

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SIKORSKY SUPPORT SERVICE, INC.
d/b/a SIKORSKY AEROSPACE
MAINTENANCE

and

CASE 15–CA–19692

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL–CIO

Donna M. Nixon, Esq., for the General Counsel.
A. McArthur Irvin, Esq., for the Respondent.
Ramon Garcia, Grand Lodge Representative,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Fort Rucker, Alabama, on October 25, 26, 27, and 28, 2010. The charge was filed by the International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) on July 26, 2010. Based upon the allegations contained in the charge, the Regional Director for Region 15 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing on October 1, 2010.

The complaint alleges that on or about April 16, 2010, Sikorsky Support Service, Inc. d/b/a Sikorsky Aerospace Maintenance (Respondent) issued employee Jeremy Crutcher (Crutcher) a warning and on April 26, 2010 discharged Crutcher in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act.) The complaint also alleges that on May 3, 2010, Respondent issued a written job description and job duties for the bargaining unit position of aircraft mechanic. The complaint alleges that Respondent did so without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent in violation of Section 8(a)(5) and (1) of the Act. Additionally, the complaint alleges that on various dates in March and April 2010, Respondent’s named agents and supervisors interrogated employees regarding their union activities and sentiments and

regarding the union activities and sentiments of other employees, solicited grievances from the employees with the promise or with an implied promise to fix the grievances, and promised unspecified benefits to employees if they would vote against selecting the Union as their collective-bargaining representative. The complaint further alleges that during this same time period, Respondent implied to employees that their activities on behalf of the Union were under surveillance and impliedly threatened employees twice with discharge because of their activities on behalf of and/or sentiments toward the Union.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, with an office and place of business in Fort Rucker, Alabama, has been engaged in the business of providing aircraft maintenance for the United States Army. Annually, Respondent provides aircraft maintenance services to the United States valued in excess of \$50,000 and performs services valued in excess of \$5000 in states other than the State of Alabama. Based on its operations, Respondent has a substantial impact on the national defense of the United States. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a subcontractor under American Eurocopter; the main contractor with the U.S. Army to provide the LUH aircraft in support of the U.S. Army's mission. Respondent is owned by United Technologies Corporation. The LUH (light utility helicopter) program is a medevac helicopter program that replaces the former UH-1 aircraft for medium and light logistics flying. In June 2009, Respondent assumed a contract at Fort Rucker Army Aviation Center (Fort Rucker) for the LUH program. In performing the contract, Respondent provides the manpower to service and maintain the aircraft mechanically and logistically in support of the Army's Flatiron mission at Fort Rucker. The Flatiron mission at Fort Rucker not only provides support for student training, but also supports the local community for medical evacuation. Specifically, the mission supports the civilian hospitals in southeast Alabama and northwest Florida with medical service support and air ambulance service to assist in critical cases where ground transportation would not be the most efficient means of transporting patients.

¹ Respondent's counsel filed a motion to correct the transcript citing seven errors involving misspellings or typographical errors. Inasmuch as the motion is unopposed and the proposed corrections are consistent with the testimony given and do not alter the substance of the testimony, the motion is granted. Accordingly, the transcript is hereby corrected to incorporate the corrections included in Respondent's December 13, 2010 motion to correct the transcript of the hearing.

As the Respondent’s labor relations manager, Adrienne DeLuca (DeLuca) maintains an office in Respondent’s corporate headquarters in Stratford, Connecticut. DeLuca functions as both human resources representative and labor representative to Respondent’s operation at the Fort Rucker facility.² In addition to her responsibilities at the Fort Rucker facility, DeLuca administers 12 collective-bargaining agreements and works with 9 separate union business agents.

When Respondent began its operation at the Fort Rucker facility, Todd Schell (Schell) was Respondent’s site manager and Justin Ott (Ott) was the lead mechanic. On approximately March 1, 2010, quality control inspector Steve Kopko filed a hostile work environment claim against Respondent, asserting that he was treated unfairly by Schell and Ott. On March 2, 2010, DeLuca went to Fort Rucker to investigate Kopko’s claim. DeLuca testified that in conducting her investigation of the claim, she interviewed all of Respondent’s employees at Fort Rucker. DeLuca was assisted in her investigation by Frank Eddy; manager of labor relations for United Technologies, Pratt & Whitney. DeLuca explained that it is standard protocol for United Technologies to send someone from a “sister unit” to assist in such an investigation and serve as an objective observer. DeLuca testified that upon investigation, she found an egregious situation involving threats, intimidation, and coercion. Based upon the investigation, DeLuca recommended the termination of both Schell and Ott. Mechanic James Green was promoted to fill the position of lead mechanic. While DeLuca was conducting a search for a new site manager, Respondent brought in James Disotell (Disotell) to serve as the interim site manager. Disotell was Respondent’s site manager for its Fort Polk, Louisiana facility. Aircraft mechanic Billy Brown (Brown) was ultimately selected as the new site manager. Prior to his promotion Brown was an hourly employee with no management responsibilities. Disotell guided Brown in learning the operational side of his new job and DeLuca counseled him in personnel and human resource’s (HR) issues. DeLuca recalled that she told Brown that the site was extremely vulnerable because of the recent trauma experienced by the employees. DeLuca testified that she also personally apologized to the Fort Rucker employees for what had happened to them. DeLuca told Brown that she wanted to remain very closely tethered to the site to “ensure smooth sailing” and to provide advice and counsel to Brown.

In early 2010, and during the relevant period for the issues involved in this proceeding, Respondent employed approximately 11 employees, most of whom were aircraft mechanics. Earle Tatum (Tatum) was the only test flight mechanic. As the test flight mechanic, Tatum retrieved data and made adjustments to the aircraft while it was in flight. As an aircraft mechanic, Tatum was also responsible for removing and replacing aircraft parts, troubleshooting, and assuring that the aircraft was airworthy. Thomas Blisard (Blisard) was the functional check pilot for the LUH aircraft program. He also served as Respondent’s environmental health and safety manager. There were approximately four to five aircraft mechanics who worked on the first shift and one to two mechanics who were assigned to the second shift. Because the site manager and the lead mechanic worked primarily on the first shift, the employees assigned to the second shift worked without direct supervision. For

² DeLuca testified that she has a law degree and has completed work toward a master’s degree in labor relations.

purposes of this proceeding, Brown and Blisard were admitted to be supervisors within the meaning of Section 2(11) of the Act. None of the other employees working at the Fort Rucker facility are alleged or admitted supervisors.

5 Employees Tatum, James Green (Green), Blisard, Wayne Parker (Parker), and Brown all began their employment with Respondent when the contract began in June 2009. Jeremy Crutcher (Crutcher) applied to work at Respondent's Fort Rucker facility on January 15, 2010. Crutcher, Robert Barber (Barber), Loretta Etheredge (Etheredge), and Chris Colter (Colter) were all hired on or about January 31, 2010. Before they began working at the Fort
10 Rucker facility, they attended a 4-week training program in Texas. After a short period of orientation on the first shift, Crutcher and Etheredge were assigned as the only two mechanics on the evening shift.

B. Union Activity

15 In November or December 2009, the International Association of Machinists and Aerospace Workers, AFL–CIO (Union) began a union organizing campaign at Respondent's Fort Rucker facility. Tatum was the primary organizer for the campaign. An election was held on April 8, 2010. Tatum served as the Union's observer for the election and Etheredge
20 served as the Respondent's observer for the election. The employees voted 4 to 3 in favor of union representation. The Union was certified as the representative of the mechanics and quality assurance employees on April 19, 2010.

25 Tatum testified that he was surprised at the election outcome. He explained that until a few days before the election, he and other union supporters expected Green and Etheredge to vote for the Union. Etheredge testified that while she had initially signed a petition in support of the Union, she withdrew her support for the Union prior to the election.

C. Alleged 8(a)(1) Violations

1. Alleged 8(a)(1) conduct alleged to have occurred before the election

30 The complaint alleges that during the course of the union campaign, certain agents, and supervisors of Respondent engaged in conduct in violation of Section 8(a)(1) of the Act.
35 The conduct alleged during this period of time involves interrogation, the solicitation of grievances, and one allegation involving a promise of benefits. In support of the complaint allegations of preelection interrogation and solicitation of grievances, counsel for the Acting General Counsel offered the testimony of three employees involving the conduct of three supervisors. In support of the allegation of unlawful promise of benefits, the Acting General
40 Counsel submitted the testimony of one employee involving one supervisor in one alleged incident. The remainder of the alleged 8(a)(1) conduct is alleged to have occurred after the April 8, 2010 election and relates to Crutcher. The allegations involving postelection conduct are discussed below in conjunction with Crutcher's warning and discharge.

a. Prevailing law

It is well established that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend upon an employer’s motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959).

(1) Interrogation

In determining whether the questioning of an employee constitutes an unlawful interrogation, the applicable test is that found in the Board’s decision in *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); a test that the Board has continued to follow for the past 26 years. In its analysis, the Board considers what has come to be known as “the Bourne factors,” as these factors were first set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors are:

- (1) The background, i.e. is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information upon which to base taking action against the employees?
- (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g., was employee called from work to the boss’s office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.

As the Board has pointed out, interrogation of known union adherents is not per se unlawful. The Board has found that the totality of the circumstances must be examined, and the appropriate inquiry is whether the interrogation “reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Rossmore* above at 1177. The *Bourne* criteria are not however, prerequisites to a finding of coercive questions, but rather have proven to be useful indicia that serve as a starting point for assessing the “totality of the circumstances.” *Perdue Farms, Inc.*, 144 F.3d 830, 835 (D.C. Cir. 1998); *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987); *Westwood Health Care Center*, 330 NLRB 935 (2000). The Board has specifically noted that in the final analysis, the Board’s task is to determine whether “under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Id.* at 940.

Thus, it is apparent that there is no one-size fits all definition of unlawful interrogation. Because Section 8(a)(1) prohibits employers only from activity which in some manner tends to restrain, coerce, or interfere with employees, either the words themselves or the context in which they are used must suggest an element of coercion or interference to fall within the parameters of Section 8(a)(1). *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980).

As the Third Circuit has pointed out in its analysis of unlawful interrogation, consideration must be given to the fact that supervisors and employees often work closely together and consequently discuss a range of subjects of mutual interest; including unionization. The circuit went on to note that to hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983). Thus, wording, circumstances, background, location, and relationship of the participants are all vital factors in determining whether a supervisor’s questions constitute unlawful interrogation. Again, the analysis is an objective test and looks to whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question was actually intimidated. *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1228 (2000).

(2) Solicitation and promise of benefits

It is fundamental that absent a previous practice of doing so, the solicitation of grievances during an organization campaign accompanied by an express or implied promise to remedy such grievances violates the Act. *Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001); *Maple Grove Health Care Center*, 330 NLRB 775 (2000); *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

An employer who has a past policy and practice of soliciting employees’ grievances may continue such a practice during an organizational campaign. The employer, however, cannot justify solicitation of grievances where it significantly alters its past manner and methods of solicitation. *Wal-Mart, Inc.*, 339 NLRB 1187, 1187–1188 (2003); *Carbonneau Industries*, 228 NLRB 597, 598 (1977). As the Board has long noted, there is a compelling inference that an employer is “implicitly promising to correct those inequities that he discovers as a result of inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.” *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972).

Certainly, an employer is free to speak about a union campaign and express opinions. Under Section 8(c), however, that freedom does not extend to statements that promise benefits to employees in relation to the union campaign. *Grouse Mountain Associates II*, 333 NLRB 1322, 325 (2001). The Board has traditionally held that the granting or promising of benefits during the pendency of an election is prima facie evidence of intentional interference with employees’ Section 7 rights and is presumed to be for the illegal object of influencing employees. *Lampi, L.L.C.*, 322 NLRB 502, 502 (1996). An employer’s promise of benefits need not be detailed or specific to be violative of the Act. Promises that an employer “would someday better itself” and offer employees “more” have been found sufficient to constitute an unlawful promise of benefits. *JFB Mfg., Inc.*, 208 NLRB 2, 6 (1973). Thus, the inquiry must be whether the express or implied promise of benefits, whether specified or not, was given for the purpose of influencing the employees’ vote in the election and of a type reasonably calculated to have that effect. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

b. The 8(a)(1) allegations involving Tom Blisard**(1) Evidence presented**

5 Complaint paragraph 7(a) alleges that on or about March 2010, Respondent, acting
through Thomas Blisard, interrogated employees regarding their activities on behalf of/or
sentiments toward the Union. Paragraph 7(b) alleges that on or about the same date, Blisard
solicited grievances from the employees with the promise to fix the grievances. Blisard has
worked for Respondent since Respondent began its operation at the Fort Rucker facility in
10 June 2009. Blisard is the functional check pilot for the LUH program. In addition to being a
pilot, Blisard is also a certified airframe and power plant mechanic. Respondent admits that
Blisard is a supervisor within the meaning of the Act.

15 Before working together at Respondent’s facility, Blisard and Crutcher worked
together for 4 years at Army Fleet Support (AFS). Blisard was the test flight operations
manager and Crutcher was a shop steward for the union at the facility. Blisard recalled that
Crutcher, as a union steward, represented an employee supervised by Blisard during a
grievance proceeding at AFS. Blisard testified that he had found Crutcher to be reasonably
20 knowledgeable of the grievance procedure. When Crutcher applied to work at Respondent’s
facility, Respondent’s former site manager Todd Schell asked Blisard if he knew Crutcher
and, if so, what was his opinion of Crutcher’s work. Blisard recalled that he told Schell that
he didn’t have any direct knowledge of Crutcher’s mechanical ability or qualifications. He
told Schell that his only involvement with Crutcher had been the grievance procedure when
Crutcher was a union steward. Blisard testified that he told Schell that he had nothing
25 positive or negative to add.

Crutcher testified that on or about the end of February or the first of March 2010, he
had a conversation with Blisard in the hangar’s employee breakroom. Crutcher estimated that
the conversation occurred approximately 30 minutes before their shift began and no other
30 employees were in the area. Crutcher testified that Blisard mentioned that he knew that
Crutcher had been involved with the union at AFS (Army Fleet Support) and he asked
Crutcher’s “take” on the Union coming in at Respondent’s facility. Crutcher testified that he
told Blisard that he was too new to know and that he was relying on what he heard from the
more senior employees. Crutcher testified that Blisard asked him how he thought the Union
35 would benefit the other employees. Crutcher told Blisard that the Union would give the
employees affordable health insurance and would address the overtime and compensatory
time pay issues. Crutcher testified that Blisard told him that the company was going to
address those issues and if the employees gave the company a chance, the company would
address and rectify the issues. Crutcher responded that there had been 9 months for
40 Respondent to rectify the issues and the issues had not suddenly arisen. Crutcher testified that
Blisard opined that the issues had not been addressed with upper management because of the
previous site manager who was no longer at the facility.

Blisard recalled that prior to the election he had a conversation with Crutcher about
45 the Union. He testified that he asked Crutcher what he hoped to get out of bringing the union
to the company. Blisard recalled that Crutcher responded by mentioning better pay and better

benefits. Blisard asserted that he explained to Crutcher that Respondent had a totally different kind of contract than AFS and comparing the pay and benefits of the two companies was like comparing apples and oranges. Blisard recalled that he explained to Crutcher that AFS had a direct contract with the U.S. Army while Respondent contracted with the U.S. Army through American Eurocopter. He told Crutcher that Respondent could not provide the same kinds of benefits and pay as his prior employer because of the fixed price of Respondent’s contract with American Eurocopter.

During his testimony, Respondent’s counsel asked Blisard if he solicited any grievances during his conversation with Crutcher. Blisard replied: “Not knowingly.” Blisard recalled asking Crutcher why he would bring in an outside arbitrator and try to resolve the issues through the Union rather than to bring the questions to the company to be resolved.

(2) Conclusions

Prior to the alleged interrogation and alleged solicitation of benefits, Crutcher and Blisard worked together for 4 years prior to their employment with Respondent. There is no dispute that Crutcher’s union activity was well known to Blisard and they had worked together in their respective union/management roles. As a union steward, Crutcher represented an employee who was supervised by Blisard. The conversation in issue came about during the course of their daily work activities. Although Respondent stipulated that Blisard was a supervisor within the meaning of the Act, there is no record evidence that Blisard had any specific supervisory responsibility for Crutcher. Based upon the testimony of both individuals, Crutcher appeared to respond to Blisard’s inquiry without hesitancy, freely explaining the anticipated benefits that would be available with unionization. I find that Blisard’s inquiry was simply casual questioning based upon his prior work relationship with Crutcher and would not reasonably tend to coerce, restrain, or interfere with Section 7 rights. Accordingly, I do not find that Blisard engaged in interrogation in violation of the Act as alleged in complaint paragraph 7(a).

I found Blisard to be an exceptionally credible witness; appearing to be straightforward in his description of his conversation with Crutcher. He candidly acknowledged that he asked Crutcher how he hoped to benefit by the Union and why Crutcher had chosen to bring in the Union to resolve issues rather than taking his concerns to Respondent. There is no evidence that Blisard had the authority to address any of the issues raised by Crutcher or even to recommend correction of any problems to upper management. There is, in fact, no complaint allegation that he promised any benefits to Crutcher or to any other employees. I credit Blisard’s testimony that after hearing the benefits that Crutcher hoped to obtain with the Union, Blisard attempted to explain to Crutcher the economic differences in their prior employer and the Respondent and why the additional pay and benefits might not be attainable because of these differences. Crutcher admitted that Blisard explained that the issues in pay had not been addressed with higher management because of the problems with the prior site manager. It is reasonable that Blisard asked Crutcher to give the company a chance to address these problems now that upper management had removed the prior site manager and was in the process of putting a new manager in place.

On the basis of the entire record, however, Blisard’s comments may objectively be construed as a solicitation of benefits that might reasonably tend to interfere with an employee’s Section 7 rights. Accordingly, I find merit to complaint paragraph 7(b).

5 *c. Allegations involving Mathew Kerzner*

(1) Evidence presented

10 Complaint paragraph 8(a) alleges that on or about March 2010, Respondent, acting through Mathew Kerzner (Kerzner) interrogated employees on two separate occasions regarding their activities on behalf of and/or sentiments toward the Union. Paragraph 8(b) alleges that during the same time period, Kerzner interrogated employees regarding other employees’ activities on behalf of and/or sentiments toward the Union. Complaint paragraph 8(c) alleges that during the same time period, Kerzner solicited grievances on two occasions
15 from employees with the implied promise to fix the grievances.

Kerzner is Respondent’s labor relations project manager for corporate human resources. He primarily deals with the unions and with labor relations enterprisewide. Kerzner initially visited the Fort Rucker facility approximately 6 weeks prior to the April 8,
20 2010 election and then again closer to the election date.

Crutcher testified that in March 2010, he had a conversation with Kerzner in the breakroom/tool crib. Crutcher recalls that he had come into the room to check out some tools and only Kerzner was present in the room. Crutcher testified that Kerzner commented on his
25 being new at the facility and asked him his opinion on the Union “coming in.” Crutcher recalled telling Kerzner that he was really too new to the facility to know and he was simply relying upon what the employees hired before him said about the issues. Crutcher testified that Kerzner then asked if there was anything that Respondent could do to stop the Union from coming in. Crutcher testified that he told Kerzner that he thought that “it was too far
30 gone.” He added that the employees had petitioned for the Union and they were afraid to back out at that point. Crutcher recalled that Kerzner rubbed his forehead, sighed, and said nothing further.

Robert Barber (Barber) worked at the Fort Rucker facility from January until June
35 2010, when he resigned. Barber testified that Kerzner was the first supervisor at the facility who mentioned the Union to him before the election. Barber recalled that in March 2010, he was walking through the break area when he saw Kerzner working at his computer. Barber testified that Kerzner asked him how the employees felt about the Union and also asked if anything could be done to change the way employees were thinking. Barber responded that
40 there really wasn’t anything that he could do to change what other people were thinking and he personally was still looking at both sides of the issue. Barber also recalled that later in March, he met with DeLucca and Kerzner for his 60-day evaluation. At the end of the meeting, Kerzner asked Barber if “anything had changed with the guys.” Barber responded that as far as he knew, everyone felt the same and they would just have to wait and see what
45 happened.

Kerzner recalled having conversations with both Crutcher and Barber. Kerzner described his contacts with Crutcher to center around Crutcher’s DUI situation. Kerzner recalled that during Crutcher’s 60-day review, he asked Crutcher about a pending DUI charge and informed Crutcher that he was aware that this was not the first offense. Kerzner told
5 Crutcher that his employment would be reviewed after his upcoming legal hearing. Crutcher assured Kerzner that he was confident that the case would be dismissed and he would have his license returned. Kerzner also recalled that Crutcher asked him if he were bringing up the matter of the DUI because of the pending union election. DeLuca was also present for the 60-day review and immediately responded to Crutcher’s question. DeLuca told Crutcher
10 that she was offended by his comment and that his DUI was brought up because it was a serious concern and had nothing to do with the union or the election. DeLuca went on to offer Crutcher help through the employee assistance program. Kerzner testified that he actually attended Crutcher’s court hearing along with Brown. Kerzner denied that he ever asked Crutcher what could be done to stop the union. Kerzner denied that he ever asked any
15 employee how he felt about the Union. Kerzner recalled that he had several conversations with Barber; but only about Barber’s operational experience as a mechanic, his qualifications as a pilot, and about his family. Kerzner testified that while he had several conversations with Barber, nothing was said about the Union.

20 **(2) Conclusions**

While I do not credit all of Crutcher’s record testimony, it is also common in judicial decisions to believe some and not all of a witness’s testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), vacated and remanded on other grounds 340 U.S. 474 (1951). With respect to Crutcher’s alleged conversation with Kerzner, I find the
25 testimony credible. In part, I do so because of the similarity in conversations alleged by both Barber and Crutcher. I found Barber to be a credible witness and there is no basis to conclude that there was any collusion in which Barber and Crutcher tailored their testimony to have such similarity. It is reasonable that the two conversations occurred as described by Crutcher
30 and Barber. Kerzner’s blanket denial that he had any conversations about the Union while at the facility is not reasonable. Kerzner was not prohibited from having conversations with employees about the Union. He could have legally given them his opinion and urged them to vote against the Union, as long as he did so without coercion, threats, or promises. As Respondent’s labor relations project manager, it was reasonable that he would have wanted to
35 say something to employees to encourage their support for Respondent in the upcoming election. To assert that he said nothing at all is illogical and undercuts the credibility of his testimony.

Accordingly, the record supports a finding that on or about March 2010, Kerzner
40 interrogated employees about their own union activity and about the union activity of others and solicited grievances with the implied promise to fix the grievances as alleged in complaint paragraphs 8(a),(b), and (c.)

d. Allegations involving James Disotell**(1) Evidence presented**

5 Complaint paragraph 9 alleges that in March 2010, Respondent, acting through James
Disotell, promised unspecified benefits to employees if they would vote against selecting the
Union as their collective-bargaining representative. James Disotell (Disotell) is the site
manager for Respondent’s operation at Fort Polk, Louisiana. In March 2010, Respondent
temporarily assigned Disotell to the Fort Rucker facility to cover the responsibilities of site
10 manager while Schell’s replacement could be found. Disotell recalled that he was at the Fort
Rucker facility for approximately 3 weeks.

Barber testified that he had a conversation with Disotell one afternoon at the end of his
shift. He recalled that as he and Disotell were walking toward the parking lot, Disotell
15 commented that he really hoped that the employees would not vote in the Union. Barber also
recalled that Disotell stated that there were a lot of good things coming down from the
company, however, he couldn’t tell Barber what they were or promise Barber anything.
Disotell testified that while he had conversations with employees during his 3 weeks at the
facility, he didn’t remember any conversation in which he promised benefits to employees if
20 they would vote against the Union.

(2) Conclusions

In very general terms, Disotell’s comment to Barber was simply a request for the
employees to give the company a chance. The Board has held that where such requests for an
25 opportunity to prove oneself are not coupled with promises of benefits, they are not conduct
that interferes with employees’ free choice in an election. *Noah’s New York Bagels, Inc.*, 324
NLRB 266, 267 (1997), citing *National Micronetics*, 277 NLRB 993 (1985). Conversely,
requests by an employer for the chance to prove itself that are coupled with express or implied
30 promises of benefits have been found to be unlawful. *Reno Hilton Resorts Corp.*, 319 NLRB
1154, 1156 (1995). Certainly, there was nothing unlawful about Disotell’s comment to
Barber that he hoped that the employees would not vote for the Union. Disotell was
apparently mindful that he could not make promises to any employees during this preelection
period and told Barber that he could not make promises. Barber recalled, however, that
35 Disotell went on to opine that there were good things to come from the Respondent. Disotell
was not a part of the Fort Rucker management staff. He was simply assigned for
approximately 3 weeks to manage the operation until Respondent could put into place a
permanent site manager. There is no dispute that there were perceived problems associated
with the prior site management; sufficient to spur a hostile work environment complaint by an
40 employee. Based upon the circumstances that brought Disotell to the facility, it is likely that
he would view the opportunity for a change in management as a good thing for employees. It
is entirely likely that it was this future new management that he was referring to in his
conversation with Barber. Nevertheless, there is no evidence that Disotell provided this kind
of detail to Barber when he talked about the “good things” that would come from Respondent.
45 Disotell could not recall the conversation and could not provide any further information in his
testimony. Accordingly, crediting Barber’s testimony, and there being no record evidence to

clarify the basis for Disotell’s remark, I find that Respondent promised unspecified benefits as alleged in paragraph 9 of the complaint.

e. Allegations involving Frank Eddy

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(1) Evidence presented

Complaint paragraph 10 alleges that at about the end of March or the beginning of April 2010, Respondent, acting through Frank Eddy, interrogated employees regarding their activities on behalf of and/or sentiments toward the Union. Frank Eddy (Eddy) is the manager of labor relations for United Technologies, Pratt & Whitney in East Hartford, Connecticut. Eddy testified that he was sent to the Fort Rucker facility in 2010 to provide third-party oversight to the investigation of a hostile work environment claim involving Site Manager Schell. Eddy interviewed most of the employees along with DeLucca and he was present at the site for approximately 3 or 4 days. Eddy also returned to the facility again a day or two before the April 8, 2010 election. Eddy conducted a meeting with all employees and explained the collective-bargaining process to them.

Gary Wayne Parker (Parker) recalled that prior to Eddy’s meeting with the employees; he was in the breakroom with Eddy and Blisard. He recalled that Eddy made the comment “You are not for this stuff, are you? You’re a Republican, aren’t you? Mostly Democrats are for this stuff.” Parker recalled telling Eddy “Frank, I actually used to like you because I’m not either. I’m Independent.” Parker testified that he understood that Eddy was talking about the Union.

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Eddy testified that while he spoke with Parker prior to the election, he never asked Parker if he were “for all this union stuff.” He explained that while he never asked a question of Parker, he made a statement that might be similar to such a comment. Eddy recalls that he made the comment “You know this union stuff, I’m not really concerned one way or the other, because you all are pretty bright people and you’re going to figure it out one way or the other, and it’s going to work itself out.” Eddy testified that while he spoke with other employees while he was at the facility, he specifically recalled speaking with Parker because he had a unique speech pattern³ that required Eddy to pay attention when Parker was speaking.

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(2) Conclusions

Although Eddy’s statement to Parker was couched more in terms of a statement than a question, it was clearly intended to elicit a response from Parker. As the Board has noted, the fact that a statement may not have a definable question mark at the end does not detract from its coercive potential. *Clinton Electronics Corp.*, 332 NLRB 479, 479–480 (2000). I find no basis to discredit Parker’s testimony. As Parker describes the conversation, Eddy’s question and Parker’s response were both made in a joking manner. As evidenced by Parker’s response, Parker felt a need to explain his political preference and Parker testified that he clearly understood Eddy’s remark to pertain to the Union. Parker’s testimony does not appear

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³ Eddy did not clarify what he meant by “unique speech pattern.”

to be contrived or exaggerated. There is no doubt that Eddy was making an appeal to support the Respondent by suggesting that Parker was a Republican. Eddy’s statement, however, was also an attempt to force Parker to disclose his support for the Union. While Parker side-stepped the question by claiming to be Independent and giving a joking response, the question was nevertheless sufficiently coercive to be violative of the Act. Furthermore, Eddy’s description of the conversation was simply too fluent and smooth to be plausible. There is no dispute that this conversation occurred just prior to Eddy’s meeting with employees; a meeting conducted to persuade employees to support the Respondent rather than the Union. It is far more probable that Eddy’s statement to Parker was just as Parker recalled. The overall record supports a finding that Respondent interrogated employees about their union activities as alleged in complaint paragraph 10.

f. Preelection conduct related to Billy Brown

(1) Evidence presented

The only conduct alleged in the complaint relating to Brown is conduct that is alleged to have occurred on April 14, 2010, and 6 days after the election. Complaint paragraphs 11(a), (b), and (c) are the only allegations in the complaint relating to the conduct of Brown. Complaint paragraph 11(a) alleges that on or about April 14, 2010, Respondent acting through Billy Brown interrogated employees regarding their activities on behalf of and/or sentiments toward the Union. Paragraph 11(b) alleges that Brown implied to employees that their activities on behalf of the Union were under surveillance. During the course of the hearing, counsel for the Acting General Counsel stated that the testimony of both Crutcher and Parker was offered in support of paragraphs 11(a) and (b). Complaint paragraph 11(c) alleges that Brown impliedly threatened employees twice with discharge because of their activities on behalf of and/or sentiments toward the Union. Counsel for the Acting General Counsel confirmed that only Crutcher’s testimony was offered in support of complaint paragraph 11(c). The record reflects, however, that there was some confusion and that Parker’s testimony concerning Brown related to a conversation that is alleged to have occurred a few days before the election. Parker did not testify concerning any conversations with Brown on or about April 14, 2010, and Parker did not allege that Brown engaged in conduct similar to that alleged in complaint paragraph 11(a) or (b). Parker’s testimony concerning his individual conversation with Brown is described below. A discussion of the merits of complaint paragraphs 11 (a), (b), and (c) as related to Crutcher is discussed below in relation to Crutcher’s warning and discharge.

Brown was initially hired as an aircraft mechanic in June 2009. Brown remained an hourly employee until he was promoted to site manager on March 23, 2010. Brown testified that when the union organizing first began, he discussed with the other hourly employees the pros and cons of having union representation. He specifically recalled that he discussed the Union with Green, Parker, and Tatum. Brown testified that he made no attempt to hide his support for the Union and that he signed a union card along with Green, Parker, and Tatum. Brown explained that they did so in order to obtain better benefits. Brown recalled that the employees discussed the various roles they would play if there was a union. In their discussions, he and the other employees discussed the fact that both Parker and Crutcher were

former union stewards. Brown further testified that he and Crutcher discussed Crutcher's previous work as a union steward. Crutcher told him that he believed he had been terminated from a prior job because he was "up and coming" in the union. Crutcher testified that for a period prior to Brown's promotion, he worked with Brown on second shift. He recalled discussing the Union numerous times with Brown. Crutcher recalled telling Brown about his serving as a union steward and his serving on the strike committee at his prior employment.

Brown recalled that when he was promoted to site manager, he asked to speak with DeLucca and Kerzner. He recalled telling DeLucca that he did not want to be a part of any retaliation against any of the employees who supported the Union. He told her that if she ever asked him to fire someone because of their union "wants or needs," he was not the person for the job. Brown recalled that DeLucca told him, "Billy, that's why the previous person in your position was let go. I will not tolerate it. I will not let it happen, and Sikorsky will not let it happen."

Parker testified that a few days after Brown became site manager and prior to the election, he spoke with Brown. Parker recalled that Brown made the statement: "Why don't we give the company a chance to correct this and do right by us?" Parker recalled that he told Brown: "Billy, we all went and signed up for the union and we all decided to stay the course." Parker told Brown that he understood that Brown had changed sides, however, he was still going to stay the course with what he had said that he would do. Parker denied that he had any other conversations with Brown or any other managers or supervisors about the union.

(2) Conclusions

Although this particular conversation is not alleged in the complaint, I nevertheless find no violation. The alleged statements were brief comments in casual conversation and clearly directed to a known union supporter. They were of a general and noncoercive nature. *Dynamics Corp. of America*, 286 NLRB 920 (1987).

D. Crutcher's Warning and Termination

The complaint alleges that Respondent unlawfully disciplined Crutcher on April 16, 2010, and unlawfully terminated Crutcher on April 26, 2010. The Acting General Counsel maintains that Respondent's asserted reasons for Crutcher's discipline and termination were pretextual and that Respondent took such actions because of Crutcher's support for the Union. Respondent asserts that Crutcher was a probationary employee and could be dismissed even without cause at any time prior to the completion of probationary period. Respondent contends, however, that Crutcher was discharged for creating a disruption in the work force by engaging in an "unrelenting campaign against Loretta Etheredge, both within and without the workforce."

1. Background related to Crutcher

As referenced above, Crutcher was hired at the Fort Rucker facility on January 31,

2010. Before he began working at the facility, he attended a month’s training with newly hired employees Etheredge and Colter. Prior to leaving for Texas to attend the training, Crutcher was charged with DUI (driving under the influence.) His driver’s license was suspended on March 15, 2010, and he was unable to drive any vehicles in the performance of his job for the remainder of his employment. After returning from his training in Texas, Crutcher worked for a short period of time on the day shift. Eventually however, Crutcher and Etheredge were assigned to work the evening shift.

Crutcher testified that he was active in the union organizing campaign. He asserted that he wore red on Thursdays to show his union support and carried a union notebook. As described above, Crutcher also testified that he spoke with Blisard, Kerzner, and Brown concerning the Union.

2. Events leading to Crutcher’s termination

Respondent asserts that there was escalating hostility in the workplace beginning in late March and continuing until Crutcher’s discharge. Respondent asserts that there were several incidents that occurred during this period of time that demonstrate Crutcher’s role in creating the hostile work environment. The first event occurred on March 26, 2010.

a. March 26, 2010 incident

In order to provide maintenance for an aircraft, mechanics occasionally tow an aircraft from one location to another at the facility and four employees are normally required to complete the tow. On the afternoon of March 26, 2010, an aircraft was scheduled to return from a training flight at approximately 4:30 or 5 p.m. Upon its return, the second shift employees were to move the aircraft to a specific area outside the hangar in order for the first shift employees to begin maintenance on the aircraft the following morning. As lead mechanic Green needed to leave work at 3:30 p.m. on that particular day, he told Etheredge and Crutcher that the aircraft should be towed upon its return to the facility. At the time that Green first spoke with Etheredge and Crutcher, Brown, and Blisard were away from the facility. Green informed Etheredge that if the aircraft returned to the facility before Brown and Blisard returned, she could contact Tatum to work overtime and to return to the facility to assist with the towing.

Before leaving the facility, however, Green spoke by telephone with Brown and learned that Brown and Blisard were returning to the facility and would be able to assist Crutcher and Etheredge in towing the aircraft. After speaking with Brown, Green informed Etheredge that Tatum would not be needed to assist with the tow. Etheredge in turn told Crutcher that they would not need to call anyone in as Brown and Blisard were coming back to the facility to help with towing the aircraft.

Green testified that he left the facility at approximately 3:30 p.m. By the time that he arrived at his home, he received what he termed a “nasty” telephone message from Tatum inquiring why Green had not called him in to work overtime. Green testified that Tatum appeared to be upset and Tatum demanded to know why he had not been called to come in to

work overtime to tow the aircraft. In response to the message, Green telephoned Tatum and learned that his information was based upon a telephone call from Crutcher. Based upon the telephone call from Crutcher, Tatum understood that Green directed Etheredge not to call Tatum in for overtime under any circumstances. Green explained to Tatum why he had not
5 been needed and denied that he had given any such directive to Etheredge.

In response to Tatum’s telephone call, Green telephoned Brown and informed him of what Tatum said. Green told Brown that Tatum was very upset about not being called in for overtime and also upset because Etheredge had said that Green did not want Tatum to be
10 called in for overtime. Although Brown did not immediately understand the source of Tatum’s information, Brown later confirmed that it was Crutcher who had given this information about Etheredge to Tatum.

b. An incident occurring shortly after the election

15 The Taylor Dunn is a motorized vehicle that employees use to transport various materials and equipment to and from the hangar to the aircraft. Crutcher did not have a valid driver’s license after March 15, 2010, and he sometimes rode with Etheredge when she drove the vehicle. Etheredge testified that at no time did she ever refuse to allow Crutcher to ride
20 with her.

A few days after the election, Tatum received a telephone call from Crutcher during Crutcher’s shift. Because Crutcher appeared to be out of breath, Tatum asked him why. Crutcher told Tatum that Etheredge had not allowed him to ride with her on the cart (Taylor
25 Dunn) and he had been forced to carry a 7-foot ladder for a mile and a half to and from the hangar to the aircraft. The following day Tatum complained to Green that Etheredge had treated Crutcher unfairly. Green assured Tatum that he would speak with Etheredge. The next evening Tatum spoke again with Crutcher and informed him that he (Tatum) had made a complaint about Etheredge to Green. During the course of the conversation, Crutcher told
30 Tatum that Etheredge had made the statement that Tatum was a “sorry mechanic” and a “waste of perfectly good oxygen.” The following day Tatum went to Brown and complained about Etheredge’s comments. Tatum recalled telling Brown that Etheredge’s comments were not going to do anything but hurt the morale and the work force.

35 Crutcher acknowledged that he had a conversation with Tatum in which he discussed Etheredge. Crutcher testified that during the conversation Tatum made the statement that Etheredge was a good mechanic. Crutcher testified that he had laughed and responded “She doesn’t feel the same about you.” In describing the remainder of the conversation, Crutcher testified “I think that was about it.” He did not confirm or deny the specific comments that
40 Tatum testified that he had heard from Crutcher.

c. Incidents on April 13 and 14, 2010

45 Brown met with his employees on April 13 and discussed his concerns about harassment. Etheredge recalled that Brown told the employees that there was a lot of harassment going on. He read a section from Respondent’s policy concerning harassment and

reminded the employees that they were all adults. Etheredge recalled that Brown told the employees that they needed to come to work, do their jobs, go home, and stop the harassment.

5 Part of the work given to the mechanics on second shift on April 13 was the completion of an alert service bulletin (ASB) that began on first shift. The bulletin required the replacement of some aircraft parts. Brown recalled that at approximately 8 p.m. on April 13, he received a telephone call from Crutcher asking for assistance. Crutcher told him that the aircraft in question had returned to the flight line and he didn't know what he was to do with the aircraft. Brown directed him to contact the flight crew to determine its availability and then to secure the aircraft.

15 Etheredge recalled that when she began her shift that evening, she discovered that some aircraft parts had been removed by the day shift mechanics. She assumed that the mechanics had done so in order to get their arms into the narrow space in which the work had to be performed. She recalled that she had shown the parts to Crutcher and had shared with him her confusion as to why the day shift mechanics removed the parts. Etheredge also testified that as she was later working underneath the aircraft, an aircraft part fell on her chest. She recognized the aircraft part as a rod end and she knew that the part was important. After attempting to find the source of the fallen part, Etheredge contacted Green to get some 20 guidance on what she needed to do. Green told her that it sounded as though the rod was a part of the auto pilot system. He directed her to mark the part and put it on his desk for the next morning. Etheredge recalled that Crutcher had not been in the vicinity at the time the rod fell or when she had spoken with Green. When she saw Crutcher approximately 3 hours later, she told him about the rod and shared her concerns about the rod. Etheredge recalled that 25 when she spoke with Crutcher she had not been angry and had not said anything about Barber.

Barber testified that he had worked on the aircraft during his regular day shift on April 13. He had not been able to complete the project prior to the end of his shift. Barber recalled that Crutcher called him during the evening and asked him about the work that he had done on 30 the aircraft. During the telephone call, Crutcher also told Barber that Etheredge "was yelling and screaming" and had stated that Barber had "messed up" and did not know what he was doing. Crutcher also told Barber that Etheredge stated that Barber was a "waste of oxygen" and that it was going to take her all night to correct what he had done.

35 Tatum testified that at approximately 6 p.m. on that same evening, he received a telephone call from Crutcher. During the telephone call, he heard Etheredge speaking in the background. Tatum asserted that he heard Etheredge say that Barber was a "sorry fucking mechanic" and that Barber screwed up the aircraft. He recalled that when he asked Crutcher was what going on, Crutcher told him that Etheredge was "pissed" because a rod end had 40 fallen from the plane. Tatum recalled that Crutcher told him that he was calling to ask Tatum what to do about the rod end. Tatum simply suggested that Crutcher position the rod end in place and Tatum would fix it the next day.

45 Crutcher testified that on that particular night, he was conducting ground service equipment inspections and Etheredge was working on the ASB assignment. Crutcher testified that Etheredge was upset that Barber had taken apart some things on the aircraft that he had

not needed to take apart and that Etheredge stated that Barber had “fucked up” the ASB and that it would take her all “fucking” night to finish it. Crutcher contended although he had offered to help Etheredge with the ASB, she had cursed him, rejected his offer, and told him to get away.

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Despite the fact that Crutcher was not working on the ASB, he testified that he tried to call Green to find out about the circumstances involving the ASB. He testified that when he couldn’t reach Green, he tried to call Barber. When he didn’t initially reach Barber, he telephoned Tatum. Crutcher testified that Tatum explained that Barber had disconnected the part in order to get access to a part of the aircraft. Tatum told Crutcher not to worry about it and he (Tatum) would take care of it in the morning. Crutcher recalled that during the conversation, Etheredge was cursing and Tatum asked what Etheredge was saying. Crutcher recalled that he told Tatum that Etheredge was saying that Barber had “fucked it up.” Crutcher recalled that Tatum told him to tell Etheredge that he (Tatum) would take care of it in the morning. Crutcher also recalled that while he had been talking with Tatum, Barber returned the earlier telephone call. Crutcher admitted that during his conversation with Barber, he told Barber what Etheredge had said about him and Barber became upset.

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Before Brown arrived at work the next morning, he received a telephone call from Blisard, informing him that Barber was visibly upset and was asking for the harassment policy that Brown had read to the employees the previous day. When Brown arrived at work, Barber was waiting outside and Brown asked to speak with him. Brown asked Barber to explain the problem. Brown recalled that Barber replied: “Well, I don’t like employees talking about me and telling them that I’m a waste of oxygen.” Barber went on to explain that he understood that Etheredge had problems with the ASB the previous night and she had stated that Barber “screwed up the mod”⁴ and that it was going to take her all night to finish that particular job. Barber further repeated that Etheredge had stated to Crutcher that he (Barber) was a “fucking waste of oxygen.” Barber explained that he knew this because Crutcher told him what Etheredge had said. Brown asked Barber to write a statement confirming what Crutcher had told him.

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Brown recalled that he checked with Green to get additional information about what occurred on the previous shift. Green confirmed that Etheredge had texted him the previous evening. When Green spoke with Etheredge she reported to Green that a rod had fallen on her while she was performing the assigned task. Green confirmed to Brown that he had told Etheredge to leave the completion of the project for the day shift and he would contact the manufacturer to determine the proper repair of the aircraft part. When Brown asked Green why was there such a commotion, Green didn’t know. He told Brown that he only knew that Barber was upset about statements made by Etheredge and Barber knew this from Crutcher’s telephone call. After obtaining the statement from Barber and from Blisard, Brown met individually with Etheredge and Crutcher.

When Brown met with Etheredge she explained that when she was working on the ASB, a rod fell on her chest. Brown asked if during the incident, she made any statement

⁴ There is no record definition for “mod.”

about Barber. She denied doing so. When Brown spoke with Etheredge, he recalled his previous conversation with Tatum in which Tatum described the comments that Etheredge had allegedly made to Crutcher about Tatum. Brown recalled Tatum's previous comments that he didn't appreciate Etheredge making statements about him. In his meeting with
5 Etheredge, Brown also asked if she had ever made statements about Tatum. She denied doing so. Brown asked Etheredge to give him a written statement concerning what happened the previous night with the rod and also a statement about whether she had made comments about Tatum.

10 In his meeting with Brown, Crutcher admitted that he telephoned both Tatum and Barber during the previous night's shift. Crutcher explained that he had telephoned Tatum because of a maintenance question and that he had telephoned Barber because he wanted to find out some information about the rod. Brown recalled that he told Crutcher that if he had a question about maintenance or work, he should have called either Brown or Green. Brown
15 reminded Crutcher that he was to call supervision if there was a problem or question. He went on to remind Crutcher that he (Crutcher) had in fact called him about the aircraft the previous evening and Brown had told him what he needed to do. When Brown asked Crutcher if he had told Barber that Etheredge made statements about him, Crutcher confirmed that he had. Brown asked Crutcher why he had done so and inquired if Crutcher was trying to
20 "stir up stuff" between Barber and Etheredge. Brown reminded Crutcher that only the previous day he had read the harassment policy to the employees. He recalled telling Crutcher, "This has got to stop; you can't keep causing the conflict." During the conversation, Crutcher did not mention that Tatum had overheard any of Etheredge's comments about Barber.

25 When DeLucca visited the facility earlier in the month, she happened to leave her business card with Etheredge. She had also told Etheredge to call her if she ever had any questions. On the evening of April 14, Etheredge sent a text message to DeLucca, asking if she could telephone her. DeLucca returned the text immediately and Etheredge telephoned
30 DeLucca. DeLucca testified that when she spoke with Etheredge, Etheredge seemed to be distraught and extremely upset. Etheredge told DeLucca that she felt that she was being targeted and that the other employees were not speaking to her. DeLucca recalled that Etheredge told her that Crutcher had falsely told employees that she was saying things about them. Etheredge testified that she told DeLucca that she had been asked questions about
35 comments that she had allegedly made about Barber and Tatum. DeLucca recalled that she asked Etheredge if perhaps some of her comments might have been misconstrued. Etheredge asserted, however, that she had not said any of the remarks attributed to her. Etheredge told DeLucca that she just couldn't handle the stress of the job anymore. She explained that she was tired of coming to work, pulling daggers out of her back every day. She told DeLucca
40 that she just wanted to come to work, do her job, and go home.

Because of the expense involved in the initial training for the mechanics, Respondent's policy required employees to reimburse the company \$15,000 if they resigned during their first year of employment. During Etheredge's telephone conversation with
45 DeLucca, Etheredge asked the check amount that she would need to write in order to resign. Etheredge recalled telling DeLucca "Tell me who I need to write a check to, how much I need

to send, and where I need to send it tonight, to get out of this contract.” DeLuca told Etheredge to give her some time and let Brown investigate the situation. Etheredge was hospitalized 2 days later and remained in the hospital for the next 7 days. Etheredge testified that she suffers from Crohn’s Disease, a condition that is exacerbated by stress.

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Brown testified that he spoke with DeLuca several times and told her that he felt that Etheredge and Green were being targeted. DeLuca testified that after the first incident involving Etheredge’s alleged statement concerning overtime, Brown told her that he thought that Etheredge’s sexual preference was a factor in what had happened. DeLuca confirmed on cross-examination that she had also believed that Etheredge’s sexual preference was one of the reasons for what was happening to Etheredge. DeLuca testified that based upon the information provided by Brown, she also believed that Green and Etheredge were ostracized by the other employees because of the election.

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Brown prepared a statement for DeLuca on April 14, 2010, and included the other statements that he had obtained in the course of his investigation of the harassment. Brown’s memorandum included a brief description of the incident in which Crutcher telephoned Tatum to report that Etheredge had kept him from getting overtime. Brown also included a description of Crutcher’s calls to Barber and Tatum in which he reported comments that Etheredge had allegedly made about them. Brown’s memorandum and recommendation concluded with the following wording:

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I see that for whatever reason that Jeremy Crutcher is causing a disruptive work force by calling employees to inform them of what Loretta is saying which is also causing a hostile work environment for her. I feel that if some action is not taken soon that Loretta will file a formal complaint. I have talked to the whole crew on the 13th of April 2010 about the company’s policy on a hostile work environment and that we need to stop all of the personal issues with one another. We need to move on and work as professionals together. I feel that Jeremy has some personal motives for his action, what they are I do not know. I recommend that Jeremy Crutcher [to] be terminated before his 90 day probation period ends with this site.

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When DeLuca spoke with Brown about his recommendation to terminate Crutcher, DeLuca explained that there was no corroboration of either Crutcher or Etheredge’s statements which resulted in a “he said/she said” situation. DeLuca told Brown that Respondent needed to be cautious in issuing discipline and that Crutcher should receive only a verbal warning. DeLuca recalled that she told Brown that Respondent was now postelection and she believed that every decision she made or action that she took would be scrutinized. She testified that because she wanted to avoid unfair labor practice hearings, she was trying to take sufficient time in her decisions and she was trying to be fair and measured. She explained that even though Crutcher was a probationary employee, she didn’t feel that Respondent had a sufficient basis to terminate him. The decision was made to give only a warning to Crutcher.

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DeLuca went on to tell Brown that Respondent could not prove that Etheredge made

the alleged statements or didn't make the statements. DeLucca urged however, that Brown needed to strongly enforce to Etheredge that if she were making such statements, she must stop as there is no place in their workplace for such comments.

5 On April 16, Brown met with Crutcher to give him the formal verbal warning. Green was also present. The written formal verbal warning given to Crutcher included the following:

10 State the Specific Violation: Violation of Harassment Free Workplace Policy.

State Circumstances of Violation: Unprofessional behavior for the purpose of dividing fellow employees thereby creating a hostile work environment.

15 State Exact Date and Time of Violation: On or about March 26, 2010, you contacted Earle Tatum and told him that Loretta Etheredge said that Earle was a sorry person" and not trustworthy.

20 Further on or before April 14, 2010, you contacted Randy Barber and told him that Loretta Etheredge said, "Randy's workmanship was not good and that he did not know what he was doing."

25 Such behavior is unprofessional, counter-productive and divisive all of which has created dissention amongst the crew and which has promoted a hostile work environment.

3. Events occurring after Crutcher's warning

a. Blisard's April 22, 2010 statement

30 On April 22, 2010, Blisard was sitting in an aircraft performing avionics checks for the radios and electronics on the aircraft while some of the crewmen were working nearby. As he finished his paperwork, he overheard the employees' discussing Crutcher and Etheredge and their working relationship. After hearing the conversations, he sought out Brown to share what he had heard. In addition to verbally informing Brown about the
35 comments that he overheard, he prepared a written memorandum for Brown. He testified that because of the recent events involving Crutcher and Etheredge and after Brown's admonition to employees to get along and not conjure up animosity among the work force, he found the conversation disturbing. In the statement, Blisard documented the conversation that he overheard and also outlined his concerns about the working relationship between Crutcher
40 and Etheredge. His statement to Brown contained the following:

45 During the afternoon of 21 April 2010, following the conduct of some ground Avionics maintenance, I overheard several of the hourly employees discussing (with some degree of disgust) the alleged mis-treatment of Jeremy Crutcher by his 2nd shift coworker Loretta Etheredge during the previous weeks operation.

5 Apparently, Mr. Crutcher claimed that Ms. Etheredge would not allow him to ride on the Taylor Dunn with her. He also alleged that several times during the work shift that he had to hand carry a ladder from the hangar back to the flight line because she took all the equipment back to the hangar on the cart. This information was apparently passed from Mr. Crutcher to Earle Tatum. It appears that Mr. Crutcher's insistence that Ms. Etheredge's actions were deliberate and spiteful has evoked the sympathy and support of at least two of the day shift mechanics to the extent that they openly and verbally resent Ms. Etheredge.

10 Although it is difficult to pinpoint how/when this rift began between Mr. Crutcher and Ms. Etheredge; the fact remains that there is a severe degree of animosity between the two; at least on the part of Mr. Crutcher (as evidenced by his continued conversations with Mr. Tatum on the subject). It also appears that it has become increasingly difficult to expect any appreciable productivity on second shift with those two individuals on that shift.

b. Crutcher's activities related to applicant Gibson

20 Daniel Gibson (Gibson) testified that when he had previously worked for Army Fleet Support (AFS) at the Fort Rucker base, he was supervised by Brown and he had been a member of the Union. In April 2010, Gibson interviewed with Brown for a position with Respondent. Gibson testified that prior to his interview with Brown; he had given a copy of his resume to Crutcher to give to Brown. Gibson recalled that a few weeks after his interview, he received a telephone call from Crutcher. During the conversation, Crutcher told Gibson that Respondent was not going to hire him. Crutcher explained that Etheredge had told Brown that it wouldn't be a good idea to hire him.

30 After speaking with Crutcher, Gibson contacted Ed Baldwin, who was a friend of Gibson's and also a mechanic who had worked with Brown at AFS. Gibson asked Baldwin to help him find out what was going on with his application. Baldwin testified that in response to Gibson's telephone call, he contacted Brown and asked Brown if it were true that he was not going to hire Gibson because of something a female employee had told him. Baldwin asked Brown if there was any merit to what he had heard and whether the female employee had made statements about Gibson being a "bad apple" or "trouble maker."

40 Brown testified that on the evening of April 21, 2010 he received the telephone call from Baldwin. Baldwin inquired about the employment situation with Gibson. Brown testified that Baldwin told him that he had received a telephone call from Gibson and Gibson told Baldwin that Etheredge had allegedly badmouthed him to Brown and interfered with his chance of getting a job. When Brown asked him what he was talking about, Baldwin explained that Gibson had received this information from Crutcher. Brown told Baldwin that nothing like that had happened. He told Baldwin that he was still interviewing applicants and had not made a final decision on who he would hire for the job.

45 The following day Brown telephoned Gibson and asked him if he had spoken with

Crutcher. Gibson confirmed to Brown that he had spoken with Crutcher. Gibson told Brown that Crutcher volunteered that Etheredge had badmouthed him to Brown and ruined his chances for employment. Brown assured Gibson that Etheredge had never said anything about him.

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Crutcher admitted that he telephoned Gibson and told him that he would not be hired because of Etheredge. Crutcher testified:

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Well, you know, I called him and told him, you know that I didn't think that he was going to get hired, because when I handed the resume to Billy, Loretta Etheredge was in there and she, you know, looked at it and said, 'Oh, I know him, don't hire him; he's a troublemaker, he's nothing but trouble'."

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Brown recalled that after his conversation with Gibson, he was upset. He called DeLucca and Kerzner and told them what he had learned from Baldwin and Gibson. He recalled telling them "Okay, enough's enough. He's interfering with my hiring process now, telling applicants that someone is badmouthing them." Brown went on to add "I don't need that and don't want that. This needs to stop, and we need to take action on this." Brown testified that on the afternoon of April 22, 2010 he prepared a memorandum describing how he came to interview Gibson and describing his conversations with both Gibson and Baldwin.

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Brown additionally prepared a formal recommendation to terminate Crutcher. The memorandum included a listing of five violations upon which Brown based the recommendation. The first two violations were described as:

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Discrimination or harassment against fellow employees, customer representatives, or other contract personnel at any time in areas assigned to the company.

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Threatening, intimidating, coercing, or interfering with or making defamatory, vicious or malicious statements against any employee, customer, the Company or its products or services.

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The third-, fourth-, and fifth-listed violations referred to an incident in which there was an allegation that Crutcher, Tatum, and an unknown third party entered Respondent's property, accessed the Respondent's computer, and printed a statement prepared by Blisard concerning Tatum. DeLucca testified that while she considered the first two violations as a basis for terminating Crutcher, she did not rely upon the allegations concerning the other three-listed violations. She explained that because the computer was not password protected and was accessible to all employees, she did not believe that such an alleged violation was sufficient for just cause to terminate Crutcher. She testified that such an action did not rise to the level of a violation of company policy because of the nature of the computer accessibility. DeLucca contacted Brown and informed him that his recommendation for Crutcher's termination was approved and that Crutcher would be terminated for creating a disruption in the work force and creating a hostile work environment.

45

DeLuca testified that she had not only been outraged about Crutcher’s comments to Gibson, but she had also been concerned about Respondent’s exposure for liability. She explained that if Gibson were protected under Title VII,⁵ Respondent might be liable for failing to hire him. She also testified that she was concerned for Etheredge’s safety if Gibson
 5 believed that she had prevented his being hired. DeLuca testified that she didn’t know how long Gibson had been out of work or how desperate he was to get the job.

E. Conclusions Concerning Crutcher’s Warning and Termination

10 The complaint alleges that Respondent issued a warning to Crutcher on April 16, 2010 and subsequently terminated him on April 26, 2010 in violation of Section 8(a)(3) and (1) of the Act. The Acting General Counsel asserts that Respondent disciplined and warned Crutcher because Respondent believed that Crutcher assisted the Union and engaged in
 15 concerted activities, and to discourage employees from engaging in these activities. The Board’s test for determining whether an employer has engaged in such conduct in violation of Section 8(a)(3) is found in its landmark decision, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, in order to establish a prima facie violation of Section 8(a)(3) and (1), the Acting General Counsel must initially establish that the alleged discriminatee engaged in union activities and that the
 20 employer had knowledge of such activities. In this case, there is no question that Crutcher was a known union supporter who had been active in the union in his previous employment. Blisard was aware of his prior work as a steward and Brown was aware of his union sentiments because of their mutual organizing efforts prior to Brown’s promotion. Once an employee’s union activity and the employer’s knowledge of that activity are established, the
 25 Acting General Counsel must show that Respondent’s conduct was motivated by union animus. Such animus is essential in establishing the nexus between the protected activity and the motivation for the adverse action.

30 It is this necessary nexus that is weak in this case. Crutcher’s testimony was offered in support of direct animus toward Crutcher. For the reasons described below, I do not find the testimony sufficiently credible to support a finding of specific animus toward Crutcher.

Crutcher testified that after he first spoke with Brown on April 14, 2010 about the situation with Etheredge, there was a second conversation with Brown later in the day.
 35 Crutcher testified that during this second conversation in the parking lot, Brown told him that he knew that Crutcher had been involved with the union at AFS and that “the company all the way up to corporate” knew that as well. Crutcher asserts that Brown asked him if he intended to be on the negotiating committee or simply a “lowly steward.” Crutcher testified that
 40 Brown told him:

45 I know that you got a family to take care of, you know, I don’t want to see anything bad happen to you, you know, but I’m afraid that since the company all the way up to corporate knows of your past union involvement and your obvious pro-union attitude here that higher ups are going to force me to do something I don’t want to do.

⁵ Civil Rights Act of 1964, § 701(f), as amended 42 U.S.C. A. § 2000e.

Crutcher maintained that Brown began crying and told him (Crutcher) that he needed a temporary “change in latitude to change his attitude.” Crutcher testified that Brown again said that he didn’t want to see anything bad happen to him and Brown didn’t want to do something that he didn’t want to do because Crutcher only had 15 days left in his probationary period.

Complaint paragraph 11 is apparently based upon this testimony and alleges that on or about April 14, 2010, Brown interrogated employees regarding their activities on behalf of and/or sentiments toward the Union, implied to employees that their activities on behalf of the Union were under surveillance, and impliedly threatened employees twice with discharge because of their activities on behalf of the Union.

With respect to the alleged interrogation, I note that Crutcher and Brown were alone when Brown is alleged to have asked Crutcher if he were going to be on the negotiating committee or just a “lowly steward.” There were no other employees around and Crutcher was an open and known union supporter. Based upon Brown and Crutcher’s mutual involvement in supporting the Union prior to Brown’s promotion, I don’t find it remarkable that Brown was curious about Crutcher’s aspirations. Crutcher had evidently served in more than one capacity with the union in his past employment. Thus, while Brown may have made an inquiry related to Crutcher’s union activities, this kind of inquiry does not fit within the framework of unlawful interrogation as envisioned by the *Rossmore* decision. A supervisor’s inquiry as to the plans or intentions of a known union supporter with no apparent coercion has not been found to be unlawful. *Tualatin Electric, Inc.*, 312 NLRB 129, 134 (1993). Accordingly, I do not find that Brown unlawfully interrogated Crutcher as alleged in complaint paragraph 11(a).

Additionally, I do not find that the record evidence supports the allegations contained in complaint paragraphs 11(b) and (c). After considering the entire record testimony, I do not find Crutcher’s account of this conversation to be credible. I make this finding based upon a number of reasons. First of all, Brown is the most unlikely supervisor to engage in interrogation and/or threats. He was active in bringing in the union and openly supported the union prior to his promotion. The record also reflects that Tatum was viewed as the primary employee involved in starting and sustaining the organizational activity. Tatum recalled that after Brown’s promotion was announced to the employees, he approached Brown and told Brown that his promotion would not change things at all. Tatum testified that Brown told him that it didn’t matter to him because he could work with or without a union. Brown added that if the employees felt that they needed to continue with the organizing effort, they should “go right ahead.” Brown did, however, mention to Tatum later that he thought that the employees should give the company a chance before they voted in the Union. Despite Tatum’s role in the organizing activity, there is no allegation that Brown made any threats or promises to Tatum or any other employees because of the union.

Brown denied the conduct alleged in complaint paragraph 11. He explained, however, that he cautioned Crutcher to be careful and to stop causing controversy between other employees. The record reflects that as of April 14, 2010, Crutcher had already made several

telephone calls to other employees; telling them negative things about Etheredge. The comments were further inflammatory because the comments resulted in employees concluding that Etheredge was making derogatory comments about them or had taken some negative action toward them. Based upon Crutcher's gratuitous telephone calls, Tatum not
5 only believed that Etheredge had prevented his working overtime, but also that she had made derogatory comments about him and his work. Additionally, because of Crutcher's unsolicited telephone call to Barber, Barber believed that Etheredge had criticized his work and made insulting remarks about him. It is totally reasonable that when Brown spoke with Crutcher on April 14, Brown urged Crutcher to change his attitude (as Crutcher asserts) and to
10 watch his conduct as he still had time remaining in his probationary period.

Thus, in weighing the record testimony and considering the undisputed facts, I find Brown to be the more credible witness. Thus, I do not find that Respondent engaged in the violations alleged in complaint paragraph 11(a), (b), and (c).
15

Turning back to the *Wright Line* analysis, I am mindful that a prima facie case may be established by indirect evidence as well as direct evidence and that the employer's motive may be determined by the totality of the circumstances. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). Although, I have not found that Respondent violated the Act as alleged in
20 complaint paragraphs 11 and 7(a), I have found that Respondent engaged in 8(a)(1) activity as alleged in paragraphs 7(b), 8(a), (b), and (c) as well as in paragraphs 9 and 10. Accordingly, while I find this to be a very fragile nexus, the argument may be made that there was a modicum of animus that would be sufficient to establish a prima facie case of unlawful discrimination with respect to both Crutcher's warning and his discharge. *Starbucks Corp.*,
25 354 NLRB No. 99, slip op. at 56 (2009).

Once the elements of a prima facie case have been established by the Acting General Counsel, the burden under *Wright Line* shifts to the Respondent to prove by a preponderance of the evidence that it took the adverse action for a legitimate nondiscriminatory business
30 reason. *Wright Line*, at 1090. I find that the Respondent has met this burden.

As Respondent asserts in its posthearing brief, Crutcher was a probationary employee and did not have the same job security as employees who had completed their probationary period. Of course, it is axiomatic that Respondent is not permitted to use this probationary
35 period as a means of disciplining an employee because of his union activities. I find, however, that the total record evidence supports a finding that Respondent would have taken the same action with any other probationary employee who engaged in the same conduct.

Essentially, Respondent issued a warning to Crutcher and then subsequently
40 terminated Crutcher for his actions that caused a hostile work environment for his fellow employee. There is no dispute that Crutcher told other employees that he was being mistreated by Etheredge, with the potential of causing other employees to turn against her. Additionally, there is no dispute that he told Barber, Tatum, and Gibson that Etheredge said derogatory things about them. For Tatum and Gibson, Crutcher's comments also indicated
45 that Etheredge had affected their livelihood ranging from a loss of overtime pay to actually losing a job opportunity. Crutcher's conduct did not occur in the context of casual

conversation. He specifically telephoned these individuals and sought them out to deliver the negative comments about Etheredge.

5 During their discussions prior to Crutcher's warning and termination, Brown and DeLucca speculated as to why Crutcher had taken such actions against Etheredge. They speculated that it may have been because of her personal sexual preference or it may have been because she withdrew her support for the Union prior to the election. They were never able to answer that question and even Etheredge testified that she didn't know why she was targeted.

10 The overall evidence reflects that there was no apparent reason for Crutcher to have contacted these individuals as he did. There is no dispute that on the evening of April 13, Crutcher was not involved in working on the ASB. Crutcher testified that he was conducting ground service equipment inspections and Etheredge was working on the ABS. He further testified that when he offered to help her with the ASB, she rejected his offer. Etheredge credibly testified that when she encountered problems with the falling rod, she contacted Green to get direction on how to handle the situation. He told her what she needed to do. There was no reason for Crutcher to have been involved in any respect. Earlier in the evening, he had contacted Brown to get directions on how to handle that particular aircraft. He had been able to reach Brown without any difficulty and he found out what he needed to do. There was no reason for his having called Tatum and then Barber to talk with them about the ASB assignment. First of all, he was not doing the work, and secondly, he could have again contacted Brown if he really needed to know something about the ASB work. It is likely that Etheredge was annoyed with the day-shift mechanics and in all likelihood, she probably made disparaging comments about the state of the aircraft and the removed parts. There was, however, no apparent reason for Crutcher to get involved and to disclose her annoyance or comments to either Barber or Tatum.

30 Additionally, there was no reason for Crutcher to have telephoned Gibson and to tell him that Etheredge had prevented his getting the job. It is Crutcher's communication with Gibson that suggests that Crutcher was aware that his conduct had gone beyond acceptable bounds. As indicated above, Gibson testified at the hearing and recounted what Crutcher told him about Etheredge's having kept him from getting the job for which he applied. Additionally, Gibson testified that there was an additional telephone conversation with Crutcher after Crutcher was terminated. Gibson explained that Crutcher telephoned him and told him that he would be getting a call from the "federal labor board." Crutcher told Gibson that he should not tell the person from the Board that he had said anything about Etheredge. Gibson recalled that while he initially agreed to comply, he began thinking about it and decided not to get involved. Although the Board agent tried to contact him, Gibson failed to take the call. On cross-examination, Crutcher recalled that he may have spoken with Gibson again after April 2010. Crutcher testified that he called only to ask how Gibson was doing. Crutcher was not asked the substance of his conversation with Gibson. Counsel for the Acting General Counsel argues that Crutcher had not seen the internal discharge recommendation and would not have known that the call to Gibson was a basis for his discharge. Counsel argues that it is implausible that Crutcher would have urged Gibson to lie when he admitted to what he told Gibson during his testimony. I found Gibson to be a

credible witness. He has no apparent ties to Respondent or personal bias that would have led him to fabricate his testimony. Although Crutcher contends that he made the follow-up call to Gibson simply to inquire how he was doing, Crutcher did not testify as to the substance of his full conversation with Gibson or actually deny that he had asked Gibson to lie to the Board agent. Crediting Gibson, it is apparent that Crutcher was cognizant that his statement to Gibson was a factor in his termination.

It is understandable that Crutcher's telephone call to Gibson was the proverbial straw as far as Brown was concerned. Brown credibly testified that when he learned of Crutcher's call to Gibson, he told Kerzner and DeLuca "Okay, enough's enough. He's interfering with my hiring process now, telling applicants that someone is badmouthing them." I find Brown to be a credible witness and the total record evidence supports his testimony that he recommended Crutcher's termination. Although he had wanted to terminate Crutcher after the first incidents involving Crutcher's statements about Etheredge to Tatum and Barber, DeLuca declined to do so. If Brown's recommendation had been followed, Crutcher would have been terminated 2 weeks earlier.

It was only after Crutcher interfered with a job applicant that DeLuca agreed to his termination. It is not inconsequential that this whole issue of Crutcher's conduct occurred within 2 months of the hostile work environment investigation involving the prior site manager and lead mechanic. For an operation that had existed only a little over 10 months, Respondent was again facing a potential claim of a hostile work environment. When DeLuca received information about Crutcher's call to Gibson, she was already aware of Etheredge's distress. Both Etheredge and DeLuca credibly testified that when Etheredge spoke with DeLuca on April 14, 2010, she shared her concerns that she was being targeted and that Crutcher had falsely told other employees that she was saying things about them. Etheredge told DeLuca that she could no longer handle the stress of the job. She told DeLuca that she would write a check to the company to reimburse them for the cost of her training just to get out of the situation. Although DeLuca had urged Etheredge to give Brown time to investigate the matter, Etheredge entered the hospital 2 days later for a flare up of her Crohn's Disease. When DeLuca telephoned Etheredge in the hospital, Etheredge told her that her condition had been exacerbated by her recent stress. DeLuca described Etheredge as distraught.

Thus, at the time that Brown again recommended Crutcher's termination, DeLuca was not only aware of Etheredge's concerns, but also aware that Etheredge believed that her hospitalization was caused by her current stress at work. DeLuca testified that when Brown told her about Crutcher's telephone call to Gibson, she was not only outraged but also worried about the potential liability that Crutcher could have brought upon the company. She explained that because of Crutcher's comments, Respondent might be exposed for a Title VII⁶

⁶ Title VII of the Civil Rights Act of 1964 prohibits discrimination with respect to terms, conditions, or privileges of employment based on race, color, religion, sex, or national origin. It is not limited to economic or tangible discrimination, but extends to the entire spectrum of disparate treatment of men and women in employment including a situation where individuals are required to work in a discriminatorily hostile or abusive environment. Civil Rights Act of 1964 §§ 701 et seq., 703 (a)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a)(1); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

claim, depending upon Gibson’s protected status. DeLuca testified that she also thought about the possible risk to Etheredge’s safety. DeLuca testified that she didn’t know how long Gibson had been out of work or how desperate he might be for employment and what kind of risk there might be for Etheredge. I find DeLuca to be a credible witness in this regard. Given the circumstances presented to her, and after the recent issue with the prior site manager, the risks envisioned by DeLuca were realistic. As the Supreme Court has noted, conduct need not seriously affect an employer’s psychological well-being or lead the employee to suffer injury to be actionable under Title VII as “abusive work environment” harassment. It is sufficient that the environment would reasonably be perceived, and is perceived, as hostile. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Based upon her contacts with Etheredge, DeLuca had a reasonable basis to conclude that the circumstances involving Etheredge were moving toward such a situation. As also observed by the D.C. Circuit, a reasonably cautious employer would consider adopting measures that would maintain a workplace free of a hostile environment and free of harassment covered by Title VII. The court went on to opine that to severely limit an employer’s ability to insulate itself from such liability is to place it in a “catch 22.” *Adtranz ABB Daimler-Benz Transp., N.A. Inc. v. NLRB*, 253 F.3d 19, 27 (C.A.D.C. 2001). Respondent argues that it was facing this kind of liability and concern when making the decision to terminate Crutcher. Although it was totally speculative as to whether Crutcher had placed the Respondent in a risk of liability, the concern was a reasonable one.

One factor in my concluding that Respondent would have terminated Crutcher in the absence of his union activity is the fact that Respondent could have terminated him earlier in his employment. DeLuca testified that when she first visited the site, the previous site manager recommended Crutcher’s termination. He did so because of Crutcher’s DUI. DeLuca recalled that she denied the site manager’s recommendation and opted to counsel with Crutcher. Although she offered Crutcher the benefit of the employee assistance program, Crutcher declined and asserted that he did not need the program. Because she understood that Crutcher had a court date in early April, she told Schell that they would allow Crutcher to have his day in court and a decision could be made about his job after his court date. DeLuca explained that she was under the impression that this was his first DUI. After becoming site manager, Brown reviewed the employees’ personnel file to familiarize himself with the employees. In looking through Crutcher’s file, he discovered a previous DUI conviction. DeLuca testified that when Brown told her, she was stunned that Schell would have hired Crutcher with that kind of background. She concluded, however, that he was already hired and Respondent would just have to live with it. When she later confronted Crutcher with the fact that this was not his first DUI offense, she told him that she was a little upset because he had failed to tell her this when they had first spoken about the DUI. She recalled that Crutcher told her that she was only raising this with him because of the Union. DeLuca testified that she told Crutcher that her comments had nothing to do with the Union and had to do with someone showing a pattern of behavior and also because Respondent was in the business of dealing with flight safety. Thus, even after the onset of union organizing, Respondent might have easily terminated Crutcher simply on the basis of his pending DUI charge and his previous DUI history. Respondent did not do so. In fact, Respondent’s support for Crutcher in this regard is evidenced by the fact that Brown and Kerzner attended Crutcher’s court hearing. Despite the fact that Crutcher did not have a valid driver’s license

after March 15, 2010 and could not drive a motor vehicle at the facility, Respondent did not seize the opportunity to terminate Crutcher.

Accordingly, based upon all of the record evidence, I find that Respondent has met its *Wright Line* burden and demonstrated that it would have terminated Crutcher in the absence of any union activity. Therefore, I recommend the dismissal of complaint paragraphs 12, 13, and 14.

F. Whether Respondent Implemented a Unilateral Change on May 3, 2010

There is no dispute that on April 19, 2010, the Union was certified as the collective-bargaining representative for Respondent’s aircraft mechanics and quality assurance employees employed at the Fort Rucker facility. Respondent does not dispute that following the April 8, 2010 election, Union Representative Jimmy Cotter sent DeLucca a request to bargain about the terms and conditions of the unit employees. Complaint paragraph 18 alleges that about May 3, 2010, Respondent issued a written job description and job duties for the bargaining unit position of aircraft mechanic. Complaint paragraph 20 alleges that Respondent did so without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct in violation of Section 8(a)(1) and (5) of the Act. Since the Union’s initial request to bargain, the parties have met and have begun bargaining.

Upon receipt of the May 3, 2010 job description, employees were required to sign the document. Employees Parker, Tatum, and Barber testified that they did not receive a job description when they were hired. Cotter testified that the Union was not notified prior to the job description being given to the employees and he only learned that the job description had been given to employees when Tatum brought him a copy of the job description that he had signed. Respondent asserts that there is no unilateral change in the terms and conditions of employment and further asserts that there is not a single task in the May 3, 2010 job description that was not performed by mechanics prior to the issuance of the document.

In support of its argument, Respondent points out that Tatum testified that the job description listed a number of functions always performed by a mechanic, including fuel check, pre and postflight inspections, tool inventory, quality assurance and various manufacturers and technical manuals. Respondent maintains that Tatum only pointed to a few items that were added to the scope of a mechanic’s job; HELOTRAC functions; ordering repair parts; deficiency reports; and EH&S (environmental health and safety) functions. HELOTRAC is an aircraft recordkeeping system that maintains a copy of the same information found in the mechanics’ log book.⁷ Tatum testified that any information entered into the log book should also be entered into HELOTRAC. Tatum testified that prior to the issuance of the job description, HELOTRAC was primarily used by the lead mechanic. Green further testified that while the mechanics were initially trained to use HELOTRAC, they were not allowed to use the system before he became lead mechanic in April 2010. Disotell also testified that when he came to the facility as acting site manager, the employees had no

⁷ The record does not contain a specific definition of the system, however it appears to be computer software program related to aircraft maintenance.

experience with the HELOTRAC program because they had not been allowed to use it when the former site manager and former lead mechanic were in charge of the operation. Disotell also acknowledged that even after completing the mandatory training program in Grand Prairie, Texas, employees are not completely skilled in using the HELOTRAC program. Accordingly, Disotell brought in a trainer to help employees learn to use the program. Disotell testified that knowing how to use the system was a perishable skill and that if not used over time, the employees may not be familiar with how to navigate through the program, affecting their ability to update certain inspections on the aircraft.

Respondent asserts that Tatum’s testimony concerning HELOTRAC is contradicted by Crutcher and Etheredge. Crutcher confirmed that while working on the night shift, he and Etheredge worked together to input the information into HELOTRAC. He opined that “most days” he used the system. Etheredge testified that she uses HELOTRAC “at least once a night, sometimes more.” Based upon their testimony, it is apparent that Etheredge uses the system daily and that Crutcher used the HELOTRAC system more than occasionally. Their testimony, however, does not establish that there was a past practice or requirement for all mechanics to use the HELOTRAC system. It is significant that Crutcher and Etheredge were the only employees working on the second shift. There was no lead mechanic or any other employee available to input the information into HELOTRAC. The fact that they could depend upon no one else to perform this task does not support a finding that there was a practice of all mechanics regularly preparing and maintaining the HELOTRAC records as mandated by the May 3, 2010 job description. It is reasonable that with Disotell’s direction and Green’s urging, mechanics have become more proficient in the use of the system. While it is likely that some of the mechanics have now come to use the system more regularly, the overall evidence does not reflect that there was a past practice of all mechanics regularly performing this task as mandated by the job description.

It has long been held that an employer violates its duty to bargain if, when negotiations are sought or are in progress, it unilaterally institutes changes in existing terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). The Board has also held that in order for a unilateral change in a term or condition of employment to constitute a violation of Section 8(a)(5), it must be a material, substantial, and significant change. *Alamo Cement Co.*, 277 NLRB 1031 (1985). I am mindful that Respondent’s operation at the Fort Rucker facility was a new one; with a significant number of its work force hired and trained only a few months prior to the implementation of the job description. There is no dispute, however, that employees were never issued a job description prior to May 3, 2010 and were never required to sign a job description. As reflected by the testimony of Crutcher and Etheredge, employees were at varying levels of proficiency in using the system prior to the issuance of the May 3, 2010 job description. Both Tatum and Green confirmed that the past practice involved only the lead mechanic using HELOTRAC. Contrary to the sporadic and inconsistent requirements to use the HELOTRAC in the past, the newly issued job description implemented a requirement that all aircraft mechanics “shall” prepare and maintain aircraft maintenance records to include HELOTRAC and to be proficient in all aspects of the HELOTRAC automated system. Thus, rather than the past practice of only a few employees using the system, the job description mandated that all aircraft mechanics were required to prepare and maintain records using the HELOTRAC system. I find that in issuing and

implementing the job description, Respondent implemented a material and significant change in the terms and conditions of employment. Respondent's having done so without notification or bargaining with the Union constitutes a violation of the Act. According, I find that Respondent violated Section 8(a)(5) and (1) as alleged in complaint paragraphs 18 and 20.

III. COMPLIANCE SPECIFICATION

The underlying complaint allegations in this matter were set forth in an October 1, 2010 Order Consolidating Complaint and Compliance Specification and Notice of Hearing. The incorporated compliance specification provided that the gross backpay due Crutcher is the amount of earnings he would have received, but for the discrimination against him. The backpay period for Crutcher is alleged to begin on April 26, 2010, and to continue until a valid offer of reinstatement is made to him. In determining the amount of backpay that would be due to Crutcher, the Acting General Counsel used a traditional formula; the number of hours that he would have worked during the backpay period multiplied by the wage rate that he was earning at the time of his discharge. This amount is reduced by his interim earnings during the backpay period.

As discussed above, I have not found that Respondent discriminatorily terminated Crutcher and my recommended remedy does not provide for reinstatement or backpay to Crutcher. In the event that the Board does not adopt my recommendation, I am including my additional recommendation with respect to the reinstatement and backpay issues related to the compliance specification.

A. Backpay Amount

The Acting General Counsel has determined the amount of gross backpay by utilizing an average of 40 hours per week at a rate of \$22.65 an hour. The gross backpay also utilizes an average of 10 hours of overtime worked per month at a pay rate of \$33.97 per hour. After a reduction of Crutcher's net interim earnings, the net backpay and interest was determined to be \$20,739.87 as of September 30, 2010. The Acting General Counsel takes the position, however, that the backpay obligation is continuing as no offer of reinstatement has been made to Crutcher. Compliance Officer Debra Warner (Warner) testified as to how the formula was used to determine the backpay amount included in the compliance specification. Warner testified that the information that she used to determine interim earnings came from Crutcher. She also explained that the 60 hours of overtime that was included in the backpay specification was based upon Crutcher's estimate of overtime hours that he worked before his discharge. She explained that Crutcher told her that he had worked 8 to 10 hours of overtime each month when employed by Respondent. She confirmed that this amount was an estimate by Crutcher and not provided under oath.

Respondent submits that it does not possess any independent knowledge of Crutcher's current employment circumstances, and is therefore taking no position regarding his claim for regular pay and benefits. Respondent asserts, however, that the evidence introduced by the Acting General Counsel is wholly unreliable as it relates to the overtime hours worked by

Crutcher during his employment for Respondent.

Respondent submitted seven separate timesheets covering each pay period for the full period of Crutcher's employment. The time sheets show that Crutcher worked a total of 13.4 hours overtime during the twelve-week period. Four of the timesheets contained Crutcher's signature and three did not. Crutcher testified that each day employees document their arrival and departure times in their own handwriting. Although Crutcher denied that he had ever seen a typewritten copy of a document containing the total hours worked for each pay period, he recognized his signature on three of the four sheets containing an employee signature. Although Crutcher disputed his signature on one of the timesheets, Crutcher did not dispute the information contained in any of the sheets. He also confirmed that the first two pay periods covered the time that he was training in Texas and he would not have had overtime during those periods.

Counsel for the Acting General Counsel asserts that Respondent did not produce payroll records to support its contention that Crutcher earned less overtime than the 6 to 8 monthly hours that he estimated. Counsel cites the Board's decision in *PPG Industries*, 338 NLRB 559, 561 (2002), and *Filene's Basement Store*, 299 NLRB 183, 204 (1990), for the proposition that a respondent's failure to produce evidence that is within its control allows an inference that such evidence, if produced, would not be favorable to it. Certainly, there were other records that Respondent could have provided to show that Crutcher worked only 13.4 hours of overtime during his 12-week employment at Respondent's facility. Respondent could have produced the daily timesheets that were submitted by Crutcher during this period of time or Respondent could have produced payroll records showing the actual pay to Crutcher for each pay period during the 12-week period. While the records that Respondent provided may not have been the best records to show overtime worked, they were nevertheless the only documentary evidence produced by any party to show overtime. Neither Crutcher nor the Acting General Counsel presented any pay stubs to dispute the information provided in Respondent's records. When confronted with Respondent's records, Crutcher acknowledged that he had no basis to dispute the information. There is no allegation that Respondent failed to provide Crutcher with accurate pay stubs during his period of employment and it is reasonable that such records were still in his possession. Accordingly, inasmuch as Crutcher does not dispute Respondent's records and there are no documents to show otherwise, it is reasonable to conclude that Crutcher worked no more than the 13.4 hours of overtime as shown by Respondent's records and the net backpay amount should be modified accordingly for the total backpay period.

B. Reinstatement

Respondent argues that there are two reasons that Crutcher cannot be reinstated to his former job at the Fort Rucker facility. First of all, Respondent asserts that Crutcher cannot perform the duties of an aircraft mechanic because he cannot lawfully drive. Respondent submits that Crutcher has not had a valid driver's license since March 2010 and will not regain his license until March 2011. In the posthearing brief, the Respondent maintains that Respondent would be exposed to significant loss of productivity if Respondent is forced to assign another employee to assist Crutcher in the performance of his duties and to assume the

driving responsibilities when a driver is needed. I don't find Respondent's argument to be persuasive. The record reflects that Crutcher worked from March 15, 2010 until his discharge on April 26, 2010 without the benefit of a driver's license. There is nothing to indicate that his lack of a driver's license upon reinstatement would be any different than when he was previously employed. Additionally, as of the date of this decision, there is relatively little time remaining for Crutcher's driving restriction. As of March 15, 2011, this issue will be moot. Accordingly, I do not find that the absence of a valid driver's license prior to March 15, 2011 is sufficient to preclude Crutcher's reinstatement if ordered by the Board.

Respondent's second basis for precluding Crutcher's reinstatement is best described as after-acquired evidence. It is this second basis which is a far more complex issue for analysis. Respondent presented the testimony of Green concerning Crutcher's comments about Etheredge. Respondent does not assert that this information was known to Brown or DeLucca at the time the decision was made to terminate Crutcher. The information only became known to Respondent after Crutcher's discharge. Green testified that prior to Crutcher's termination, he had occasion to walk nearby Crutcher and Tatum and to overhear a part of their conversation. Green testified that he heard Crutcher used a derogatory term in relation to Etheredge. Green understood the term to refer to Etheredge's sexual preference. Green admonished Crutcher for using the term and left the area. As indicated above, I found Green to be a credible witness and I credit his testimony. I do not find, however, that this one isolated comment is sufficient to preclude Crutcher's reinstatement if the Board so orders. I think that it is reflective of the animosity that Crutcher had toward Etheredge, however, this animosity is already apparent in Crutcher's conversation with Barber, Tatum, and Gibson. While it might arguably be indicative of the hostile work environment; the concerns of which triggered Crutcher's discharge, it was not a factor relied upon by the Respondent for the discharge and it is insufficient by itself to preclude Crutcher's reinstatement.

Etheredge testified that on a number of occasions, Crutcher asked her explicit questions about her sexual practices and preferences. She recalled that while working with Crutcher, Crutcher gave her detailed descriptions of his sexual exploits. In her testimony, she described a very explicit story that Crutcher told her about a sexual experience. She recalled that at one point, she told him that she had enough of his stories and she told him that she did not want to know about his sex life or what he did outside work.

Counsel for Respondent asked Etheredge how she would feel if Crutcher were reinstated to work on second shift with her. Etheredge responded:

I would call Ms. DeLucca and ask her the same question: how much money do I need to write a check for? Who do I need to mail it to to get out of this contract, because my life is more valuable than the point that I'm at right now.

Etheredge went on to explain how the recent stress had affected her health and her medical condition. Etheredge's testimony was probably the most compelling and persuasive testimony presented during this hearing. As she testified, she became tearful and observably distressed. With demonstrable emotion, Etheredge testified:

I don't need the stress of this job. I'm not going to let this job kill me, and I'm not going to let Jeremy Crutcher kill me. If I need to write a check right now for \$15,000 to get out of this contract and make this crap go away, I'll do it.

5 Respondent argues that now that it has knowledge of Crutcher's misconduct, permitting him to return and again engage in such offensive conduct would subject the Respondent to massive liability in the event of repetitive conduct. Citing the eleventh circuit decision in *Reeves v. C.H. Robinson Worldwide, Inc.*,⁸ Respondent argues that "gender-specific, derogatory comments made about women on account of their sex" constitutes sexual
10 harassment for which an employer may be liable.

As I have discussed above, I find that Respondent met its burden of demonstrating that it would have terminated Crutcher in the absence of any union activity. In large part, Respondent met this burden by demonstrating that there were valid concerns about potential
15 liability and safety issues resulting from Crutcher's conduct toward Etheredge. Essentially, Respondent defended its discharge of Crutcher on the concerns relating to a hostile work environment. I have not, however, made a finding that there was a hostile work environment nor could I make such a finding. To sustain Respondent's argument that Crutcher cannot be
20 reinstated because of after-acquired evidence of Crutcher's misconduct would be tantamount to my finding a Title VII violation or to my finding that there was a hostile work environment because of Crutcher's presence and conduct. Such a finding would be inappropriate for me to make and beyond the parameters of this proceeding. Thus, I do not find a basis to preclude Crutcher's reinstatement should the Board fail to affirm my recommendation.

25 **CONCLUSIONS OF LAW**

1. Respondent Sikorsky Support Service, Inc. d/b/a Sikorsky Aerospace Maintenance is an employer engaged in commerce within the meaning of Section 2(6) and (7)
30 of the Act.

2. International Association of Machinists and Aerospace Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting grievances from its employees with the promise or implied
35 promise to fix the grievances, Respondent has violated Section 8(a)(1) of the Act.

4. By interrogating its employees regarding their activities on behalf of and/or sentiments toward the Union, Respondent violated Section 8(a)(1) of the Act.

40 5. By interrogating employees regarding other employees' activities on behalf of and/or sentiments toward the Union, Respondent violated Section 8(a)(1) of the Act.

6. By promising employees unspecified benefits if they would vote against selecting the Union as their bargaining representative, Respondent violated Section 8(a)(1) of

⁸ 594 F.3d 798, 813 (11th Cir. 2010).

the Act.

7. By issuing a written job description and job duties for the bargaining unit position of aircraft mechanic without notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct, Respondent violated Section 8(a)(5) and (1) of the Act.

8. Respondent has not violated the Act in any other way.⁹

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend that the Respondent be ordered to rescind the job description and job duties that were issued on May 3, 2010.

The Respondent shall post an appropriate notice, as described in the appendix, attached. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it or defacing its contents.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Sikorsky Support Service, Inc. d/b/a/ Sikorsky Aerospace Maintenance, Fort Rucker, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their activities on behalf of and/or sentiments toward the Union.

(b) Interrogating employees regarding other employees' activities on behalf of and/or sentiments toward the Union.

⁹ During the course of the hearing, counsel for the Acting General Counsel elicited testimony from various witnesses concerning conduct that was not alleged to be violative in the complaint. Although counsel argues in the posthearing brief that such conduct demonstrates animus, there was no motion to amend the complaint to include such conduct as violative and the testimony was offered for background. Inasmuch as the conduct is not included in the complaint or alleged to be violative, I have made no findings in this regard.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Soliciting grievances from the employees with the promise or implied promise to fix the grievances.

5 (d) Promising employees unspecified benefits if they vote against selecting the Union as their collective bargaining representative.

10 (e) Making unilateral changes in bargaining unit employees' terms and conditions of employment without providing notice of the proposed changes to the Union and giving the Union adequate opportunity to bargain about those changes.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

15 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the May 3, 2010 job description.

20 (b) On request, bargain collectively with International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of the employees in the appropriate bargaining unit described below:

25 All aircraft mechanics and quality assurance employees employed at Cairns Army Airfield, Fort Rucker, Alabama, excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

30 (c) Within 14 days after service by the Region, post at its Fort Rucker, Alabama facility copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the
35 Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2010.

40 (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., January 24, 2011.

5

Margaret G. Brakebusch
Administrative Law Judge

10

APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated Federal labor law and has
ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15 Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

20 **WE WILL NOT** coercively question you about your union support or activities.

WE WILL NOT coercively question you about the union support or activities of other employees.

25 **WE WILL NOT** solicit grievances from you with the promise to fix the grievances in order
to interfere with, coerce, or restrain you in the exercise of your rights under the National
Labor Relations Act.

30 **WE WILL NOT** promise you unspecified benefits if you vote against selecting the Union as
your collective-bargaining representative.

WE WILL NOT unilaterally change your terms and conditions of employment without
notifying your bargaining representative and giving your representative a chance to bargain
about those changes.

35 **WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the
exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the May 3, 2010 job description.

40 **WE WILL**, on request, bargain with the Union concerning the terms and conditions of
employment for our employees in the bargaining unit:

45 All aircraft mechanics and quality assurance employees employed at Cairns
Army Airfield, Fort Rucker, Alabama, excluding all office clerical employees,
professional employees, managerial employees, guards and supervisors as
defined by the Act.

**SIKORSKY SUPPORT SERVICE, INC. d/b/a
SIKORSKY AEROSPACE MAINTENANCE**

(Employer)

Dated _____ By _____
(Representative) (Title)

5 The National Labor Relations Board is an independent Federal agency created in 1935 to
enforce the National Labor Relations Act. It conducts secret-ballot elections to determine
whether employees want union representation and it investigates and remedies unfair labor
practices by employers and unions. To find out more about your rights under the Act and
10 how to file a charge or election petition, you may speak confidentially to any agent with the
Board’s Regional office set forth below. You may also obtain information from the Board’s
website: www.nlr.gov.

7th Floor, 600 South Maestri Place, New Orleans, LA 70130-3413
(504) 589-6361, Hours 9:00 a.m. to 5:30 p.m.

15

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY
20 ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR
COMPLIANCE WITH ITS PROVISION MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE’S COMPLIANCE OFFICER, (504) 589-6389.