In the Matter of:

CHARLES McLEAN, **ARB CASE NO. 12-005**

COMPLAINANT, **ALJ CASE NO. 2010-AIR-016**

v. **DATE: September 30, 2014**

AMERICAN EAGLE AIRLINES, INC.,

RESPONDENT.

BEFORE THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Charles W. McLean*, pro se*, Homestead, Florida

For Respondent:
Donn C. Meindertsma, Esq., *Conner & Winters, LLP*, Washington, District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge;* Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge. Judge Brown concurring. Judge Corchado concurring, in part, and dissenting, in part.*

FINAL DECISION AND ORDER

This case arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or Act), 49 U.S.C.A. § 42121 (Thomson/West 2007), and implementing regulations, 29 C.F.R. Part 1979 (2013). Charles McLean, a quality control inspector, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, American Eagle Airlines, Inc. (American Eagle or Company), terminated his employment in violation of the Act. OSHA dismissed the complaint. McLean requested a hearing with the Office of Administrative Law Judges. On September 23, 2011, following an evidentiary hearing, an Administrative Law Judge entered a Decision and Order Dismissing Complaint. *McLean v. American Eagle Airlines, Inc.*, ALJ No. 2010-AIR-016 (D. & O). McLean petitioned the Administrative Review Board (ARB) for review.

On November 30, 2011, American Eagle notified the ARB that the Company had petitioned for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York, triggering an automatic stay of the administrative proceeding pursuant to 11 U.S.C. § 362(a). Following an Order to Show Cause, the ARB entered an Order staying proceedings on May 23, 2013. On December 29, 2013, American Eagle notified the ARB that the Bankruptcy Court had entered a Confirmation Order in the federal bankruptcy proceeding, and the automatic stay was lifted effective December 9, 2013.

Following briefing by the parties on the merits of McLean's AIR 21 complaint, we affirm the ALJ's decision dismissing the complaint.

BACKGROUND

A. Facts

The facts in this case are set out fully in the ALJ's decision, and are based on the parties' joint stipulations, undisputed evidence proffered at the hearing, and the facts found by the ALJ to support the conclusions of law.

McLean was employed at American Eagle for 17 years, and at the time of the events leading to the OSHA complaint, he worked as a Maintenance Quality Control Inspector in the Company's facility in Miami, Florida. Quality Control Inspectors "oversee maintenance work to ensure the work is performed in compliance with procedures, and they release aircraft back to service." D. & O. at 4 (citing Hearing Transcript (Tr.) at 63-64). The process for quality control at the Company includes "first and second line maintenance schedules" that ensure "the daily maintenance on aircraft such as oil checks or checking any discrepancies the pilots may have noticed" to "get the aircraft back in service." *Id.* The "night shift maintenance shift is primarily there to do the heavier schedule overnight maintenance which is usually items that are not done on the flight line because these are items which would potentially delay a flight." *Id.* (citing Tr. at 536). A "separate department, the Planning Department, evaluates work that is coming due on an aircraft and schedules the work on a Bill of Works, which include both maintenance activities and quality control activities." *Id.*

The maintenance process employs a "Time Deferred Maintenance Item (TDMI) . . . process [that permits] some required maintenance tasks or repairs that do not involve the airworthiness of the aircraft [to be] . . . deferred to a later time." *Id.* (citing Tr. at 537-538). There are specific procedures for employing the TDMI process. For example, where an "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 schedule the item again before the time remaining to address the specific issue or item expires." *Id.* at 4-5 (citing Tr. at 540-541). The Company uses an automated system called SABRE to manage time-controlled items. Maintenance mechanics and supervisors enter information into the SABRE system. *Id.* at 5 (citing Tr. at 543).

On August 2, 2008, Robert Del Rio, a Quality Control Inspector for American Eagle, performed a borescope inspection on a Pratt & Whitney engine of an N399AT aircraft. Joint Stipulation (Jt. Stip.) 4; Tr. at 305-306. A borescope is a camera-tipped cable which is threaded through the engine housing of a plane and makes a video of any damage or wear on the impeller blades found behind the propellers. Tr. at 68, 70-72. Inspector Del Rio used the stereo method in making his borescope inspection; this method requires using a computer that takes the actual measurement of the nick. *Id.* at 6 (citing Tr. at 449-451, 308). During the borescope inspection of the N399AT plane engine, Inspector Del Rio discovered a "Category 1" nick in the C area of the impeller blade. *Id.* See also Tr. at 306. Based on this finding, Inspector Del Rio faxed a TDMI form to MOC, and e-mailed MOC and Quality Control Supervisor Nestor Pedraza that he had located a nick in the impeller blade. D. & O. at 6 n.7. "MOC updated the SABRE with the reinspection dates and American Eagle's Planning Department scheduled the required follow up or subsequent inspection for August 15-16." *Id.*

On August 16, 2008, McLean was assigned to conduct the subsequent inspection required for the N399AT aircraft. McLean used the SABRE computer system, and reviewed the KVA entry for the N399AT engine. Based on information in the SABRE system, McLean was aware of the prior August 2, 2008, inspection conducted by Inspector Del Rio, and the reported Category 1 nick Del Rio had reported. D. & O. at 5-6. McLean placed the nick in the Cc location of the blade, rather than the C location. *Id.* at 6. McLean stated that he used the comparator method for measuring the nick. Tr. at 79. Using this method, McLean "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." D. & O. at 6 (citing 79-85, 185-189). McLean's borescope inspection calculated a nick on the impeller blade at .109, an increase from the August 2 measurement. D. & O. at 6; see also Tr. at 85. The ALJ summarized McLean's explanation at the hearing as to how he measured the nick on the N399AT engine:

> 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. 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. 202-204. . . . 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 the "area 'Cc' just by a ballpark and a judgment call, which was fair enough to me." Tr. 195-196, 199.

Id. at 6 & n.10. The Category 3 damage McLean calculated "required the aircraft engine to be scheduled for removal within 10 [flight] hours." *Id.* at 6 (citing Joint Exhibit (JX) 6 at 72-73); Tr. at 107-108. This change in the aircraft's time constraint required notice to MOC. JX 5 at AA0015. McLean recorded his borescope inspection findings and the 10-hour time constraint on the non-routine work card, entered the information in the aircraft's log book, on the maintenance item control sheet, and on the turn over log for the next shift. D. & O. at 6. McLean also

informed Acting Maintenance Supervisor Orlando Vasquez, who entered the finding into the SABRE computer system. *Id.* at 6-7. McLean did not notify MOC by telephone, e-mail or fax about the change in the aircraft's flight restriction. *Id.* at 7; Tr. at 160-162.

On August 20, 2008, Quality Control Director Santiago Ortiz notified Supervisor Pedraza that he had grounded the aircraft in Savannah, Georgia, because it had overflown the 10-hour flight limit required by McLean's Category 3 finding. D. & O. at 7. Supervisor Pedraza pulled the inspection findings from the computer and reviewed the borescope information from the August 2nd and August 16th inspections. Tr. at 705-706. Supervisor Pedraza believed that the nick on both dates were alike, and the impeller damage was in the C area, not the Cc area. D. & O. at 7 (citing Tr. at 706). Supervisor Pedraza consulted with two other company quality control inspectors. Tr. at 707-709. Supervisor Pedraza and two other company inspectors determined that the photo of the damage taken during McLean's inspection on August 16 showed no change in the size or location of the nick from the August 2 photos. *Id.* at 7 (citing Tr. at 706-709); see also *id.* at 7, n.14; Tr. at 912.

Following an investigation, Company officials determined that McLean failed to properly measure the nick and failed to follow company procedures for notifying MOC about TDMI changes, which resulted in Eagle being forced to cancel "flights which left many passengers stranded." JX 20. On October 22, 2008, the Company sent McLean a Career Day Decision Advisory letter (JX 11) pursuant to the Company's progressive discipline policy (JX 13). The letter (JX 11) stated:

> During the lay-over of aircraft N399AT in Savannah, GA, the borescope pictures were reviewed and verified that you had incorrectly categorized the damage type and incorrectly identified the affected area. The limitations, had they been correctly identified, would have allowed the aircraft to continue revenue operation. . . .
>
> Upon further investigation it was found that you failed to follow procedures established in the GPM. You were responsible to update the SABRE KVA entry and if the time constraint of the borescope changes, you were responsible to contact MOC to update the clock as per GMP 17-01A(2)(d).
>
> Furthermore, after we countermanded your decision, your QC Supervisor requested your explanation on what you had based your decision. You attempted to justify your August 16th findings by reinserting the initial borescope photographs into the machine and re-measuring them to match your initial finding. On September 23, 2008, we re-inspected the damage and confirmed that our decision to countermand your finding was correct.

The Company determined that McLean's actions violated American Eagle Airlines Rules and Regulation 16 (prohibiting misrepresentation of facts or falsification of records) and 17

(requiring workers to work carefully; observe posted or published regulations). The Company gave McLean three options in response to the letter: (1) sign a letter of commitment agreeing to comply with the rules, including satisfactory performance; (2) resign or receive separation benefits; (3) be discharged with option to grieve. Refusal to elect any of the options would result in discharge. JX 11 at 2.

On October 24, 2008, McLean reported to company officials that he was unable to decide among the options. A company representative proposed that McLean relinquish his authority as an inspector and return to work as a mechanic. McLean refused. On October 24, 2008, the Company issued McLean a Final Advisory letter terminating his employment. JX 12.

B. ALJ Decision

On September 23, 2011, the ALJ entered a decision and order dismissing the complaint. The ALJ determined that McLean failed to prove that any actions he took were protected under AIR 21. D. & O. at 16-20. The ALJ further determined that even assuming that McLean proved that he had engaged in protected activity under AIR 21, that the Company "has established an affirmative defense that it would have taken the same unfavorable personnel action even in the absence of any protected activity." *Id.* at 20 n.38.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated authority to issue final agency decisions in cases arising under AIR 21 to the ARB. Secretary's Order 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110. The ARB reviews an ALJ's findings of fact for substantial evidence, and conclusions of law de novo. 29 C.F.R. § 1979.110(b); *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

DISCUSSION

A. Statutory and regulatory framework

To prevail under AIR 21, a complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, and that the protected activity was a contributing factor to the alleged adverse action. *See* 49 U.S.C.A. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a). If the complainant proves that the respondent violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected acts. *See* 49 U.S.C.A. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.109(a); *White v. Action Expediting*, ARB No. 13-015, ALJ No. 2011-STA-011, slip op. at 6 (ARB June 6, 2014).

B. Clear and convincing evidence in the record fully supports the ALJ's determination that the Company would have issued McLean a Career Day Decision Letter even absent protected activity, due to a failure to adequately perform his work duties

The difficult question whether McLean engaged in protected activity need not be resolved because of the clear and convincing evidence in the record that the Company would have taken the "same unfavorable personnel action even in the absence of any protected activity." D. & O. at 20, n.38. In *Speegle v. Stone & Webster Constr., Inc*., ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014), the ARB explained that assessing "clear and convincing evidence" requires a case-by-case balancing of three factors: "(1) how 'clear' and 'convincing' the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer 'would have' taken the same adverse actions; and (3) the facts that would change in the 'absence of' the protected activity." *Speegle v. Stone & Webster Constr., Inc*., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 (ARB Apr. 25, 2014) (internal citations omitted). Evidence clearly and convincingly "supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion." *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012). In this case, there is clear and convincing evidence in the record that fully supports the ALJ's determination that the Company would have issued McLean a Career Day Decision Letter even absent any protected activity, due to McLean's failure to adequately perform his work duties.[1]

First, the evidence establishes that McLean did not accurately measure the nick on the N399AT aircraft. McLean utilized the comparator method for measuring the nick on the N399AT blade. This method "use[s] the size of a known object (often set in place by the manufacturer, or introduced with the probe) to measure other objects in the same view and plane." JX 15 at 90. A subsequent review of McLean's measurement established that the measurement was not conducted properly. Tr. at 721-729.[2] Moreover, McLean testified at the

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[1] In assessing the Company's liability under AIR 21, the ALJ applied the "Title VII burden-shifting framework." D. & O. at 15 (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)). While the ARB has made clear in recent cases that the "clear and convincing evidence" burden of proof standard required of American Eagle is a higher burden of proof than the Title VII preponderance of evidence standard, *see, e.g.*, 75 Fed. Reg. 53550, the ALJ's failure to apply the proper standard is, in this case, harmless error. As explained here, the ALJ's factual findings fully support a determination that clear and convincing evidence in the record establishes that the Company would have taken the same action against McLean even absent protected activity. *See Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (agency may rely on harmless error rule when its mistake does not affect the result).

[2] Supervisor Pedraza reviewed McLean's August 16 measurement and testified (Tr. at 728):

> Q: And what was your reaction to seeing this photo with the measurement?
> A: I was pretty shocked, because I couldn't – after reading the borescope manual, and going through the procedures of doing a

hearing that his placement of the nick on August 16 was an approximation, and not exact. McLean testified as follows:

> Q: So it was your testimony there that your determination of the difference between C and Cc was just a ballpark?
> A: In contents, between C and Cc, what we're talking about, just C and Cc, I said it's just a judgment call. I said it was a ballpark because I didn't – as I said before, it didn't actually measure where Cc actually stops and starts. What I can determine just by my .109 and look at where Cc is suppose to start at and end, that was in the damage. And so I did not – and, remember, I am the only QA there. I can't really be wasting a lot of time, so I deduce that this thing was in area Cc just by a ballpark and a judgment call, which was fair enough to me.

Tr. at 195-196. Moreover, Company policy appears to require that any changes to the constraints of an aircraft requires that the damage be photographed. See JX 7 ("when a borescope inspection requires a TDMI or changes the constraints of a TDMNI . . . [t]ake pictures and save them on the share drive . . . ."). McLean did not photograph a nick measuring .109 on August 16. He testified as follows:

> Q: And you agree there's no photograph August 16 that shows a measurement – length, depth, or anything else – that's .109, right?
> A: Right. There is no photograph.
> Q: And that's because you didn't have a photo with the measurements on it, right?
> A: Because the machine froze. I had the measurement, right.
> Q: When the machine froze, you could have gone back in and done your comparison method again so you had a record of your number, correct?
> A: It takes so long it takes to reboot. You have to reboot the thing. It's going to take a while to come back up. I say, I already have my measurement, and time is of the essence here because I need to get this information out and I – you know, I have to go back.

Tr. at 197.

McLean further testified that he did not review the August 2 photograph that had been taken in the prior inspection, and that rendered the nick a Category 1. Tr. at 204; D. & O. at 6. He testified:

> Q: And while you were there you could have looked at Mr. Del Rio's photos from August 2, correct?

> comparison check, I just can't see how any measurements, be either the depth, length, or whatever, could be taken as accurate.

> A: I could have.
> Q: And you knew he had recorded it as category 1 damage, correct?
> A: I knew. I knew that much, yeah.
> Q: But you came up with category 3?
> A: That's correct.
> Q: And you knew category 3 was very serious?
> A: Yes.
> Q: And you didn't bother to go look at his photos?
> A: Because, as I said, it's significant at that point then that was when I need to let people know that this engine needs to be off the wing. So that's a second priority to me because here I have damage that's category 3, engine needs to be off.

Tr. at 204-205. Finally, McLean testified that he did not categorize the nick as being in the Cc area because the manual required it, he stated that he placed the nick with the Cc area "as an extra margin – I error on the side of safety." *Id.* at 202. Based on McLean's approximate measurement, the N399AT aircraft became a Category 3 damage requiring that the plane be taken out of operation within 10 flight hours. McLean testified that this was the first time he had ever measured a Category 3 damage on an impeller blade. *Id.* Based on this evidence, the ALJ concluded that the Company officials "could reasonably have expected [McLean] to have taken greater care and been more precise in his measurements, inspection findings, and conclusions." D. & O. at 21. Moreover, the ALJ found that McLean "conceded at hearing that his measurement of the nick was incorrect." *Id.*.

Second, the evidence establishes that McLean did not properly notify the MOC after measuring the Category 3 damage on the impeller blade. Under American Eagle's General Procedures Manual, Quality Control is responsible for "updat[ing] SABRE after any borescope inspection. If the borescope time constraint is changed, *QC will notify MOC of this change*." JX 5 at AA0015 (emphasis added). McLean updated the SABRE computer system after completing the borescope inspection on August 16; he did this by recording the time constraint "in several places including on the non-routine work card, in the log book kept with the aircraft," and notified Acting Maintenance Supervisor Vasquez to enter the finding into "the KVA/SABRE computer system." D. & O. at 21; see also Tr. at 108-115; JX 8; JX 10; JX 14. The ALJ found that "it was not uncommon for the maintenance supervisor to enter the borescope information into the SABRE computer system for a QC inspector." D. & O. at 7 n.11 (citing JX 22); Tr. at 391, 776-777. McLean was aware, however, that as the Quality Control Inspector, he was required to notify MOC. Tr. at 169. McLean testified that he believe he satisfied that requirement when the borescope findings were entered into the SABRE computer system. Tr. at 168-170; see also Tr. at 114-115. However, the Procedures Manual states that in *addition* to updating SABRE following a borescope inspection, when a time-constraint changes, Quality Control "will notify MOC of this change." JX 5 at AA0015. As the ALJ reasonably concluded, this added duty requires more than updating the SABRE system. D. & O. at 21 (ALJ stating that "[i]f a KVA entry constituted notification to MOC of a change in time constrain, there would be no reason for the second sentence of this provision instructing that QC inspector will notify MOC if a borescope time constrain is changed."). The ALJ found, based on the evidentiary

record, that notice to MOC required that a Quality Control Inspector "telephone, email or call MOC to be sure they were aware the time had been changed . . . ." D. & O. at 22; see also Tr. at 429, 432, 483, 736-737, see also Tr. at 595-597; JX 20. McLean however did not telephone, e-mail or call MOC to report the change in the time-constraint; moreover, McLean did not inform the Quality Control Inspectors who took over on the next shift of the change in the time-constraint for the N399AT aircraft, nor e-mail or call Supervisor Pedraza to report the 10-hour flight restriction. Tr. at 160-161. See D. & O. at 22 ("Respondent had that 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 AIR 21 statute "renders whistleblowers no less accountable than others for their infractions or oversights." *Daniel v. Timco Aviation Svcs., Inc.*, ALJ No. 2002-AIR-026, slip op. at 25 (June 11, 2003). "It ensures only that they are held to no greater accountability and disciplined evenhandedly." *Id.* Based on the evidence in this case, the ALJ reasonably concluded that McLean's failure to adequately perform his duties was clear and convincing evidence that the Company would have taken the same adverse action against him even absent protected activity. Protected activity will not shield an under-performing worker from discipline. *See, e.g., Formella v. U.S. Sec'y of Labor*, 628 F.3d 381, 392 (7th Cir. 2010); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) ("We have consistently held that an employee's insubordination toward supervisors and coworkers, even when engaged in a protected activity, is justification for termination."). See also 135 Cong. Rec. H747 (daily ed. Mar. 21, 1989) (under the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, *see* 5 U.S.C.A. § 1221(e) (1), Congress explained in the Explanatory Statement on Senate Amendment S. 20 that "this new test will not shield employees who engage in wrongful conduct merely because they have at some point 'blown the whistle' on some kind of purported misconduct."). Here, McLean's failure to follow proper procedures in measuring the nick on the impeller blade of the N399AT aircraft, and failure to notify MOC as required by the Company's General Procedures Manual warranted the Company's disciplinary action.[3]

The record evidence fully supports the ALJ's determination that the Company presented clear and convincing evidence that McLean would have been disciplined even absent protected activity. Based on the ALJ's ample findings of McLean's poor performance surrounding his August 16 borescope measurement and his failure to notify MOC as required by the Company's General Procedures Manual, the ALJ reasonably determined that the Company's disciplinary measure, *e.g.*, issuance of the Career Decision Day letter to McLean "was consistent with its progressive discipline system." *Id.* at 23; see also JX 13 (Company disciplinary policy stating

[3] The ALJ found that McLean violated American Eagle Rule 16 based on Supervisor Pedraza's testimony that he believed McLean had attempted to explain his August 16 measurement by misrepresesenting facts during the investigation. D. & O. at 22-23. The ALJ found Supervisor Pedraza's testimony credible, and that "Pedraza believed Complainant's re-called photograph misrepresented the facts because Pedraza was convinced Complainant's measurement was not supportable." *Id.* at 23. There is no reason for disturbing the ALJ's credibility determination. *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012).

"[i]t is your responsibility as an employee to know the company's rules of conduct an performance standards for your job, and to consistently meet or exceed those standards."). This was not McLean's first involvement with the Company's disciplinary system. Because he had received First and Second Advisory notices by the Company (the Second Advisory just eight months prior to the August 16 incident),[4] Company policy required that McLean be issued the Career Decision Day Letter. See JX 13; see also D. & O. at 23. The letter gave McLean three options – the final option constituted termination with the option to grieve. McLean chose this option and was issued a Final Advisory on October 24, 2008.

CONCLUSION

The ALJ's Decision and Order Dismissing Complaint is **AFFIRMED.**

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

Judge E. Cooper Brown, concurring.

I concur in Judge Edwards's affirmation of the ALJ's determination that Eagle proved by clear and convincing evidence that it would have fired McLean even if he had not engaged in protected activity. I write separately because I am also of the opinion that the ALJ correctly found that McLean failed to establish that he engaged in any AIR 21 protected activity.

Protected activity under AIR 21 requires: (1) that the complainant engage in activity protected under 49 U.S.C.A. § 42121(a) including, inter alia, the provision of information to one's employer or the Federal Government involving a purported violation of a regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation;[5] and (2) the complainant's belief that a violation of AIR 21 occurred must be both subjective and objectively reasonable.[6]

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[4] See JX 38 (Second Advisory issued to McLean on Dec. 27, 2007, for "fail[ing] to ensure that all steps of the maintenance manual were followed correctly and that this inaction directly resulted in the engine shutdown during flight" in "a direct violation of the American Eagle/Executive Airlines Rules of Conduct, Rule 17 . . . .").

[5] In pertinent part relevant to the instant case, 49 U.S.C.A. § 42121(a) protects an employee from retaliation because the employee has –

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation

It is not disputed that on September 18 and 19, 2008, McLean refused to sign the airworthiness certificate and complained to the FAA, and that his actions qualify for protection under AIR 21. However, the ALJ found that to the extent that McLean's refusal to sign the certificate and his FAA complaint were based on a belief that Eagle was in violation of AIR 21 safety standards, McLean's belief was not objectively reasonable. Because of this lack of objective reasonableness, the ALJ concluded that McLean did not engage in AIR 21 whistleblower protected activity.

In contravention to the ALJ's finding, McLean asserts on appeal, as he did before the ALJ, that his belief as of September 18-19, 2008, that a borescope inspection of the plane was overdue and therefore the plane was unsafe to fly was objectively reasonable. Thus, McLean argues, he engaged in AIR 21 protected activity on September 18 and 19 when he refused to sign the airworthiness certificate and complained to the FAA.

Initially, the ALJ found, and Eagle does not dispute, that on August 16, McLean believed that he had correctly measured the damage to the impeller blade and that the engine needed to be replaced within the next 10 hours of flight time.[7] The ALJ concluded, however, that by September 18-19 McLean's belief was no longer objectively reasonable in light of Eagle's response to his August 16 inspection, Pedraza's countermanding of the 10-hour constraint that McLean had imposed, subsequent inspections and reviews of the photographs McLean took, the results of Pedraza's investigation, and his September 5 meeting with McLean, when Pedraza explained why McLean's August 16 measurements were incorrect and why he had countermanded the time constraint.[8]

The ALJ found that after the aircraft's grounding on August 20, Eagle irrefutably established with McLean that he had erred in his August 16 measurement. McLean was

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> or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
>
> (2) filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; . . .

[6] *Sitts v. COMAIR, Inc.*, ARB No. 09-130, ALJ No. 2008-AIR-007, slip op. at 9 (ARB May 31, 2011).

[7] The ALJ noted, at footnote 35 of the D. & O., that McLean's belief at the time of his August 16th inspection that the aircraft engine needed to be replaced within 10 hours of his inspection was not in dispute. However, neither McLean nor his attorney, either before the ALJ or on appeal, has asserted that the concerns he raised at that time constituted AIR 21 protected activity.

[8] *Id*. at 18.

informed that his findings had been countermanded by two other inspectors, by the Pratt and Whitney representative, and by Eagle managers. McLean was fully aware that they had all viewed the August 2 and 16 borescope photos and determined that the damage had not progressed beyond that reported by Del Rio, and that it was not a Category 3 nick in the Cc area but a Category 1 nick in the C area of the impeller blade. McLean was also aware of the fact that because the nick had not changed in size or location, the Pratt and Whitney representative and Eagle had not only countermanded his August 16 findings but ended the 200-hour deferred-maintenance status of the plane that Del Rio had previously imposed on August 2.

The ALJ found that by September 18-19, McLean knew that his August 16 measurement was a "ballpark estimate" and that his 10-hour flight constraint had been countermanded. Eagle had explained to McLean in detail the basis for its determination that the conclusions he had drawn from his August 16 measurement were not accurate. Furthermore, the ALJ found that McLean knew that Pratt and Whitney's advice to end the deferred-maintenance status of the plane was based on the lack of progression of the damage to the impeller blade. The ALJ determined that McLean had no additional evidence by September 18/19 to support his view that the 10-hour restraint had been exceeded or that the 10-hour restraint was justified. The ALJ concluded that McLean's continued insistence that an inspection was required due to the 10-hour restraint was no longer objectively reasonable and that McLean thus lacked a good-faith reasonable belief that deferring the inspection set for September 18 violated the 10-hour time constraint.[9]

Alternatively, McLean sought to justify the objective reasonableness of his belief through expressed concerns that the 200-hour deferred-maintenance constraint imposed by Del Rio's initial inspection on August 2 was still in effect as of September 18-19, and that a new inspection was required thus justifying his refusal to sign and his complaint to the FAA. The ALJ found, however, that Del Rio's constraint ended with McLean's August 16 inspection because, as Eagle explained, the lack of progressive damage to the impeller that in fact McLean's August 16 inspection evidenced, cancelled the aircraft's deferred-maintenance status. While Eagle's procedures manual required no further inspection at that time, Pedraza scheduled another inspection within 200 hours after he countermanded McLean's 10-hour constraint. McLean was fully aware of all of this, including the fact that the inspection on September 18 was deferred because there were still 56 hours of flight time remaining on the 200-hour flight time constraint that Pedraza had imposed.[10] Because McLean was fully aware of all of this, the ALJ found that McLean could not have had an objectively reasonable belief that Eagle ignored his concerns on September 19 or that continuing to permit the plane to fly an additional 56 hours would overfly the Del Rio's 200-hour deferred-maintenance constraint.

Regarding McLean's assertion that his complaint to the FAA at the end of his shift on September 19 about the plane being released to fly without an inspection nevertheless constituted

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[9] D. & O. at 19.

[10] On September 22-23 the aircraft was inspected again, still within the 200-hour constraint, and the size and location of the nick remained the same. D. & O. at 13 & n.26; *id*. at 19.

AIR 21 protected activity, it is conceded that air safety complaints to the FAA are generally considered protected activity. However, the same findings the ALJ made with regard to the objective reasonableness of McLean's beliefs pertaining to his refusal to sign the airworthiness certificate applied to his complaint to the FAA. The ALJ found that McLean's continuing contention that the aircraft's engine needed to be changed immediately was "unreasonable based on the objective information" that McLean had by September 18-19 acquired.[11] Again, McLean was fully aware that Eagle had determined that the impeller blade nick's size and location had not changed from that Del Rio identified on August 2nd, had as a result countermanded McLean's 10-hour flight constraint, and as of August 20th had ended the TDMI that Del Rio imposed on August 2.

In addition to begin fully aware of the foregoing, McLean was also aware of the fact that Pedraza had, as a precaution, also scheduled a follow-up inspection within 200 hours that as of September 18-19 had 56 hours of flying time remaining.[12] Because of this, the ALJ found that "to the extent [McLean] 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 not objectively unreasonable."[13] The ALJ concluded that McLean failed to establish that his belief that Eagle violated or was about to violate an FAA regulation or any federal law was objectively reasonable, and therefore his complaint to the FAA did not constitute AIR 21 protected activity.

Because the ALJ's determination that McLean did not engage in protected activity on September 18 and 19, 2008, because his belief at that time of air safety violations was not objectively reasonable is supported by substantial evidence of record and otherwise in accordance with applicable law, I would affirm the ALJ's dismissal of McLean's complaint on this basis as well.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Luis A. Corchado, concurring, in part, and dissenting, in part.

On procedural grounds, I concur with the dismissal of this appeal because the parties failed to sufficiently respond to the Board's January 13, 2014 order, asking the parties to explain why this matter is properly before the Board, while they dispute McLean's proof of claim in bankruptcy court. On November 29, 2011, American Eagle filed for bankruptcy protection,

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11 *Id*.

12 D. & O. at 19. See Tr. at 713 (Pedraza testifying at hearing that he agrees the nick between .020 to .120 is Category I and "requires inspection at the next 100 hours, not more than 200 hours" in accordance with the Pratt and Whitney manual.); see also Tr. at 716.

13 D. & O. at 20, *see* Tr. at 137-38.

listing McLean as an unsecured creditor. American Eagle said that "any judgment in this action will be subject to the Bankruptcy Code and Plan" and that the bankruptcy court is still considering whether to "disallow" McLean's proof of claim for this action. The parties agree that McLean filed a proof of claim for his retaliation claim and that they dispute the value assigned to the claim in the reorganization plan. Despite the Board's request for clarification, what still remains unclear is the status of that dispute and whether the Board's ruling on damages or other aspect of this case will have any significance given the parties dispute over the proof of claim in bankruptcy court. The Board can and should exercise its discretion to dismiss this matter if the parties failed to comply with the Board's orders.

As for the merits, I raise two main points that prevent me from joining the majority's decision. First, contrary to American Eagle's assertions, the ALJ specifically connected McLean's actions on September 19, 2008, to American Eagle's termination of McLean's employment. American Eagle denied that it considered the events of September 19, 2008, in firing McLean. Consistent with this denial, and as I read the record, the October 22, 2008 Career Decision Day letter and subsequent October 24, 2008 termination notice do not discuss the events of September 19, 2008. Pedraza testified unequivocally that neither he nor anyone at American Eagle punished or criticized McLean for not releasing the aircraft (N399) that day. Tr. at 750. Yet, the majority opinion criticizes McLean's actions that day. Contrary to Pedraza's testimony, the ALJ expressly found that American Eagle did consider the events of September 19, 2008, in terminating McLean's employment. D. & O. at 17. If McLean's actions on September 19th constitute protected activity, then the ALJ's findings establish that protected activity contributed to McLean's loss of employment as a matter of law. I believe that McLean did engage in protected activity on September 19, 2008, requiring that American Eagle prove by clear and convincing evidence that it would have reached the same decision absent the protected activity.

Second, turning to the events of September 19, 2008, I am very concerned about the manner in which the majority has glossed over the significance of that day from a safety perspective and, which I believe establish that McLean engaged in protected activity. It is undisputed that Pedraza ordered that "the engine [of aircraft N399] was to be scheduled for [borescope] re-inspection *at [the] next 100 hours not more than 200 hours*" (D. & O. at 8). This means Pedraza's directive alone provided more than sufficient basis for requiring that the aircraft be rechecked after 100 hours irrespective of McLean's thinking. Pedraza's directive obviously involves a safety issue when his purpose was to "be certain" and "double-check" and "corroborate" the borescope information about the status of the aircraft's engine. Tr. at 713-714. It is undisputed that the aircraft had flown 144 hours as of September 19, 2008. D. & O. at 19 (56 hours remained). Yet, even though Pedraza did not criticize McLean's decision, the majority surgically focuses on the part of McLean's reasoning that was unreasonable and flatly ignores the very simple fact that Pedraza's directive made the 100-hour mark significant. Plus, McLean correctly stated that the engine had not been examined since August 16, 2008. D. & O. at 12.

In my view, it is a dangerous precedent and inconsistent with whistleblower protection law to arguably suggest that McLean should have performed the role of a "rubber stamp" and should have released the plane rather than erring on the side of caution and following Pedraza's directive at 144 hours. The majority finds solace in interpreting Pedraza's directive of "at 100

hours, no later than 200" to mean "within 200 hours" and that somehow it was unreasonable to insist on an inspection at 144 hours. Why is it so unreasonable to refuse to further delay an inspection ordered by one's supervisor? After all, we are talking about airplanes flying in the sky that cannot just pull over at a sky service station for repairs if waiting for the 200th hour was a mistake and something goes wrong, particularly if the plane is flying over the Atlantic Ocean. It should be noted that the Category 1 nick required a mandatory inspection by August 16, 2008, only 2 weeks later. Moreover, on September 18, 2008, McLean had contacted the FAA with complaints about the inspection concerns, and the FAA ordered that an inspection occur on September 23, 2008. D. & O. at 13, 17. To sum this up, in my view, the hairs the majority split in this case raise major concerns.

LUIS A. CORCHADO
Administrative Appeals Judge