pedraza had not countermanded Complainant's August 16th inspection on his own, but rather they had consulted with Pratt and Whitney and the manufacturer decided the damage was not a Category 3 damage as Complainant had determined. JX 19 at 152.<sup>21</sup> Ortiz wanted to know what had happened in that no one knew about the 10 hour flight restriction until August 20th when the aircraft was grounded, and he posed three questions to Complainant. *Id.* Specifically, Ortiz asked "(1) Why wasn't MOC informed of the 10 hours so that they could contact someone? The time was never changed to reflect the 10 hours remaining; (2) Why didn't the Supervisors informed [sic] us that there was an engine change in 10 hours? Especially on a week-end [sic]; (3) Please explain your events after the Borescope. Who did you contact?" JX 19 at 148, 152. Complainant answered by e-mail on August 30 and he stated that (1) he did the inspection and filled out his findings and gave the non-routine work card to the crew chief; (2) he has never contacted MOC for a TDMI at night in all his years working as an inspector; (3) he always reports his findings to the maintenance person in charge of the Shift – "That night it was the maintenance crew chief [Orlando Vasquez]." JX 19 at 151.

After receiving Complainant's response, Ortiz instructed Pedraza to interview Vasquez, the maintenance crew chief on duty on August 16th. JX 19 at 151. Pedraza e-mailed Vasquez, and in response to Pedraza's questions Vasquez essentially pointed the finger at Complainant, replying that he was not the one to do the borescope inspection that was QC, and he was not the one to reset the time, that was MOC. JX 22. Vasquez replied that he entered the borescope information in the KVA SABRE system and made his turn-over report but said "looks like this time nobody followed up." JX 22 at 304. Vasquez said he thought QC should have notified Pedraza there was a possible engine change due to the borescope inspection findings. Vasquez concluded by stating "[u]nfortunately the night in question I was supervisor, the crew chief and mechanic," three separate roles. JX 22 at 161. After seeing the e-mail responses from Complainant and Vasquez, Pedraza's supervisor, Ortiz e-mailed Pedraza stating "It is obvious the ... [Complainant] did not raise the flag. Everyone is depending on the next person." JX 22 at 161.

On September 5, 2008, Pedraza called a meeting with the Complainant who was accompanied by Luis Reyes, another QC inspector, who also acted as the union representative.

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<sup>20</sup> Grounding the aircraft caused flight delays and disruptions. JX 20.

<sup>21</sup> At hearing, Complainant was dismissive of the Pratt and Whitney representative Moreno opinion, referring to him as "field rep." TR 239-40.

TR 719-20.<sup>22</sup> Pedraza asked Complainant to explain how he arrived at his borescope inspection measurement of .109 and at placing the nick in area Cc rather than area C. TR 720-21. Although Pedraza acknowledged the comparison method is an acceptable method for performing a borescope inspection, he determined Complainant had not correctly used that method. TR 721-29. Pedraza explained that in order to use the comparison method, it was necessary to have the full length of the impeller blade, and when he looked at the Pratt and Whitney manual the only measurements on the diagram Complainant referred in determining his measurement were the lengths of the C and Cc area of the blade. When those two measurements are added together the resulting figure does not equal the full length of the impeller blade, so it was not possible to do a comparison method with the photo Complainant took because area C and Cc together do not reflect the full impeller blade. TR 721-23.

After his investigation, including his meeting with Complainant, Pedraza concluded that Complainant failed to follow company procedures to update the TDMI procedures. TR 733-34. Specifically, Pedraza determined Complainant violated the General Procedures Manual (GPM) provision regarding the Time Deferred Maintenance Item (TDMI) System Procedures, Section A. 2 (d), which provides:

QC is responsible to update SABRE after any borescope inspection. If the borescope time constraint is changed, QC will notify MOC of this change. MOC will then change the time constraints in SABRE.

JX 5 at 56 at A. 2 (d). Pedraza maintains that “notify” MOC in this provision of the GPM means inform in some fashion other than just entering the information in the SABRE system, that is, that Complainant was required to telephone, e-mail or fax MOC so that MOC could change the time when due associated with the borescope TDMI on the aircraft at issue. TR 734-36.<sup>23</sup> It is undisputed that MOC is the entity responsible for updating the time when due for a particular TDMI which may be required based upon inspection findings. TR 734-35, 806. Pedraza explained that the time when due is what starts the clock or initiates the TDMI for tracking purposes. TR 739. A KVA entry made in the SABRE system would not update the time when due, rather the KVA information would be used by the QC inspector in performing a subsequent inspection. TR 734-35. In other words, the QC inspector would look at the KVA entry to see what had been done previously. *Id.* Pedraza noted that at any one time the airline can have hundreds of TDMI’s on various aircraft, and without specific notice to MOC that the time when due needs to be changed or updated for a specific TDMI, MOC does not act. TR 735-36, 805-06. Here Pedraza contends that because Complainant did not call, e-mail or fax MOC after his

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<sup>22</sup> Reyes testified that at the September 5 meeting the Complainant explained to Mr. Pedraza how he obtained his borescope measurement and Mr. Pedraza explained the company’s views and positions. JX 50, TR 956-57, 963. Reyes did not recall any discussion at the meeting suggesting that the Complainant falsified the photograph. JX 50, TR 969, 973.

<sup>23</sup> Mr. Griffin testified that a ten hour time constraint, such as the one Complainant placed after his August 16th borescope inspection, is a very small or short time constraint, and therefore, it should have had a lot of attention put on it. TR 595. In other words, Complainant had to call MOC to tell them to update the TDMI. *Id.* Similarly, in his hearing testimony Perez stated that if an entry in the SABRE system requires a time change, it is necessary to call or e-mail MOC in addition to making the SABRE entry, so that MOC will then reset the time, and the TDMI will reflect the time change and that the aircraft engine issue identified must be addressed within 10 flight hours. TR 383-85, 431-34.

August 16 borescope inspection, MOC never updated the time when due on the TDMI for this aircraft, and the aircraft was grounded in Savannah when it was discovered that it had overflown the 10 hour restriction tied to Complainant's August 16 inspection results. TR 737, 805-06; JX 20.

On September 12, 2008, Pedraza e-mailed Ortiz his report on the investigation along with his recommendation that a Career Decision Day letter (CDD) be given to Complainant. JX 20. Pedraza testified that he made the decision to issue the CDD letter, but he conceded Ortiz could have overruled his decision. TR 742-44. However, Pedraza also said his e-mail to Ortiz recommending issuance of a CDD letter was simply a "formality" as Ortiz had concurred with his recommendation before September 12, 2008. TR 742-44.

#### *E. September Re-Inspection of Engine N339AT*

The engine of aircraft N339AT was scheduled for a borescope re-inspection on September 18, 2008 as a consequence of Pedraza's August 20 instruction to MOC to schedule another borescope inspection on the engine. TR 135. On September 18, QC inspector Ralph Perez deferred the inspection for a later date as there was not sufficient time to perform the borescope inspection that evening, and there was time remaining before the inspection was required to be completed. TR 388-90. Earlier that shift, Complainant, as a QC inspector, was asked to sign an airworthiness release deferring the borescope inspection and releasing the aircraft for flight, which he initially did before crossing his name out. TR 135. He said he refused because the borescope re-inspection had not occurred. TR 135. Complainant explained he believed an inspection was due, to determine whether his August 16th measurement of the nick or Del Rio's August 2 measurement were correct, noting his inspection had resulted in a 10 hour flight restriction, and the aircraft had flown many miles beyond that by September 18th, and no one had looked at the engine since his August 16th inspection. TR 136-37.<sup>24</sup> Complainant explained that he understood that because Pedraza overrode his August 16 inspection measurement, that nullified his inspection, and another inspection was necessary. TR 243-44, 257-58. When Complainant refused to sign the airworthiness release, a physical altercation with the maintenance supervisor on duty, John Glowacki, occurred. TR 136.<sup>25</sup> The Complainant went to the FAA at the end of his September 18th shift. TR 137.

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<sup>24</sup> The same aircraft had flown in and out of Miami for maintenance several times between August 20 and September 19. TR 238, 744-45.

<sup>25</sup> Complainant and the maintenance supervisor, Mr. Glowacki, were suspended with pay pending an investigation of the altercation by the company. TR 138, 577, 579, 747-49; JX 29; JX 37. The company investigation was completed on September 30, 2008 and did not result in discipline for the Complainant. EX 36 Tab 20; TR 753. At the suggestion of the Human Resources department, Complainant was counseled as to appropriate responses should he feel intimidated in the future. EX 36 Tab 20 (last pg).

### *FAA Investigation of Complainant's Complaint*

Complainant met with Sam Perry of the FAA. TR 137. He reported his concerns regarding engine N399AT to Mr. Perry, including his view that the engine needed to be inspected again. TR 137.

The FAA contacted American Eagle and Pedraza exchanged information with Mr. Perry on September 22, 2008. TR. 756-57; JX 24. Pedraza is the company's liaison with the FAA and he regularly interacts with the FAA's Mr. Perry on various issues. TR 688-89, 756. In investigating Complainant's concern, the FAA asked the company to perform another borescope inspection on the engine. TR 757. Pedraza reports that this third inspection done on September 22/23 by Ralph Perez and Luis Reyes, confirmed that the decision made to countermand Complainant's August 16th borescope inspection result was correct as the damage to the impeller blade on August 2, 16 and 22/23 was the same, and it was in the "C" area of the blade. TR 758.<sup>26</sup> The FAA did not request any further information from the company. TR 760. Pedraza stated he was not concerned that the FAA was seeking information about the August borescope inspections because the company had nothing to hide and had a good safety record. TR 762. Pedraza said the FAA's investigation played no role in the issuance of the CDD to Complainant. 761. He denied that he would discipline or punish a QC inspector for raising a safety issue because that is one of the QC functions. He noted the QC inspector has authority to ground an aircraft. TR 762-63.

In a letter to the Complainant, dated November 21, 2008, Mr. Perry acknowledged the FAA closed out the initial complaint based upon the information submitted. However, he stated that he re-opened the complaint on October 16, 2008, after Complainant provided additional information that re-focused the investigation into a different area. JX 26. Neither the Complainant nor American Eagle presented evidence as to any further action taken by the FAA.

### *F. Issuance of Career Decision Day Letter*

On October 22, 2008, the Complainant received a CDD advisory letter under American Eagle's Peak Performance Through Commitment Policy (PPC). TR 569; JX 11; JX 13. The CDD letter criticized the accuracy of Complainant's August 16th borescope inspection, alleged a failure to notify MOC to update the time constraint, and asserted that he attempted to justify his findings by re-inserting the initial borescope photographs into the machine and re-measuring them to match his initial measurement. JX 11.<sup>27</sup> The CDD Advisory stated that the described actions constituted violations of American Eagle Airlines Rule 16 (Misrepresentation of facts or falsification of records is prohibited) and Rule 17 (Work carefully. Observe posted or published

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<sup>26</sup> Perez testified that he performed a borescope inspection of the aircraft on September 23. TR 393-96; JX 4 at 31. He took three photographs of the nick each with a slightly different measurement of the length of the nick ranging from 0.64 to 0.65 and 0.66, and identified the location of the nick as area C. TR 395-96, 408, 410; JX 4 at 28, 29, 31.

<sup>27</sup> A Career Decision Day Advisory or Letter is given if an employee has previously received a written First Advisory and Second Advisory. JX 13; TR 570-71; 741-42. At the time the events at issue here occurred, Complainant had been issued a Second Advisory for an unrelated issue approximately eight months earlier on December 27, 2007. JX 38; TR 571-73.

regulations), and presented the Complainant three options. TR 139; JX 11. The options were as follows:

- Option # 1- Sign a “Letter of Commitment” agreeing to comply with all Company Rules and Regulations, inclusive of both satisfactory work performance and personal conduct.
- Option # 2- Sign an agreement “General Release” not to exercise your appeal rights and in turn, the Company will accept your resignation with following transition benefits....
- Option # 3- Termination of employment with the option to grieve.

The letter concluded by stating, “[f]ailure to select one of the options as specified above will result in the termination of your employment (Option # 3). The Career Decision Day Advisory will be re-issued as a Final Advisory.” JX 11. Pedraza gave Complainant a day off to decide which option he wished to accept. Option 1 contemplates an employee remaining employed, committing to improved performance and carries with it a two-year probationary period. TR 140, 250. Complainant said he viewed Option 1 in reference to the CDD letter as a charge that he had falsified documents or records, and argued he did not falsify any record, but simply reported what he had done to reach the borescope results he obtained on August 16th. TR 250-52. When he returned after the day off, Complainant was uncertain as to which option he wanted to select. TR 633-34. He consulted with Luis Reyes the union representative for this purpose. TR 249, 763. In an effort to assist in resolving the CDD, Reyes suggested another option, which was to have Complainant work under Griffin in the maintenance department rather than as a QC inspector under Pedraza.<sup>28</sup> Pedraza and Griffin agreed to Reyes’ suggestion and Griffin was willing to take Complainant, if he wanted to exercise this option. TR 249, 636, 763.<sup>29</sup> Complainant claims he wanted an opportunity to have his side of the story on the engine heard. TR 139.<sup>30</sup> Complainant said he did not choose any of the offered options, and was defaulted to Option 3, and a Final Advisory was issued. TR 140-41, 252, 254; JX 12.<sup>31</sup> Complainant maintains he was fired for going to the FAA. TR 142. Complainant’s attempts to find employment with other airlines or outside the airline industry have been unsuccessful. TR 143-48.

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<sup>28</sup> Pedraza testified that he agreed to Reyes suggestion because what the company was really looking for was a commitment from Complainant that he would comply with company rules and regulations going forward. TR 763-64.

<sup>29</sup> Complainant was aware that he was given the option under Option 1 of the CDD letter of continuing to work as a QC inspector at the same pay rate or of continuing to work, but transferring to the maintenance department as a mechanic under Tim Griffin, rather than as a QC inspector under Pedraza. TR 249-50. Either choice under Option 1 included a two-year probationary period. Complainant viewed going back to maintenance as a demotion and doing so also carried with it a two-year probationary period. *Id.* Griffin acknowledged the hourly rate paid mechanics was less than the hourly rate for QC inspectors and he agreed that had Complainant accepted Option 1 and decided to come to work for him in maintenance, there was a two year probationary period. TR 635-37.

<sup>30</sup> Respondent afforded the Complainant an opportunity to tell his side of the story when he met with Pedraza on September 5 and in the e-mail responses to queries from Ortiz.

<sup>31</sup> Complainant grieved his termination under the collective bargaining agreement but lost. JX 16.

Pedraza has explained that the delay in issuance of the Career Decision Day letter resulted from the fact that he was on vacation from October 4 until October 21, 2008. TR 755. He claimed that before he left he told his supervisor, Ortiz, to issue the CDD letter to Complainant, but when he returned he learned no CDD letter had been issued. TR 755-56.

## VI. Conclusions of Law

### A. *Legal Standard and Burdens of Proof Under AIR 21*

AIR21 prohibits an air carrier, or contractor or subcontractor of an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided an employer or the federal government “information relating to any violation or alleged violation of any FAA order, regulation, or standard or any other provision of federal law relating to air carrier safety....” 49 U.S.C. § 42121(a); 29 C.F.R. §§ 1979.100, 1979.102(a); *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 PDF at 6 (ARB Jan. 31, 2007); *see also Vieques Air Link, Inc. v. United States Dept. of Labor*, 437 F.3d 102, 107 (1st Cir. 2006) (citing 49 U.S.C. § 42121(a)); *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-8 PDF at 1 (ARB Jan. 31, 2006).

To establish a violation of AIR21, a complainant must prove: (1) that he engaged in protected activity; (2) that the employer was aware of the protected activity; (3) that he was subjected to an unfavorable personnel action (“adverse action”); and (4) that the protected activity was a “contributing factor” in the adverse action. 49 U.S.C. §§ 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *see also Hirst*, ARB Nos. 04-116, 04-160 PDF at 7; *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35 PDF at 5 (ARB June 29, 2006); *Brune*, ARB No. 04-037 PDF at 13; *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 PDF at 6-7, 9 (ARB Jan. 30, 2004).

The Department of Labor’s Administrative Review Board (“ARB”) has approved the Title VII burden-shifting framework for use in AIR21 cases “where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence.” *Brune*, ARB No. 04-037 PDF at 14; *Peck*, ARB No. 02-028 PDF at 10. If the complainant shows an initial inference of discrimination—that the protected activity was a contributing factor in an adverse employment action—the respondent may produce legitimate non-discriminatory reasons for taking the adverse action. *Brune*, ARB No. 04-037 PDF at 14 (“The ALJ (and ARB) may then examine the legitimacy of the employer’s articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action.”) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). If the respondent articulates legitimate reasons, the complainant may prove that they are pretext. *Id.* The complainant prevails, in light of this framework, if the complainant proves by a preponderance of the evidence that the respondent has discriminated and therefore, has violated AIR21. *Id.*<sup>32</sup>

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<sup>32</sup> “Preponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to

The burden of proof shifts to the employer only if the complainant has proven discrimination by a preponderance of the evidence. *Id.* at 14. Thereafter, the employer may avoid liability under AIR21 if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *see also Hirst*, ARB Nos. 04-116, 04-160 PDF at 7; *Clark v. Pace Airlines*, ARB No. 04-150, ALJ No. 2003-AIR-28 PDF at 11 (ARB Nov. 30, 2006); *Rooks*, ARB No. 04-092 PDF at 5; *Brune*, ARB No. 04-037 PDF at 14.<sup>33</sup>

*B. Did Complainant Engage In Protected Activity on September 19, 2008?*

Under AIR21, an employee of an air carrier has engaged in protected activity when two elements are present:

- (1) the information that the complainant provides must involve a purported violation of an FAA regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation and the complaint must be specific in relation to a given practice, condition, directive or event;
- (2) the complainant's belief that a violation occurred must be objectively reasonable.

*Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-13 PDF at 5 (ARB June 30, 2010); *see also Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-00081 PDF at 5 (ARB Mar. 14, 2008); *Rooks*, ARB No. 04-092 PDF at 6; *Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3 PDF at 9 (ARB July 31, 2006) (*citing Peck*, ARB No. 02-028, slip op. at 13); *Florek v. Eastern Air Central Inc.*, ARB No.07-113, ALJ No. 2006-AIR-009, PDF at 5 (ARB May 21, 2009); 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b)(1)-(4). “[A] complainant need not prove an actual violation, but need only establish a reasonable belief that his . . . safety concern was valid.” *Rooks*, ARB No. 04-092 at 6 (*citing Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 4-5 (ARB Apr. 8, 1997)). Furthermore, “once an employee’s concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation.” *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-8 PDF at 8 (ARB July 2, 2009) (citations omitted). If a complainant no longer reasonably believes that a violation has or will occur, then he or she cannot be said to have engaged in protected activity. *Hindsman*, ARB No. 09-023 PDF at 5-6; *see also, Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998).

The Complainant maintains that he engaged in protected activity when he refused to sign the airworthiness release for aircraft N399AT on September 18, 2008, and when he contacted the Federal Aviation Administration (“FAA”) on September 19, 2008, to report an alleged failure to

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one side of the issue rather than the other.” *Brune*, ARB No. 04-037 PDF at 13 (internal quotation marks omitted) (*quoting Black's Law Dictionary* at 1201 (7th ed. 1999)).

<sup>33</sup> “Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Brune*, ARB No. 04-037 PDF at 14 n.37 (internal quotation marks omitted) (*quoting Black's Law Dictionary* 577).

conduct a required inspection on the same aircraft. Cl. Br. at 1, 12.<sup>34</sup> The Respondent contends as an initial matter that the events of September 19, 2008 played no role in Complainant's termination as the decision to issue him a Career Decision Day letter was made on September 12, 2008. R. Br. at 1, 36-37. Respondent maintains that the decision to issue the Career Decision Day letter was made by Pedraza on September 12, 2008, making the events of September 19, 2008, a non-factor in the decision to issue the CDD to Complainant. TR 36. Pedraza recommended that a CDD be issued to Complainant in an e-mail to his boss Ortiz, on September 12, 2008, which included his report of his investigation of the Complainant's August 16 borescope inspection. However, Pedraza stated that although he made the decision to issue the CDD and sent the recommendation to Ortiz on September 12, he conceded that Ortiz could have overruled his recommendation. He then stated that his September 12 e-mail recommendation to Ortiz that a CDD be issued to Complainant was just a "formality" as Ortiz had concurred with his recommendation for issuance of the CDD before September 12. If Pedraza's CDD recommendation had simply been a "formality" because Ortiz had already agreed with and approved the recommendation then, presumably, Pedraza would have issued the CDD to Complainant that day or certainly before the events of September 19, as there was no reason to delay issuing the CDD to Complainant if Ortiz had approved issuance of the CDD by September 12. Pedraza's testimony on this point is not credible. Additionally, the CDD makes reference to the Company's September 23rd re-inspection, which is undisputed was performed on the request of the FAA. Accordingly, the evidence does not support Respondent's assertion that its decision to issue the CDD was made on September 12, making the events of September 19 irrelevant.

Alternatively, Respondent asserts that Complainant's actions on September 19 do not constitute protected activity because Complainant did not possess a reasonable good faith belief that a borescope inspection of the aircraft was required on September 19 and he failed to communicate any alleged violation of an FAA rule or regulation to the company that night. R. Br. at 29-36.<sup>35</sup>

#### 1. Refusal to Defer Borescope Inspection on September 19, 2008

On September 19, a borescope inspection of this engine was scheduled as the aircraft was in Miami overnight. Complainant initially signed off on the deferral of the borescope inspection scheduled that day, but then crossed out his signature. Complainant has said that he declined to sign the airworthiness release for the aircraft, as he was concerned both that his 10 hour time restriction associated with his August 16 borescope inspection had passed and/or that Del Rio's 200 hour time restriction associated with the August 2, 2008 borescope inspection had been exceeded and an inspection was necessary at that point. Cl. Br. at 12-13; TR 136-137, 264-65. I must determine whether Complainant's stated concern was objectively reasonable on September

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<sup>34</sup> The Complainant lists the date of his refusal to sign the airworthiness release as September 18 and the Respondent indicates this event occurred on September 19. The difference in dates identified by the parties for the Complainant's refusal to sign the airworthiness release can be explained by the fact that Complainant works the third shift which began at 9:00 p.m. on September 18 and ended at 7:00 a.m. on September 19. TR 55-56.

<sup>35</sup> American Eagle does not dispute, and I find, that when the Complainant performed his borescope inspection on August 16, he believed he had correctly measured the damage to the impeller blade and that the engine on the aircraft needed to be replaced within 10 hours.

19, 2008 in light of American Eagle's response to him following his August 16th inspection findings and the company's countermanding those determinations.

As for the concern that his 10 hour constraint had been exceeded and the engine needed to be changed immediately based upon his August 16th inspection, by September 19, American Eagle had informed Complainant by e-mail and in direct communications that he had made an error, that the company had overridden his inspection findings and the reasons supporting the company's action. Specifically, Complainant had received an e-mail from his boss Pedraza on August 20, which indicated Complainant's borescope measurements were incorrect. Pedraza had instructed Complainant to look at the photos from the earlier inspection on August 2 and his own photos. Pedraza also forwarded an e-mail from the Pratt and Whitney official stating he agreed with the conclusions of JJ Cruz, an experienced American Eagle employee, that a comparison of the photographs from August 2 and August 16 borescope inspections, did not reflect an increase in the nick size and did not show the nick was located in the Cc area of the impeller blade. The forwarded e-mail from the Pratt and Whitney official also stated that the TDMI on the aircraft impeller blade could be terminated as there was no change in the damage between Del Rio's August 2 inspection and Complainant's August 16 inspection. Additionally, Complainant had received an e-mail from Pedraza's boss, Ortiz, on August 27, informing Complainant that Pedraza did not countermand Complainant's inspection result on his own, but that American Eagle had consulted with Pratt and Whitney owners of the engine and Pratt and Whitney's employees had reviewed the photographs from the August 2 and 16th inspections and determined the damage had not progressed and was not a Category 3 damage in the Cc area. One might expect that a person with Complainant's training and experience would at least question his own borescope findings after having received the above information from the Respondent's officials.

Thereafter, Pedraza met with the Complainant, accompanied by Reyes as the union representative, on September 5. Complainant continued to insist his measurement of the nick was correct and he had an opportunity to explain how he obtained his measurement. Pedraza explained the company's position that Complainant's conclusions as to the dimension and location of the nick was incorrect citing the maintenance manual. JX 50 at 10-11; TR 956-57. I find that the Respondent adequately responded to Complainant's ongoing assertion that his borescope inspection finding was correct and that another inspection of the engine was required, as it had explained to Complainant the basis for its determination that conclusions he drew from his borescope inspection and photographs were not accurate. *Malmanger*, ARB No. 08-071 PDF at 8.

On September 19, when he refused to defer the borescope inspection, the Complainant did not have any additional evidence to support his view that the 10 hour restriction had been exceeded. Moreover, Complainant knew that his own measurement was a "ballpark estimate," he knew that the 10 hour time restriction associated with his August 16 inspection had been countermanded, the company had explained the basis upon which his inspection conclusion had been overruled, he knew the advice received from the Pratt and Whitney official that the absence of any progression in the impeller damage between the August 2 inspection and his August 16th inspection operated to terminate the TDMI, initially assigned with Del Rio's August 2 inspection. Complainant has maintained that he followed the maintenance manual in doing his borescope inspection. So he was certainly aware that the Pratt and Whitney official's statement

that because the photographs from the August 2 and August 16th inspections showed no progression in damage, no further inspection of the engine was required, was consistent with the instruction in the maintenance manual. Pedraza had also discussed the Company's concern with how Complainant had applied the comparator method. I find this information was sufficient to cause a reasonable person to doubt the accuracy of his borescope inspection measurement and placement of the nick. Based on this evidence, I find that by September 19, the Complainant's continued insistence either that his measurement was correct, that an inspection was due and required as a result of the 10 hour time constraint linked to his inspection, or that the company was ignoring his concerns, was no longer reasonable.

Additionally, even though American Eagle and Pratt and Whitney officials concluded the TDMI could be terminated, Pedraza did not terminate it on August 20th, rather, he contacted MOC and requested an additional borescope inspection be done in the next 100 to 200 hours. That is the borescope inspection that was scheduled for September 19. Accordingly, I find that on September 19th, the Complainant lacked a good faith reasonable belief that deferring the inspection set for that evening violated the 10 hour time restriction connected to his August 16 borescope inspection or that American Eagle was ignoring his concern.

At times the Complainant has also suggested that he was concerned that the 200 hour time constraint associated with Del Rio's August 2 borescope inspection elapsed on or about September 19, or had expired by then. The information discussed above, which American Eagle gave Complainant in August made clear why the company countermanded his inspection conclusions. American Eagle specifically noted that because there was no progression in damage between the photographs on August 2 and August 16th that operated to terminate the TDMI and the requirement to re-inspect the engine again. This means that the original 200 hour flight restriction associated with Del Rio's August 2 inspection ended with Complainant's August 16th inspection. No additional borescope inspections of the engine were required under the Pratt and Whitney manual. As noted, however, Pedraza has arranged for the borescope inspection scheduled for September 19 on August 20th when he countermanded Complainant's inspection conclusion. On September 19, there were 56 hours left on the TDMI associated with Pedraza's inspection request. Complainant's assertion that he was concerned that Del Rio's 200 hour constraint had expired is significantly undermined because Complainant knew Pedraza had reset the time on August 20 and a subsequent borescope inspection was to be performed.<sup>36</sup> Therefore, I find Complainant could not have had a reasonable belief that American Eagle had overflowed or was about to overfly the 200 hour time constraint originally associated with Del Rio's August 2 borescope inspection or that the company was ignoring his concerns regarding the engine on this aircraft on September 19.

Finally, when he crossed out his name on the deferral for the borescope inspection on September 19, it is not clear that Complainant told American Eagle officials present that evening why he was refusing to sign the deferral. Complainant did not provide evidence that he asserted a concern that the Respondent was violating or about to violate any FAA regulation of order at that time.

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<sup>36</sup> In his complaint, Complainant noted the TDMI issued on August 20 [by Pedraza] was "to reset the time." JX 1 at 6.

## 2. Complaint to FAA

Complainant contends he engaged in protected activity when he complained to the FAA. He stated he went to FAA at the end of his shift on September 19 because American Eagle thought the aircraft could fly without an inspection and Complainant disagreed. TR 137.<sup>37</sup> Complainant maintained the choice was to change the engine within 10 hours of his inspection or to change it immediately. *Id.* As a general matter, complaints to the FAA are considered protected activity under the AIR21 statute. Here, for the reasons discussed above, Complainant's continued assertion as of September 19 that the engine needed to be changed within 10 hours or immediately was unreasonable based upon the objective information Complainant possessed at that time. Although the TDMI could have terminated on August 20th, Pedraza instead continued with a requirement for a re-inspection within 200 hours. It was this re-inspection that was scheduled for September 19th. On that date there were 56 hours remaining on the time in which the re-inspection was to be completed. To the extent Complainant reported to the FAA that an immediate inspection was required, and his testimony in this regard is not clear or specific, such a concern was objectively unreasonable. As Complainant has failed to establish that his belief that American Eagle violated or was about to violate an FAA order or regulation or any other provision of federal law relating to air carrier safety was objectively reasonable, he has not established that he engaged in activity protected by the AIR 21 statute.

I have determined that Complainant has failed to establish that his actions on September 19 were reasonable and in good faith. Therefore, he has not proven that he engaged in protected activity.<sup>38</sup>

### *C. American Eagle Would Have Taken the Same Action in the Absence of Any Protected Activity*

American Eagle maintains that it disciplined Complainant leading to the termination of his employment for Complainant's failure to perform his duties and for an alleged misrepresentation of facts pursuant to the company's Peak Performance Through Commitment Program. Pedraza credibly testified that he believed that Complainant was careless in performing the borescope inspection on August 16th in terms of his determinations as to both the size and location of the nick. While Complainant used the comparator method, which is permitted, that method requires a nick's dimension to be determined by comparing the nick with an item of known dimension placed in the field of view and in the same plane as the nick. JX 15 at 90. Complainant's efforts to explain how he arrived at his measurement of the nick did not convince Pedraza that he correctly applied the comparator method procedures in doing his borescope inspection. Complainant demonstrated for Pedraza using a ruler on his photograph to support his measurement of .109. The error in Complainant's procedure was noted by QC inspector Reyes who was present at the September 5 meeting and stated that if the photos and the

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<sup>37</sup> This is the shift in which he and the maintenance supervisor Mr. Glowacki's verbal altercation turned physical.

<sup>38</sup> Assuming for the sake of argument and completeness that Complainant had established he engaged in protected activity on September 19, and was able to prove the remaining elements of his claim, the Employer has established an affirmative defense that it would have taken the same unfavorable personnel action even in the absence of any protected activity.

ruler were not to the same scale, the measurement would be useless, because if the photo size was smaller or larger, the measurement would change. Finally, in terms of his conclusion the nick was in the Cc area of the impeller blade rather than the C area, Complainant indicated he added the lengths of the C and Cc areas to obtain a total measurement of the blade and he could then determine the location of the nick, but the evidence shows the sum of these two areas do not constitute the full length of the impeller blade. At hearing, Complainant testified that his decision to place the location of the nick in the Cc area rather than in the C area was simply a ballpark estimate. Given the difference in action required by American Eagle between a nick located in the “Cc” area as opposed to a nick in the “C” area, with the former requiring the engine be replaced, and the later requiring no maintenance action, Pedraza could reasonably have expected Complainant to have taken greater care and been more precise in his measurements, inspection findings and conclusions.

In addition, Pedraza’s opinion that Complainant’s borescope inspection result was erroneous is supported by the evidence presented including the opinions of other QC inspectors, and by the director of Quality Control, the director of maintenance, the director of technical services and by an official from Pratt and Whitney, owners of the engine in question in August 2008. Pedraza’s opinion was confirmed again later when the borescope inspection was done on September 22 and 23 at the FAA’s request. Complainant conceded at hearing that his measurement of the nick was incorrect. Respondent’s disciplining of Complainant for his inaccurate borescope inspection was consistent with its Peak Performance Through Commitment progressive discipline policy.<sup>39</sup>

Pedraza also believed that Complainant violated the GPM provision stating “QC is responsible to update SABRE after any borescope inspection. If the borescope time constraint is changed, QC inspector will notify MOC of this change. MOC will then change the time constraint in SABRE.” JX5 at 15. Pedraza concluded that when Complainant changed the time constraint on the engine as a result of his August 16 borescope inspection but did not notify MOC by e-mail, call or fax to inform them that the time constraint had been changed to 10 hours he ran afoul of this provision of the GPM. The dispute here is what constitutes “notice” to MOC under the GPM. In considering this question it is important to note that QC inspectors are required to update SABRE after every borescope inspection. The update is done by a KVA entry into the SABRE system. It is only the borescope inspections which result in a time constraint change that triggers a duty to notify MOC of the time change. If a KVA entry constituted notification to MOC of a change in time constraint, there would be no reason for the second sentence of this provision instructing that QC inspector will notify MOC if a borescope time constraint is changed.

Here, it is undisputed that the Complainant noted the change in time constraint in several places including on the non-routine work card, in the log book kept with the aircraft, in the KVA/SABRE computer system. It is also undisputed that Complainant did not telephone, e-mail, or call MOC to ensure MOC updated the time constraint in SABRE. While the evidence

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<sup>39</sup> Some of Complainant’s co-workers stated they did not think that a QC inspector should be disciplined for making a mistake. Whatever one may think about the fairness of discipline for mistakes, American Eagle was permitted to impose discipline for an employee’s failure to follow work procedures or for poor performance under its disciplinary policy

demonstrated that at times the maintenance supervisor will call MOC for the QC inspector, there is no dispute that it is the QC inspector's responsibility under the GPM to notify MOC. Pedraza was certain that "notify" MOC in this context meant to telephone, e-mail, or call MOC to be sure they were aware the time had been changed and that MOC then updated the change in SABRE. Pedraza explained that at any one time MOC may have hundreds of TDMI on various aircraft and without a mechanism for informing them a time constraint needed to be updated, MOC would not act. He stated explicitly that information in the KVA entry to SABRE system is not notification to MOC, and MOC will not update or change the time when due unless it is notified. Complainant's coworkers, QC inspectors Perez and Reyes understood that if a time constraint is changed they are responsible for contacting MOC directly to inform MOC of the time change and then to check back on the SABRE system to be sure MOC made the time change. Indeed QC inspector Del Rio contacted MOC when his August 2 inspection first noted the nick, so that MOC would change the time and schedule the follow-up inspection [Complainant's]. Tim Griffin also noted that because the 10 hour time constraint Complainant imposed was very short, Complainant had a responsibility to notify MOC to tell them to update the system. Complainant's reliance on a routine KVA entry to notify MOC of his 10 hour time constraint, admittedly a short time period, when he understood the seriousness of his borescope inspection findings and the need to get the word out, is puzzling. The evidence supports a finding that Complainant did not notify MOC of the time change as intended and required by the GPM provision.

Moreover, the e-mail exchanges between Pedraza and his boss Ortiz in early September confirm that both were convinced after seeking information from Complainant and from Vasquez the acting maintenance supervisor that night, that Complainant did not meet his responsibility to notify MOC that the time constraint had been changed. In his September 12 e-mail recommendation to Ortiz that a CDD be issued to Complainant, Pedraza explicitly stated he believed Complainant failed to comply with this provision of the GPM. In light of this evidence, I find that American Eagle would have disciplined Complainant for failing to ensure MOC had actual knowledge that he had changed the time constraint requiring MOC to update the time in SABRE. Respondent had the authority to discipline employees for violating procedures and it believed Complainant had failed to comply with the requirement to notify MOC if the time constraint was changed.

The CDD also cited Complainant for violating American Eagle Rule 16 "Misrepresentation of facts or falsification of records is prohibited." Pedraza has stated that when he asked Complainant to explain how he got his measurements because Pedraza had not seen the measurement on Complainant's August 16 photographs, and Complainant responded by re-calling the photographs from his inspection on August 16th and re-measuring, he was convinced Complainant was trying to put one over on him. It is the re-called photos dated August 21 which include measurements which underlie Pedraza's citing the Rule 16 violation as one basis for issuance of the CDD letter to Complainant. Pedraza viewed the August 21 photos as a misrepresentation because he could not see any way, consistent with the technical manuals and borescope procedures, that any measurement could be taken with the photograph Complainant provided on August 16th. TR 760-62. Pedraza believed Complainant was trying to justify his measurement of August 16th. Pedraza did not discuss his concern that Complainant misrepresented facts or falsified records with Complainant during his September 5th meeting to discuss how Complainant obtained his measurements. Pedraza's viewing Complainant's attempt

to explain how he arrived at his measurement as a misrepresentation of facts might be viewed as an overstatement. However, I am persuaded that Pedraza believed Complainant's re-called photograph misrepresented the facts because Pedraza was convinced Complainant's measurement was not supportable.<sup>40</sup>

The Complainant's borescope inspection was wrong, he did not notify MOC as the GPM required, and Pedraza thought he misrepresented facts when he sent the re-called photos with a measurement. American Eagle's decision to issue the CDD to Complainant was consistent with its progressive discipline system pursuant to its Peak Performance Through Commitment Policy. Under its progressive discipline system a CDD may be issued if an employee has previously received a written First Advisory and Second Advisory. It is undisputed that at the time the decision to issue the CDD was made, Complainant had been issued a Second Advisory for an unrelated issue some eight months earlier. CDD offered Complainant three options. Termination of the Complainant's employment was not a foregone conclusion with issuance of the CDD. It is not seriously disputed that the Complainant's employment was terminated because he either elected or was defaulted to option three, which was termination with option to grieve. He was subsequently issued a Final Advisory terminating his employment on October 24, 2008, pursuant to American Eagle's written policy. I find the Respondent has established clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity.

## **VII. ORDER**

Based upon the foregoing findings of fact and conclusions of law, the complaint is **DISMISSED**.

**SO ORDERED.**

**A**

**COLLEEN A. GERAGHTY**  
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,

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<sup>40</sup> To the extent that the Complainant maintained his insistence that his measurement of the dimension of the nick and its location were correct, despite the Respondent's communication with him, the Company's frustration with his refusal to acknowledge his error is not surprising.

Washington DC 20210. 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. § 1979.110(a). 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 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. § 1979.110(a).

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 the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(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. § 1979.110. 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. §§ 1979.109(c) and 1979.110(a) and (b).