# United States Court of Appeals

*for the*

# Fifth Circuit

Case No. 19-60716

MARK ESTABROOK,

*Petitioner*,

v.

ADMINISTRATIVE REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

*Respondent.*

FEDERAL EXPRESS CORPORATION,

*Intervenor*.

ON APPEAL FROM THE DEPARTMENT OF LABOR (EXCEPT OSHA)
IN CASE NO. 17-0047

## BRIEF FOR PETITIONER

LEE R. A. SEHAM
SEHAM SEHAM MELTZ
& PETERSEN, LLP
*Attorneys for Petitioner*
199 Main Street, 7th Floor
White Plains, New York 10601
(914) 997-1346

# CERTIFICATE OF INTERESTED PERSONS

**Case No. 19-60716**

**MARK ESTABROOK,**
**Petitioner**

**v.**

**ADMINISTRATIVE REVIEW BOARD,**
**UNITED STATES DEPARTMENT OF LABOR,**
**Respondent,**

**FEDERAL EXPRESS CORPORATION,**
**Intervenor.**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Mark Estabrook (Petitioner)
2. Federal Express Corporation (Intervenor)
3. FedEx Corporation (Parent Company of Intervenor)
4. Lee Seham (Counsel for Petitioner Mark Estabrook)
5. Stanley J. Silverstone (Counsel for Petitioner Mark Estabrook)
6. Seham, Seham, Meltz & Petersen, LLP (Counsel for Petitioner Mark Estabrook)
7. Daniel Riederer, Esq. (Counsel for Intervenor Federal Express Corporation)

8. Phil Tadlock, Esq. (Counsel for Intervenor Federal Express Corporation)

9. Shelley Trautman (Counsel for Respondent)

Dated: December 16, 2019

*/s/ Lee Seham*

Lee Seham
Attorney of Record for
Petitioner Mark Estabrook

## REQUEST FOR ORAL ARGUMENT

Petitioner, Mark Estabrook, requests oral argument in this case. This appeal raises significant issues relating to the interpretation of the AIR 21 whistleblower law and its role in protecting aviation security, and the weaponization of psychiatric evaluation as a means of retaliating against employees engaging in protected activity. Petitioner believes that the Court's consideration of these issues would be aided by oral argument.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes and Regulations**



**Miscellaneous**

## JURISDICTIONAL STATEMENT

The Secretary of Labor had subject-matter jurisdiction over this case, in which Petitioner Mark Estabrook claims that Respondent Federal Express Corporation ("FedEx") retaliated against him because of his protected activity, pursuant to the employee whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b) ("AIR 21"). This Court has jurisdiction to review the final order issued by the Secretary of Labor pursuant to 49 U.S.C. § 42121(b)(4). Pursuant to 49 U.S.C. § 42121(b)(4)(A), this Court has jurisdiction because Petitioner Estabrook resided in this circuit on the dates of the alleged violations of AIR 21. The Secretary issued his final order on August 8, 2019, and Estabrook filed a timely petition for review of the order on September 24, 2019.

## STATEMENT OF ISSUES

1. Was the decision of the Department of Labor Administrative Review Board ("ARB" or "Board") that Estabrook's refusal to fly in hazardous weather conditions and the filing of his OSHA complaint in April 2013 were not contributing factors to FedEx's decisions to ground him or to refer him to a company-mandated medical examination arbitrary, capricious, an abuse of discretion, and/or contrary to law, or unsupported by substantial evidence?

2. Was the decision of the ARB that Estabrook's discussion of his security concerns about FedEx's operations did not constitute protected activity arbitrary, capricious, an abuse of discretion, and/or contrary to law, or unsupported by substantial evidence?

3. Did the ARB err in affirming FedEx's assertion of attorney-client privilege over emails discussing the rationale for FedEx's decision to ground Estabrook?

## STATEMENT OF THE CASE

### A. Procedural History

Mark Estabrook, a former pilot for Federal Express Corporation ("FedEx"), petitions for review of an ARB decision, dated August 8, 2019, that upholds an Administrative Law Judge's ("ALJ") decision, dated May 16, 2017, that Estabrook's discussion of security concerns regarding FedEx's operations did not constitute protected activity, and that Estabrook failed to establish that his protected activity was a contributing factor to the adverse action.

Estabrook filed two complaints against FedEx under AIR 21 with the Department of Labor's Office of Occupational Health and Safety Administration ("OSHA"). The first was filed on April 29, 2013, and withdrawn on May 2, 2013. The second complaint was filed on October 3, 2013, based on FedEx's discriminatory treatment and retaliatory discipline in response to Estabrook's protected activity. OSHA issued the Secretary's Findings on July 15, 2014, and dismissed the complaint. Estabrook appealed the Secretary's Findings on August 12, 2014, and the case was referred to an ALJ.

On April 21, 2016, both parties filed Motions for Summary Decision. By order dated May 9, 2016, the ALJ granted in part and denied in part Estabrook's Motion for Summary Decision and denied FedEx's Motion for Summary Decision (hereinafter "MSD Order"). The ALJ found that Estabrook was entitled to

judgment as a matter of law that he (i) "engaged in protected activity when he communicated his concerns to [FedEx] regarding his decision to delay the Laredo flight, and also when he filed the April 2013 AIR 21 complaint" (MSD Order at 17); and (ii) "was subjected to adverse actions when originally placed on NOQ ["not operationally qualified"] status, when NOQ status was reinstated after the August 9, 2013 meeting, and when he was compelled to submit to a 15D [medical] evaluation." (*Id*. at 22). Therefore, Estabrook's Motion for Summary Decision was granted as to these elements of his claim.

A hearing was held on June 6-8, 2016 in Memphis, Tennessee. After considering the evidence presented at the hearing and the parties' written briefs, the ALJ issued a decision and order on May 16, 2017 (hereinafter "ALJ Decision"). Despite finding FedEx's actions "deeply troubling," the ALJ dismissed Estabrook's complaint, holding that his discussion of security concerns regarding FedEx's operations did not constitute protected activity, and that he failed to establish that his protected activity was a contributing factor to the adverse action.

Estabrook filed a timely appeal with the ARB. On August 8, 2019, the ARB (i) affirmed the ALJ's findings that Estabrook engaged in protected activity when he refused to fly and filed a complaint with OSHA; (ii) affirmed the ALJ's findings that Estabrook suffered an adverse action when FedEx grounded him and directed

him to undergo a medical evaluation; (iii) affirmed the ALJ's findings that FedEx did not retaliate against Estabrook for engaging in protected activity when it grounded him and directed him to undergo a medical evaluation (hereinafter "ARB Decision").[1] Estabrook filed a timely petition for review of the ARB's decision in this Court.

B. Statement of Facts

1. Laredo-Related Protected Activity and the August 5 NOQ Grounding

Petitioner Mark Estabrook engaged in three instances of "protected activity" related to aviation safety issues. The first instance of protected activity involved Estabrook's communication of his concerns to FedEx regarding his refusal to fly into hazardous weather conditions, which required the delay of a Laredo, Texas departure on April 10, 2013. The second was Estabrook's initiation of an AIR 21 proceeding on April 29, 2013, which was in response to a retaliatory disciplinary investigation by FedEx. (MSD Order at 15-17, 25). Estabrook subsequently withdrew the AIR 21 action, on May 2, 2013, after FedEx terminated its disciplinary proceedings and personally advised Captain Rob Fisher, the Assistant System Chief Pilot and Estabrook's direct supervisor, of this withdrawal. (Estabrook, Tr. 85; RX 12).[2]

[1] The MSD Order, ALJ Decision, and ARB Decision are contained in Petitioner's Record Excerpts.
[2] The Department of Labor has filed a certified list of documents in lieu of filing the entire record, and Petitioner will file the portions of the record relied upon by the parties pursuant to Fifth Circuit

It was System Chief Pilot Captain William McDonald who directed Fleet Captain Rob Fisher to conduct the disciplinary investigation. (Fisher, Tr. 341; McDonald, Tr. 680; CX 7). FedEx Labor Relations Counsel Robb Tice participated in the investigation of the Laredo departure and consulted with management representatives Fisher and McDonald regarding the Laredo-related AIR 21 complaint. (CX 10, items 2-5; Fisher, Tr. 342-344).

The Laredo investigation was prompted by an email, dated April 10, 2013, from FedEx Duty Officer Mark Crook who faulted Estabrook for taking it "upon himself to delay a flight without coordinating and coming to an agreement with the dispatcher." Crook condemned Captain Estabrook for being the "sole source of weather" and for having "delayed the flight by that sole source of information." (CX 6; RX 8). Crook accused Estabrook of having been "directive" with Dispatcher Sherrie Hayslett and for telling her "how it was going to be." *Id*. The angry Crook sought action against Estabrook based on the captain's alleged disregard of a "system that runs by time not much slop." *Id.*

Notwithstanding Crook's allegations, the audiotaped conversation between Captain Estabrook and Dispatcher Hayslett reflects a cordial exchange, punctuated by friendly laughter, in which Hayslett – not Estabrook – first observed the

---

Rule 30.2. References to the transcript of the hearing held before the Administrative Law Judge are cited as Tr. at ____, and the exhibits submitted during the hearing are cited as "CX" (Petitioner's exhibits), "RX" (FedEx's exhibits), and "JX" (Joint exhibits).

necessity of a weather-related delay. (JX 1; RX 10 at 1-2). Far from being "directive," Estabrook gave Hayslett his cell phone number and requested an "update" with respect to any changes in conditions. *Id.* Far from being the "sole source" of weather, FedEx's internal documents reflect that Hayslett told the flight crew that they would have a WX – or weather-related delay. (RX 7 at 2). In fact, departure was not even a legal option, since the weather was so severe that Captain Estabrook was subject to an ATC gate hold, which confirms the mercenary nature of FedEx's pilot pushing. (Estabrook, Tr. 58-59, 65; Fisher, Tr. 357).

Crook's April 10 email emphatically denounces Captain Estabrook's supposed presumption in asserting his authority, as pilot-in-command, to invoke a weather-based delay. Although FedEx attempted to portray the carrier's concern as one based on the crew's determination to monitor the thunderstorms from the hotel, rather than the airport, this pretense is belied by the audiotaped conversation between Crook and Estabrook wherein Crook never questioned why the crew was still at the hotel, but only queried: "So what time are you planning to take off?" (RX 10 at 4). The cunning Crook later forwarded his Flight Duty Officer phone conversations with Estabrook to his non-recorded personal cell phone line which enabled him to exert coercive pressure by asserting that "everybody else is taking off" and "I am watching you very closely." (Estabrook, Tr. 73-74; Crook, Tr. 277, 292-93). When Sherrie Hayslett reported to the GOC Manager that Estabrook felt

he was being "pushed to leave," Crook's boss responded: "It's his damn job." (RX 10 at 8).[3]

Fleet Captain Fisher and System Chief Pilot McDonald knew all of this. Attached to Crook's April 10 email were the recorded conversations that confirmed Hayslett's raising of the weather issue, Estabrook's cordiality and request for updates, and Crook's focus on the question of an on-time takeoff, rather than the contrived issue of the crew's location at the airport hotel. In short, several weeks in advance of the investigative hearing, Fisher and McDonald were in possession of all the recorded evidence that cleared Estabrook of any misconduct. (Fisher, Tr. 350, 354; McDonald, Tr. 683).[4]

Nevertheless, McDonald directed Fisher to summon Estabrook to Memphis for a hearing identified by FedEx in a lawyer-vetted email as part of a "disciplinary" process. (Fisher, Tr. 346; CX 8). The Fisher email was in response to a letter, from Estabrook's legal counsel, Alan Armstrong, dated April 29, 2013, advising Fisher of the filing of an AIR 21 complaint as a result of FedEx's Laredo-

[3] FedEx not only conceded that Captain Estabrook expressed objections to being pressured by management to fly into hazardous weather conditions, but also that Estabrook had a good faith belief that he was being subjected to such pressure. (Fisher, Tr. 356-60). Fisher promised Estabrook that he would counsel Crook regarding his misconduct, but, in fact, never did. (Estabrook, Tr. 90; Fisher, Tr. 316, 356-360).

[4] Significantly, the very use of these tapes to initiate a disciplinary investigative process reflects FedEx's discriminatory treatment of Estabrook in view of FedEx policy that these tapes not be used for disciplinary purposes. (Dunavant, Tr. 236).

related retaliatory actions. (CX 8 at 3). Fisher would later deny to an OSHA investigator that he had any knowledge of the Laredo-related AIR 21 filing despite the presence of FedEx counsel during the OSHA investigatory meeting. (Fisher, Tr. 402-403; CX 23 at 3: "I did not know Mark filed a whistleblower complaint until you just told me.").

At the close of the investigatory hearing on May 1, 2013, Fisher advised Estabrook that based on his review of the tapes, which had been in his possession for three weeks, no disciplinary action would be taken. In light of this development, Estabrook advised Fisher that he would withdraw his AIR 21 complaint. (Estabrook, Tr. 85; Fisher, Tr. 315). Fisher responded by confessing to Estabrook that Fisher's own boss, System Chief Pilot McDonald, was disappointed that no disciplinary action would be taken against Estabrook. (Estabrook, Tr. 84). In sum, McDonald was left frustrated.

McDonald, however, perceived an opportunity, just three months later, to pursue adverse action against Captain Estabrook based on his Laredo-related protected activity. McDonald alleged that, under the title "Mayday Mark," Estabrook may have been communicating with fellow pilots on an internet forum regarding the Laredo departure. (McDonald, Tr. 699-701). McDonald directed FedEx labor counsel Tice to question Estabrook, at a meeting scheduled for August 9, 2013, for the purpose of determining whether Estabrook was Mayday Mark.

(McDonald, Tr. 701; Tice, Tr. 453-454, 485). According to Tice, McDonald never told him the reason for his interest in the identity of Mayday Mark, and McDonald admitted that he had discarded the Laredo-related evidence. (Tice, Tr. 436; McDonald, Tr. 700-701).

The fact that McDonald had a disciplinary objective in mind is confirmed by his own testimony in which he asserted that he considered the Laredo-related postings to constitute a potential violation of FedEx policy. (McDonald, Tr. 702-703). Also indicative of FedEx's disciplinary objective entering the August 9 meeting was its determination to bring its labor attorney. Heedless of the fact that no one had advised Estabrook that he was going to be subject to a disciplinary investigation, Tice expressed "surprise" that the unsuspecting Captain Estabrook declined union representation for the August 9 meeting. (CX 20).[5] McDonald told Estabrook that the August 9 meeting was for the purpose of discussing an email that Estabrook had sent to him, dated August 4, 2013. (CX 14).

In the August 4 email to McDonald, Estabrook had requested a call from FedEx CEO Fred Smith to discuss security concerns, unrelated to the flight department, that he had previously raised with FedEx Vice President of Corporate Security William Hendrikson in his capacity as the pilot union's Security

[5] Tice conceded that the primary reason for having a union representative present at a pilot-management meeting is to provide representation in the context of a disciplinary investigation. (Tice, Tr. 341, 419-420).

Committee Chairman.[6] McDonald responded by ordering that Estabrook be placed on an indefinite "not operationally qualified" ("NOQ") status. (McDonald, Tr. 642-643; CX 18).

In its interrogatory responses, FedEx first represented that the indefinite NOQ grounding of Captain Estabrook, on August 5, 2013, was for the purpose of scheduling him for a mandatory health examination pursuant to Section 15.D of the collective bargaining agreement. (CX 19 at C-92). FedEx subsequently disavowed this representation in a supplemental interrogatory response in which it asserted that the real reason for the August 5 NOQ grounding was to "facilitate the scheduling of a meeting [Estabrook] requested." *Id*. As FedEx disingenuously explained, the objective of the NOQ grounding was to "clear his work schedule and prevent the scheduling of conflicting activities." *Id*.

On its face, the purported rationale for the August 5 NOQ designation is implausible. In fact, Captain Estabrook never requested a meeting with management – his August 4 email requested a telephone call. Moreover, when FedEx insisted on grounding him for a meeting, Captain Estabrook plaintively responded that a 15-minute teleconference could address the issue and expressed

[6] The August 4 email constituted protected activity in that it communicated to FedEx that Estabrook was "about to" engage in protected activity. 49 U.S.C. §42121(a)(1).

his regret that he was being removed from a much-desired trip to Panama. (RX 14 at 1; Estabrook, Tr. 57).

FedEx typically utilizes the NOQ to ground a pilot, and suspend his jump seat privileges, due to a pilot health/training issue or to conduct a disciplinary investigation. (Estabrook, Tr. 44-45; Fisher, Tr. 455-456; McDonald, Tr. 642). Moreover, FedEx placed Estabrook not just on an NOQ, but on an NOQ UFN (Until Further Notice) thereby indefinitely grounding him and suspending his travel privileges. (CX 18; McDonald, Tr. 690; CX 30, Response No. 17 at 6).

Attorney Tice agreed that the "standard reason" for a jumpseat suspension is that the subject pilot is under investigation for a serious matter. (Tr. 456). Further evidencing FedEx's hostile objective at this juncture was its determination to staff the upcoming August 9 meeting with FedEx labor attorney Tice. As Tice testified, the "main occasions" for his legal presence at a pilot meeting would be for disciplinary investigations. (Tr. 427-28). In short, the August 5 NOQ designation, combined with attorney Tice's participation at the August 9 meeting, confirms that Estabrook walked into the August 9 meeting with a target on his back.[7]

[7] The scheduling of a meeting could have been arranged via an RMG (Remove for Management) designation, the designation "typically" used by FedEx to remove a pilot from a scheduled trip to facilitate a meeting. Indeed, Fisher did not know why the RMG designation was not used for Estabrook's August 9 meeting. (Fisher, Tr. 363-365).

At first, FedEx's trial witnesses toed the company line that the sole purpose of the August 5 NOQ was to "facilitate" a meeting. In furtherance of this obfuscation, FedEx was greatly assisted by its successful effort to withhold from evidence the flurry of emails discussing the rationale for the August 5 NOQ on the basis of attorney-client privilege.

The lie was exposed at trial, however, when attorney Tice blurted out, over the fervent objections of FedEx counsel, that FedEx's NOQ designation was, in fact, for the purpose of grounding Captain Estabrook and that the directive emanated from Vice President of Flight Operations James Bowman, whose authority exceeded that of any other FedEx witness. (Tice, Tr. 457-58, 476-77).[8] Bowman supposedly wanted Estabrook grounded and stripped of his jumpseat privileges due to the content of his August 4 email. (Tice, Tr. 458).

Tice's testimony confirmed the aggravated falsity of FedEx's interrogatory response that identified the participants in the August 5 NOQ decision as Fisher, Managing Director of Aviation Security Todd Ondra, Tice, and McDonald. (CX 22 at C-123-24). The sworn testimony of Fisher, Ondra and Tice confirmed the untruthfulness of FedEx's representation because, in fact, none of these three men

[8] Although the ALJ permitted Tice's testimony, he declined to order the disclosure of the email communications underlying Tice's testimony. (Tr. 523). As argued in Section III, Estabrook respectfully submits that the ALJ's evidentiary ruling, as affirmed by the ARB, was in error.

participated in the August 5 NOQ determination. (Fisher, Tr. 414; Tice, Tr. 429, 459, 478; Ondra, Tr. 564-68). According to the trial testimony of McDonald, he made the August 5 NOQ decision "alone." (McDonald, Tr. 659, 690-691).

But FedEx also falsely excluded from its interrogatory responses the participation of the Vice President of Flight Operations James Bowman – McDonald's boss – in the NOQ decision, until Tice let it slip on the second day of trial, thereby exposing a lie, of over two years' duration, imposed on Estabrook's counsel, OSHA, and the ALJ.

With FedEx's credibility in tatters, the thesis that the August 5 NOQ grounding was merely for the purpose of facilitating a meeting to allow Estabrook to air his safety concerns collapsed. Indeed, when Estabrook had completed his admittedly rational presentation on August 9 concerning how FedEx's reckless dissemination of intelligence data incentivized terrorist activity, FedEx's representatives did not ask him a single question nor did they ever get back to him about the issues he had raised. (Estabrook, Tr. 93-94; Ondra, Tr. 587-88).

As confirmed by Ondra's notes from the August 9 meeting, the *only matter* discussed during FedEx's pre-meeting caucus was how to interrogate Captain Estabrook regarding his purported Mayday Mark postings. (Tr. 486-87; JX 3).

2. Protected Activity of August 9, 2013

The third instance of protected activity concerned Estabrook's communication to FedEx, on August 9, 2013, that FedEx's cargo practices encourage and incentivize the introduction of destructive devices into FedEx aircraft for terrorist purposes.

Prior to 2013, Captain Estabrook had a history of deep involvement in safety issues at FedEx and served as the Security Chairman for the FedEx Pilots Association (FPA), the certified labor representative of the FedEx pilots during Estabrook's service in this position from 2001-2002. (Estabrook, Tr. 38-47; CX 15; CX 16; CX 17). Of particular concern to Estabrook was FedEx's publication of both package and aircraft real-time tracking data, which he considered to compromise the carrier's obligation to deter the utilization of cargo aircraft as a means of terrorist attack. (Estabrook, Tr. 40-42, 45-46; CX 14 (package tracking); CX 15, item 15 (aircraft tracking)). FedEx's Senior Vice President of Air and Ground Freight Services, William Logue, rejected Estabrook's safety concerns on the grounds that "security is not going to trump marketing." (Estabrook, Tr. 42).

Frustrated at every turn, Captain Estabrook discontinued his efforts to promote FedEx's compliance with safe cargo practices until he obtained various media reports during the night of August 3-4, 2013, which confirmed the immediacy of the threat to safety posed by FedEx's practices. (Estabrook, Tr. 35-

39, 50-51, 52-53). Al-Qaeda in the Arabian Peninsula (AQAP) had developed a strategy of planting explosives in packages carried by US-flag cargo carriers and in September, 2010, American intelligence officials had intercepted packages shipped to Chicago that they considered to be part of a bombing test run. (CX 12). Moreover, The New York Times reported that al-Qaeda relied on the package tracking feature on the cargo carriers' websites to plan for the detonation of these devices in a manner that would create the greatest damage. The November 1, 2010 New York Times article, "Earlier Flight May Have Been Dry Run for Plotters," reported that the shipments' "hour-by-hour locations could be tracked by the sender on the shippers' Web sites…." (CX 12). Numerous other media sources had made similar reports.[9]

[9] *See, e.g.*, "*Bomb Plot Shows Key Role Played by Intelligence*," NY Times, Oct. 31, 2010, available at: http://www.nytimes.com/2010/11/01/world/01terror.html?_r=0&adxnnl=1&page=&adxnnlx=1389849214-YEL+UkmTOFcs5bnM5AhunA ("American and British authorities were leaning toward the conclusion that the packages were meant to detonate in midair, en route to their destinations in Chicago," and reporting statement by Congressman Ed Markey that: "It is time for the shipping industry and the business community to accept the reality that more needs to be done to secure cargo planes so that they cannot be turned into delivery systems for bombs targeting our country."); "*2010 Transatlantic Aircraft Bomb Plot*," available at: http://en.wikipedia.org/wiki/Cargo_planes_bomb_plot ("U.S. officials said that an analysis of the cellphone circuitry in the bombs suggested that the intent was to delay their mid-air detonations until U.S.-bound planes carrying them were close to landing in the U.S."); "*World Scrambles to Tighten Air Cargo Security*," Spiegel Online, Nov. 2, 2010, available at: http://www.spiegel.de/international/world/foiled-parcel-plot-world-scrambles-to-tighten-air-cargo-security-a-726746.html ("Officials suspect that the aim of the September shipment may have been to test how long it would take for the packages to reach their destination."); "*Parcel Bomb Set to Go Off Over the US*," The Telegraph, Nov. 10, 2010, available at: http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8124582/Parcel-bomb-set-to-go-off-over-the-US-police-say.html ("Ensuring that [ink cartridge bombs] exploded over land would cause more casualties on the ground and US intelligence officers believe that an earlier parcel

Al-Qaeda's magazine, *Inspire*, explained in its November 2010 edition that FedEx was in its cross hairs for the indefinite future:

> We have succeeded in bringing down the UPS plane [on September 3, 2010] but because the enemy's media did not attribute the operation to us we have remained silent so we may repeat the operation. This time we sent two explosive packages, one was sent through UPS, and the other through FedEx.
>
> * * *
>
> [A]ir freight is a multi-billion dollar industry. FedEx alone flies a fleet of 600 aircraft and ships an average of four million packages per day. It is a worldwide industry. For the trade between North America and Europe air cargo is indispensable ….

(CX 14 at 4, 7). Al-Qaeda explained that it had "singled out the two U.S. air freight companies: FedEx and UPS for our dual operation." (*Id*.).

It was in this context that Captain Estabrook resumed his efforts to make FedEx fulfill its legal obligation to prevent and deter the introduction of explosive devices into cargo aircraft. Having already exhausted the hierarchy of FedEx executives in 2001 and 2002, Estabrook felt it was time to appeal to the Chairman

---

sent to an Islamic bookshop in Chicago was planned as a dry run to get the timing right."); "*Earlier Flight May Have Been Dry Run for Plotters*," NY Times, Nov. 1, 2010, available at: http://www.nytimes.com/2010/11/02/world/02terror.html; "*U.S. Feared Parcel Bomb Plot Was Coming*," ABC News, Nov. 1, 2010, available at: http://abcnews.go.com/Blotter/us-feared-mail-bomb-plot-coming-september-dry/story?id=12025563 ("The dry run is always important to al Qaeda," said Dick Clarke, a former White House counterterrorism official and now an ABC News consultant. "In this case they wanted to follow the packages using the tracking system to know exactly when they got to a point, how long the timer had to be set for, so the bomb would go off at the right point, which presumably was over Chicago.").

and CEO of FedEx Corporation. (Estabrook, Tr. 36, 47). By email dated August 4, 2013, Estabrook sought a teleconference with FedEx CEO Fred Smith to discuss the security issues that he had previously raised in his capacity as the pilot union's Security Committee Chairman. (Estabrook, Tr. 43, RX 13). As previously discussed, McDonald's immediate response was to ground Estabrook and bar him from FedEx aircraft for an indefinite period of time.

The FedEx representatives attending the August 9 meeting were Fleet Captain Rob Fisher, Labor Relations Counsel Robb Tice, and Managing Director of Aviation and Regulatory Security Todd Ondra.

During the August 9 meeting, Captain Estabrook discussed the FedEx-specific October, 2010 bomb plots and how they confirmed the threat he had previously identified to the Company in the post 9/11 period. (Estabrook, Tr. 89-91). Estabrook urged FedEx to restrict the release of aircraft and package data to the initial pick-up and final delivery of the package because the dissemination of anything beyond that information incentivizes terrorists to introduce explosives into FedEx aircraft. (Estabrook, Tr. 92, 96-97, 99; Ondra, Tr. 588; JX 4; CX 31 at 1). Fisher agreed that Estabrook admonished FedEx that "in terms of FedEx's dissemination of tracking information, the Company was not doing enough to deter terrorists from utilizing FedEx aircraft as a potential weapon." (Fisher, Tr. 362-

67). FedEx's representatives made no response to Captain Estabrook's expressed concerns. (Estabrook, Tr. 93-94).

Instead, at the request of McDonald, attorney Tice posed questions to Captain Estabrook for the purpose of determining whether Estabrook had placed postings on an internet forum under the name of Mayday Mark. (Tice, Tr. 453; Estabrook, Tr., 94). When unable to establish the Mayday Mark connection, Tice hung his head in disappointment – Estabrook's connection to the Laredo postings could not be established. (Estabrook, Tr. 95). Immediately thereafter, Fisher reinstated Estabrook to flight duty. (*Id*.)

Nevertheless, later that evening, Fisher called Estabrook to tell him that he was being placed back on NOQ status and directed him to undergo a mandatory psychiatric examination pursuant to Section 15.D of the collective bargaining agreement. (Estabrook, Tr. 98-99). The only rationale identified by Fisher for the company's actions was that Estabrook "knew too much." (Estabrook, Tr. 113; Fisher, Tr. 396). The ALJ held that both the August 9 reinstatement of NOQ status, and the subsequent 15.D directive, constituted adverse actions under AIR 21 (MSD Order at 20-22, 25), and these findings were upheld by the ARB. (ARB Decision at 10-11).

Fisher issued a written order dated August 16, 2013, ordering Estabrook to submit to a 15.D examination, and stating that he would be subject to "disciplinary

action" if he failed to comply. (JX 5). As Estabrook's direct supervisor, Fisher made an independent determination to issue the 15.D directive based, in part, on Estabrook's comments relating to FedEx's publication of live tracking information and al-Qaeda. (Fisher Tr. 392-400; RX 15).

Section 15.D of the pilots' collective bargaining agreement (CBA) restricts the decision to refer a pilot to a company-mandated medical examination to the VP of Flight Operations, the System Chief Pilot, or a Regional Chief Pilot, and further requires that the decision-maker have a "reasonable basis" for the referral. (JX 6 at 5). FedEx directed its aeromedical advisor, Dr. Thomas Bettes, to send Estabrook for a psychiatric examination instead of permitting Dr. Bettes to make an independent evaluation. (Estabrook, Tr. 109; Declaration of Dr. Thomas Bettes in Support of Estabrook's Motion for Summary Judgment at ¶ 4). When Estabrook asked Dr. Bettes what the reasonable basis for the mandatory psychiatric evaluation was, Dr. Bettes answered, "I don't know." (Estabrook, Tr. 109).

Despite repeated demands from Estabrook's legal counsel, FedEx declined to provide him with the "reasonable basis" for the referral in defiance of its own past practice. (CX 27 at 5; CX 29 at 1; Tice, Tr. 443-44). It was not until almost four months later, in the context of a position statement submitted to OSHA Investigator Jason Brush, that FedEx proffered its purported "reasonable basis" for the compulsory 15.D medical examination.

FedEx's position statement dated December 4, 2013, states three reasons for its adverse actions against Estabrook: (1) that Estabrook's August 4 email "cryptically requested that the Chairman and CEO of FedEx give him a call to discuss 'something related to 9-11,'" (2) that Captain Estabrook had asserted that "he had been chased all over Russia in his youth," and (3) he allegedly made "assertions" regarding the conversion of former FedEx hijacker Auburn Calloway to Islam and "relayed wholly unfounded suspicions that Calloway might be advising al-Qaeda." (RX 31 at 5; CX 32 at 5). FedEx effectively disavowed each of the above-stated rationales and/or the supposed factual predicate therefor. Moreover, McDonald and Fisher conceded that Captain Estabrook's protected activity contributed to the adverse actions taken against him.

McDonald testified that, immediately prior to his placement of Estabrook on NOQ status, he had targeted Captain Estabrook for an investigation of a probable violation of FedEx policy arising from internet postings related to the Laredo departure. (McDonald, Tr. 702-03). Fisher testified that his issuance of the 15.D directive, dated August 16, 2013, was based in part on Estabrook's statements at the August 9 meeting relating to al-Qaeda's potential exploitation of live tracking information released by FedEx. (RX 15; Fisher Tr. 392-400).

The trial record in this matter reflects not only discriminatory intent, but also a particularly reprehensible resort to Soviet-style psychiatric analysis as an

offensive tool. While Estabrook was eventually vindicated, it was only after months of torment and uncertainty. FedEx's weaponization of psychiatric analysis threatened not only Estabrook's job at FedEx, but any hope of employment throughout the entire aviation industry.[10] FedEx not only subverted Estabrook's status as an employee, but as a pilot and a man. Leveraged by the threat of termination if he failed to comply, Captain Estabrook was forced to allow a hostile psychiatrist to probe the most tender areas of a man's life and psyche. Estabrook described his four-month ordeal on NOQ in the following terms:

> It was terrible. It was the worst chapter of my life. I didn't know if I had a job. I didn't know if I could get another one. My legal expenses were going through the roof… I thought what they were doing was punitive. I thought they were trying to shut me up. They told me that I knew too much. I didn't think I was doing anything wrong. But they were trying to destroy me.

(Estabrook, Tr. 113). Moreover, FedEx knew every step of the way that they were making Captain Estabrook "upset" and subjecting him to a prolonged period of "anguish." (Fisher, Tr. 330; McDonald, Tr. 679).

The emotional stress continued even after Estabrook was vindicated, because FedEx's NOQ-designation forced him to miss his annual training

[10] *See, e.g.*, Kenny, K., Fotaki, M. & Scriver, S., *Mental Health as a Weapon: Whistleblower Retaliation and Normative Violence*, Journal of Business Ethics (2019) 160:801-815, at 801, available at https://doi.org/10.1007/s10551-018-3868-4 ("[O]rganizations position whistleblower subjects as mentally unstable and unreliable individuals, to undermine their claims.").

requirements and into a shortened up-or-out simulator evaluation conducted under a cloud of company hostility. (Estabrook, Tr. 45-46, 113-114).

## SUMMARY OF THE ARGUMENT

The first issue is whether Estabrook satisfied the contributing factor requirement under AIR 21. Agency determinations must be set aside when they are unsupported by substantial evidence. In this case, the ARB and ALJ violated the substantial evidence standard by failing to find that Estabrook's protected activity contributed to the adverse personnel action that he suffered. The ARB held that the ALJ's findings with respect to whether Estabrook's protected activities were contributing factors to the adverse action were supported by substantial evidence. However, both the ARB and ALJ failed to accord proper weight to the temporal proximity factor.

The AIR 21 regulations provide that temporal proximity between protected activity and an adverse personnel action normally will satisfy the remaining burden of making a *prima facie* showing of knowledge and causation. In this case, the temporal proximity between Estabrook's protected activity and the adverse action falls well within the bounds justifying an inference of causal connection. Estabrook engaged in protected activity with respect to the Laredo departure of April 10, 2013, and the related AIR 21 process from April 29 through May 2, 2013. On August 5, 2013, barely three months later, FedEx ordered Estabrook

placed on indefinite NOQ. The ALJ's decision, as affirmed by the ARB, finding no causal connection was unsupported by substantial evidence. In addition to temporal proximity, the ALJ and ARB also failed to consider the deluge of evidence demonstrating FedEx's shifting, false and perjurious rationales for its adverse actions.

Singling out a complainant who has engaged in protected activity for investigation of an unrelated incident supports a finding of a causal link between the protected activity and an adverse action. Here, Captain McDonald's determination, immediately prior to the August 5 NOQ designation, that Estabrook's suspected Laredo-related communications as "Mayday Mark" warranted investigation, confirms that Estabrook's protected activity was at the forefront of McDonald's mind. FedEx attorney Tice pursued this connection at the August 9 meeting. When the connection to Estabrook could not be proven, all further investigation of Mayday Mark's identity ceased, which is evidence that FedEx's stated reasons for the August 5 NOQ decision were pretextual.

Estabrook argued at trial and on appeal to the ARB that his communication to FedEx, on August 9, 2013, that FedEx's cargo practices encourage and incentivize the introduction of destructive devices into FedEx aircraft for terrorist purposes, constituted protected activity. Both the ARB and ALJ failed to conform with the substantial evidence standard in failing to find that the Laredo-related

protected activity at least contributed to FedEx's adverse actions of August 9, 2013.

The second issue is whether Estabrook's discussion of his security concerns about FedEx's operations constituted protected activity. The ALJ's decision, as affirmed by the ARB, errs by finding that Estabrook's August 9, 2013 communications to FedEx did not constitute protected activity. On that date, Estabrook provided information to FedEx that its cargo practices encourage and incentivize the introduction of destructive devices into FedEx aircraft for terrorist purposes. The ALJ found that Estabrook's security concerns did not constitute protected activity because his concerns "were not related to a reasonable belief of a violation of federal laws related to air carrier safety or security." However, FedEx is subject to a federal regulatory mandate requiring it to prevent and deter the unauthorized introduction of explosives into its aircraft, and Estabrook made a rational presentation that FedEx was not adequately deterring, but actually incentivizing, terrorist introduction of explosives into FedEx's aircraft by providing terrorists with the real-time tracking data – for aircraft and packages – that they coveted. Estabrook's August 9 communications fall squarely within the plain language of the federal regulatory mandate that FedEx must prevent and deter, and certainly not incentivize, the introduction of unauthorized explosives into its aircraft.

The ALJ, as affirmed by the ARB, made no effort to directly interpret the regulations. Instead, the ALJ determined that an agency's determination to not enforce the law in a certain manner renders Estabrook's understanding of the regulatory mandate *per se* unreasonable. The ALJ thereby abdicated his obligation to interpret the law. The ALJ's rationale that the FAA requires FedEx to transmit tracking information to it, and that FedEx cannot control the distribution of that information is flawed. There is no support in the record for the contention that FedEx is required to disclose its real-time package tracking data to the general public to the extent that it does on its business website. The ALJ's reliance on "evidence" that FedEx presented to conclude that the FAA requires the disclosure of flight tracking data constitutes yet another abdication of the ALJ's adjudicatory obligation. The ALJ decision is also incorrect with respect to FedEx's inability to control the distribution of its flight tracking data. While the FAA requires the transmission to the agency of Aircraft Situation Display to Industry data (ASDI) through each aircraft's Automatic Dependent Surveillance Broadcast (ADS-B) system, the issue of further data dissemination to the general public is completely in the hands of the carrier. The ALJ also erred by delegating his legal analysis, in part, to FedEx Security Manager Todd Ondra who "testified" that FedEx was not violating the law. Estabrook's belief that FedEx was failing to fulfill its duties under federal law was objectively reasonable. The policy underlying AIR 21 will

be severely compromised if Estabrook's August 9 communications relating to FedEx's regulatory obligation to prevent and deter terrorist activity are found to be unprotected.

The third issue is whether the ARB and ALJ correctly ruled on Estabrook's attorney-client privilege argument involving the testimony of FedEx attorney Tice. On cross-examination, Tice testified about the reason for the August 5 NOQ, and stated that an email from FedEx VP Bowman questioned whether Estabrook should have jumpseat privileges. The ALJ ruled, and the ARB affirmed, that the Bowman email was either attorney-client privileged or work product information, and not subject to disclosure. Estabrook submits that this evidentiary ruling was in error because voluntary disclosure of the content of a privileged attorney communication results in a waiver as to all other communications on the same subject. Therefore, Tice's testimony about his communication with Bowman and Bowman's motive for the August 5 NOQ was a waiver of attorney-client privilege, and the ALJ and ARB should have ordered FedEx to produce not only the Bowman email, but all emails on the same subject that are claimed to be protected from production by attorney-client privilege. Further, Bowman, as a concealed decision-maker in this case, escaped the scrutiny of deposition as well.

## STANDARD OF REVIEW

This Court may set aside a decision of the Administrative Review Board that is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, or unsupported by substantial evidence. 49 U.S.C. § 42121(b)(4)(A); 5 U.S.C. § 706(2); *Macktal v. United States Department of Labor*, 171 F.3d 323, 326 (5th Cir. 1999). This Court reviews the ARB's factual findings to determine whether they are supported by substantial evidence and must conclude that the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Sierra Club v. U.S. Fish and Wildlife Serv*., 245 F.3d 434, 444 (5th Cir. 2001) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc*., 462 U.S. 87, 105 (1983)); *Allen v. Admin. Review Bd*., 514 F.3d 468, 476 (5th Cir. 2008). The ARB's conclusions of law are reviewed de novo. *Allen*, 514 F.3d at 476.

# ARGUMENT

## I.

## THE ARB AND ALJ VIOLATED THE SUBSTANTIAL EVIDENCE STANDARD BY FAILING TO FIND THAT ESTABROOK'S PROTECTED ACTIVITY CONTRIBUTED TO THE ADVERSE PERSONNEL ACTION THAT HE SUFFERED

### A. APPLICATION OF THE SUBSTANTIAL EVIDENCE STANDARD IN THE AIR 21 CONTEXT

Agency determinations are unlawful and must be set aside where they are unsupported by substantial evidence. 5 U.S.C. § 706(2)(E). This standard prohibits an adjudicative body from disregarding evidence. *Dickerson v. United States,* 346 U.S. 389, 396 (1953)(holding that evidence presented must be accepted as true unless it is impeached or contradicted). Even when faced with conflicting evidence, the adjudicative body cannot arbitrarily favor one account over another. *White Glove Bldg. Maint. Inc. v. Brennan,* 518 F.2d 1271, 1276 (9th Cir. 1975) (holding that the rejection of evidence by the ALJ without a detailed explanation of his reasons for doing so was improper as being arbitrary and that reasons for rejecting uncontradicted testimony on the grounds of credibility must be spelled out in the record); *Burlington Truck Lines v. US*, 371 U.S. 156, 168 (1962) (a decision is arbitrary if the proffered rationale runs counter to the evidence before the agency); *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007); *Louisiana PSC v. FERC,* 184 F.3d 892, 898 (D.C. Cir. 1999) (agency may not fail to consider

"an important aspect of the problem" or explain its decision in a manner that "runs counter to the evidence before the agency")*; TNS, Inc. v. NLRB,* 296 F.3d 384, 394 (6th Cir. 2002)("it is not enough to merely verify that there is evidence to support the Board's determination without taking into account contradictory evidence or evidence from which conflicting inferences can be drawn.")(citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (The reviewing court must take into account whatever in the record fairly detracts from a position that the court might consider adopting).

In this matter, satisfaction of the substantial evidence standard must be considered in the context of the deliberately light burden of establishing that a complainant's protected activity contributed to the adverse action suffered. Due to the safety imperative underlying AIR 21, the contributing factor standard is satisfied by evidence of "any factor which, alone or in connection with other factors, **tends to affect in any way** the outcome of the decision." *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (citing *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563 (5th Cir. 2011)).

Administrative Law Judges rely on circumstantial evidence in terms of satisfying the contributing factor test because direct evidence of a retaliatory motive is "rare." *See, e.g., Armstrong v. Flowserve US, Inc.*, ARB Case No. 14-023 at 7, ALJ Case No. 2012-ERA-017 (ARB September 14, 2016)("Because

direct evidence of retaliation is rare, complainants may rely on circumstantial evidence to prove that protected activity contributed to the unfavorable employment action in question."); *Forrand v. FedEx Corp.*, ALJ Case No. 2012-AIR-00008 at 8 (ALJ September 6, 2012)("Direct evidence of an employer's mental processes is rare, so rare that most findings about whether intentional retaliation occurred depend on circumstantial evidence.")[11]

"Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent applications of employer's policies, shifting explanations for its action, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the [unfavorable personnel] action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 at 7 (ARB Feb. 29, 2012).

The ARB held that the ALJ's findings with respect to whether Estabrook's protected activities were contributing factors to the adverse action were supported by substantial evidence. (ARB Decision at 11-13). However, both the ARB and ALJ failed to accord proper weight to the temporal proximity factor. Moreover, the ALJ's determination that he did "not find in this case the temporal proximity *by*

[11] The ALJ and ARB decisions cited in this brief are available at: https://www.oalj.dol.gov/DECISIONS.HTM.

*itself* sufficient to demonstrate that [Estabrook's] protected activities were a contributing factor to the adverse actions he suffered" (ALJ Decision at 62) (emphasis added), confirms his failure to properly consider the other sources of circumstantial evidence identified by *DeFrancesco*, including the (a) indications of pretext, (b) inconsistent applications of employer's policies, (c) shifting explanations for its actions, (d) refusal to provide the Complainant with an explanation for its actions, and (e) the Respondent's perjurious responses to interrogatories and OSHA investigative inquiries.

## B. THE ALJ AND ARB FAILED TO ACCORD PROPER WEIGHT TO THE TEMPORAL PROXIMITY FACTOR

The ARB affirmed the ALJ's determination that Estabrook engaged in protected activity with respect to the Laredo departure of April 10 and the related AIR 21 process from April 29 through May 2, 2013. (ARB Decision at 7-8). On August 5, barely three months later, McDonald ordered Estabrook placed on an indefinite NOQ.

Temporal proximity between protected activity and an adverse personnel action "normally" will satisfy the remaining burden of making a *prima facie* showing of knowledge and causation. 29 C.F.R. § 1979.104(b)(2). Temporal proximity in this matter falls well within the bounds justifying an inference of causal connection. *Clark v. Pace Airlines, Inc.,* ARB No. 04-150, ALJ No. 2003-

AIR-28 (ARB Nov. 30, 2006)(protected activity occurring as much as four and even eight months prior to adverse action characterized as a "relatively short time" warranting inference of causation).

The ALJ's failure to apply the regulatory mandate that temporal proximity will "normally" establish the required causal link is particularly inexplicable in view of the evidence that FedEx's System Chief Pilot McDonald was brooding about anonymous postings related to the Laredo departure on the eve of the August 5 NOQ decision and ordered FedEx legal counsel to interrogate Estabrook on August 9 to determine if he engaged in the Laredo-related communications. (McDonald, Tr. 701-706; Tice, Tr. 453-454, 485). The ARB acknowledged that "the 'Mayday Mark" postings were brought up in the meeting in August…." (ARB decision at 12). Thus, the temporal proximity between FedEx's August 5 NOQ determination, and its consideration of the Laredo-related protected activity, consisted of a single day.

Under these circumstances, the ALJ's failure to apply the regulatory mandate that temporal proximity "normally" satisfies the *prima facie* requirement of establishing causation would require weighty contrary evidence. Here, however, the ALJ provided a single reason -- that the August 5 NOQ grounding was "solely to coordinate" an August 9 meeting with Estabrook concerning security issues he had raised, and that there was "no evidence" that the NOQ

grounding could be associated with adverse motivations on the part of FedEx. (ALJ Decision at 53-54). Overwhelming evidence of pretext, inconsistent applications of FedEx's policies, shifting explanations for its actions, refusal to provide Estabrook with an explanation for its actions, and outright perjury preclude a finding that the innocent motive of coordinating a meeting to discuss security issues could be considered the "intervening event" that justified the August 5 NOQ. (ALJ Decision at 52). Thus, the ARB's affirmation of the ALJ's "intervening event" theory must be overturned as arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence. (ARB Decision at 12).

The ALJ's determination that the August 5 grounding was for the sole purpose of discussing Estabrook's security concerns is in conflict with FedEx's fixation on the Mayday Mark internet postings and FedEx's deceptive testimony concerning this issue:

> Immediately prior to the August 9, 2013 meeting with Complainant, Respondent's representatives gathered for a pre-meeting. During the meeting the issue of "Mayday Mark" was raised. Captain McDonald had asked Mr. Tice to raise the issue of "Mayday Mark" with Complainant during the meeting, which he did.
>
> * * *
>
> However, despite his own notes reflecting otherwise, Mr. Ondra denied that the subject of "Mayday Mark" was discussed prior to the meeting with Complainant. This further undercuts his credibility.

(ALJ Decision at 54 (citations omitted)). Inexplicably, the ALJ discounted Ondra's testimony regarding his misrepresentations relating to the anonymous poster of Laredo-related communications, but treated the deception as non-evidence relating to the motives underlying the August 5 NOQ and the purpose of the August 9 meeting. The ALJ's finding reinforced the *immediate* temporal proximity between FedEx's consideration of Estabrook's Laredo-related protected activity and the adverse actions of both August 5 and August 9, 2013. While the ALJ finding expressly recognized the pretext and falsity of rationale provided for the August 5 NOQ grounding, both the ALJ and ARB disregarded the ARB precedent in *DeFrancesco* and its progeny that hold that such pretext and falsity of rationale support a finding of causation.

The ARB came to the same unsubstantiated conclusion by noting simply that "[t]he August 5, 2013 NOQ followed directly after the August 4 e-mail," and "[t]he August 9 NOQ and 15D examination directive followed immediately after the August 9 meeting and the strange behavior Estabrook exhibited." (ARB Decision at 12). As shown above, there is no basis for the ALJ's "intervening event" theory. Further, the ARB's characterization of Estabrook's behavior at the August 9 meeting as "strange" is not supported by the ALJ's findings, as the ALJ found that Mr. Ondra's contemporaneous handwritten notes did not corroborate his characterization of Estabrook and did not "appear to comment on [Estabrook's]

disposition during the hearing at all." (ALJ Decision at 57). The ALJ held that "[a]s such, this Tribunal places little weight on Mr. Ondra's testimony regarding [Estabrook's] temperament during the meeting." *Id.*

## C. FEDEX'S SHIFTING, FALSE AND PERJURIOUS RATIONALES FOR ITS ADVERSE ACTIONS WERE NOT ACCORDED PROPER WEIGHT BY THE ALJ OR ARB

Against this backdrop of temporal proximity and direct evidence of FedEx's preoccupation with the Laredo issue, one must further consider FedEx's serial mendacity relating to the decision-makers responsible for the August 5 NOQ grounding, the standard purpose of NOQ groundings, and shifting rationales for the August 5 NOQ grounding of Captain Estabrook:

- FedEx's interrogatory response asserted that Fisher, Ondra, Tice, and McDonald made the NOQ decision. At trial, the witnesses disavowed the interrogatory stating that McDonald "alone" made the decision. Then Tice contradicted McDonald by stating that Vice President of Flight Operations Bowman participated in the decision;

- FedEx's original interrogatory response asserted that the August 5 grounding was for the purpose of forcing a 15D fitness evaluation. (CX 22 at interrogatory No. 7). FedEx subsequently revised the response to state that the August 5 grounding was to facilitate a meeting. (CX 19 at

2). At trial, McDonald further contradicted the revised interrogatory by testifying that the August 5 grounding was implemented, in part, due to Estabrook's lack of "situational awareness."[12]

- FedEx asserted that the meeting was for the purpose of addressing Estabrook's security concerns; however, (a) Estabrook never asked for a meeting, but repeatedly asked for a mere phone call (RX 13); (b) FedEx gave no consideration to Estabrook's safety concerns either before, during, or after the August 9 meeting (Estabrook, Tr. 93-94; Ondra, Tr. 587-588); and, (c) none of the management participants researched Estabrook's prior role as Security Committee Chairman or his past dealings with the Vice President of Corporate Security (Tice, Tr. 480-482; Ondra, Tr. 560-562; McDonald, Tr. 667-678).[13]

- The ALJ found that there was "no evidence" that the August 5 grounding was connected with adverse motivations; however, (a) McDonald

[12] The ALJ found: "The term 'situational awareness' strikes this Tribunal as about as vague a term as one could provide in explaining his rationale." (ALJ Decision at 56).

[13] Ondra testified that prior to receiving Estabrook's August 4 email, requesting a call with FedEx Chairman Fred Smith, Ondra did not know that Estabrook had previously served as Security Committee Chairman. (Ondra, Tr. 560). However, this testimony is not credible given that Ondra also testified that he was copied on a 2002 letter from FedEx VP of Corporate Security to "Captain Mark Estabrook, FPA Security Committee Chairman." (*Id*. at 562-563; CX 16).

ordered that Estabrook be interrogated regarding Laredo-related postings, (b) McDonald arranged for labor counsel, whose primary purpose is to conduct disciplinary investigations, to conduct that interrogation; (c) FedEx's legal counsel expressed surprise that the unsuspecting Captain Estabrook attended the August 5 meeting without legal representation (CX 20);

- FedEx resorted to an open-ended NOQ, designed for pilot performance and disciplinary investigations, rather than the RMG designation "typically" used for non-disciplinary pilot meetings (Fisher, Tr. 364);

- FedEx ultimately admitted that the NOQ was for the purpose of grounding Estabrook and stripping him of his jumpseat privileges[14] based on "situational awareness." (Tice, Tr. 473-474; McDonald. Tr. 666; ALJ Decision at 44); and,

- FedEx's persistent refusal to respond to Estabrook's requests for an explanation of its actions. (ALJ Decision at 56-57).

[14] "In aviation, 'jump seats' are provided for individuals who are not operating the aircraft." (ALJ Decision at 8, fn. 20).

The ALJ and ARB failed to consider this deluge of evidence – from FedEx's own witnesses – in the context of AIR 21 precedent that dictates that inferences of causal connection may be drawn from indications of pretext, shifting explanations for its actions, refusal to provide a complainant with an explanation for its adverse actions,[15] and FedEx's perjurious denials of knowledge of Estabrook's prior Laredo-related AIR 21 filing in response to OSHA investigative inquiries.

The ALJ's failure to properly weigh this evidence is particularly inexplicable in light of his findings that there was "no credible evidence" supporting key factual allegations upon which FedEx's adverse actions were taken, that FedEx had attempted to "cloak its decision" to require Estabrook to undergo a psychiatric analysis, that it had taken a "disingenuous approach," and that "Respondent treads on thin ice by offering such a flimsy justification for referring Complainant to a mental evaluation in this case." (ALJ Decision at 56-57). The ALJ's decision in favor of FedEx is still more inexplicable given that he accorded "limited weight to Mr. Ondra's testimony," and found that "Captain McDonald's testimony concerning the purpose of the 15D evaluation also deserves little weight." (ALJ Decision at 44). In contrast, the ALJ made no findings challenging Estabrook's credibility. The ARB's decision to affirm the

[15] *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010)(the credibility of an employer's after-the-fact reasons for firing an employee is diminished if these reasons were not given at the time of the initial discharge decision).

ALJ's findings was arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence.

## D. DISCRIMINATORY SINGLING OUT OF ESTABROOK FOR DISCRIMINATORY INVESTIGATION

McDonald's determination, immediately prior to the August 5 NOQ designation, that Estabrook's suspected Laredo-related communications as Mayday Mark warranted investigation, confirms that Estabrook's protected activity was at the forefront of McDonald's mind. To pursue this connection, he sent in attorney Tice, whose primary function at pilot meetings is to manage disciplinary investigations. (ALJ Decision at 56; Tice, Tr. 427). The Mayday Mark connection was a topic of management's pre-meeting caucus on August 9. (ALJ Decision at 54). When the connection to Estabrook could not be proven, all further investigation of Mayday Mark's identity came to a screeching halt.

The lack of any further investigation into the identity of Mayday Mark is particularly unusual and offers further evidence that FedEx's stated reasons for the August 5 NOQ decision were pretextual. According to FedEx, its interest in whether Captain Estabrook was Mayday Mark emanated from the fact that he had allegedly violated FedEx's communication policies and/or suffered a stroke. (Tice, Tr. 482). Nevertheless, after learning that Estabrook was not Mayday Mark, FedEx abruptly terminated its investigation, heedless of the possibility of a pilot

with an undisclosed stroke continuing to fly its aircraft. In view of this undisputed factual context, the ALJ and ARB failed to properly consider AIR 21 precedent that singling out a complainant who has engaged in protected activity for investigation of an unrelated incident supports a finding of a causal link between the protected activity and an adverse action. *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009).

The ARB improperly dismissed in one sentence Estabrook's argument that "FedEx's treatment of the 'Mayday Mark' postings provide a 'Laredo-related' connection from his protected activity in April to the events in August." (ARB Decision at 12). The ARB held that "[t]hough the 'Mayday Mark' postings were brought up in the meeting in August, FedEx accepted Estabrook's denial when he stated and verified that he was not Mayday Mark." *Id*. However, rejecting the Laredo causal connection cannot be justified particularly in view of the fact that ascertaining Estabrook's responsibility for discussing Laredo-related issues was FedEx's primary objective for the August 9 meeting, as confirmed by its representatives' disinterest in discussing the security issues raised by Estabrook. The fact that FedEx's attendees at the August 9 meeting confirmed that Estabrook was not, in fact, Mayday Mark does not alter the causal linkage between Laredo and the August 9 adverse actions given that McDonald was never advised of the determination that Estabrook was not Mayday Mark. (ALJ Decision at 54). In

short, McDonald's belief that Estabrook should still be punished for his Laredo-related activity and communications remained intact.

Both the ARB and ALJ failed to conform with the substantial evidence standard in failing to find that the Laredo-related protected activity at least contributed to FedEx's adverse actions of August 9, 2013.

## II.

## ESTABROOK'S COMMUNICATIONS ON AUG. 9, 2013 CONSTITUTED PROTECTED ACTIVITY

Estabrook argued at trial and on appeal to the ARB that his communication to FedEx, on August 9, 2013, that FedEx's cargo practices encourage and incentivize the introduction of destructive devices into FedEx aircraft for terrorist purposes, constituted protected activity. To be protected activity, the information provided has to relate to a "violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety…." 49 U.S.C. § 42121(a)(1).

The ALJ concluded that providing information about "air carrier safety" includes expressing concerns about security. (ARB Decision at 8, citing ALJ Decision at 48-49). The ARB held that "the ALJ correctly concluded that 'security' is covered as part of air carrier safety under the Act." (ARB Decision at 8). However, the ALJ found that Estabrook's security concerns did not constitute

protected activity because his concerns "were not related to a reasonable belief of a violation of federal laws related to air carrier safety or security." (ARB Decision at 9, citing ALJ Decision at 49-50). The ARB affirmed the ALJ's factual findings and conclusions of law. (ARB Decision at 9). Estabrook submits that the ALJ's and ARB's factual findings are not supported by substantial evidence, and the conclusions of law are contrary to law.

It is undisputed that FedEx is subject to a federal regulatory mandate requiring it to prevent and deter the unauthorized introduction of explosives into its aircraft. 49 C.F.R. § 1544.103(a)(1); 49 C.F.R. § 1544.205(a), 49 C.F.R. § 1544.205(c)(1). Captain Estabrook made a factually specific report to FedEx on August 9, 2013, regarding FedEx's failure to:

- "provide for the safety of persons and property … against acts of criminal violence … and the introduction of explosives aboard an aircraft" (49 C.F.R. § 1544.103(a)(1));
- "prevent or deter the carriage of any … unauthorized explosives, incendiaries, and other destructive substances or items in cargo onboard an aircraft" (49 C.F.R. § 1544.205(a)); and
- "prevent[] the carriage of any … unauthorized explosive incendiary, and other destructive substance or item in cargo onboard an aircraft" (49 C.F.R. § 1544.205(c)(1)).

It is also undisputed that, on August 9, Estabrook made a "rational"[16] presentation that FedEx was not adequately deterring, but actually incentivizing, terrorist introduction of explosives into FedEx's aircraft by providing terrorists with the real-time tracking data – for aircraft and packages – that they coveted.[17] The rationality of Estabrook's concern, and FedEx's corresponding recklessness, is greatly heightened by the undisputed evidence that al-Qaeda has targeted FedEx and has sought FedEx's delivery timelines in furtherance of its terrorist activity. In short, Estabrook's August 9 communications fall squarely within the plain language of the federal regulatory mandate that FedEx must prevent and deter, and certainly not incentivize, the introduction of unauthorized explosives into its aircraft.

The ALJ made no effort, however, to directly interpret the regulations. Instead, he determined that no reasonable person could find that FedEx's actions were inconsistent with its obligation to prevent and deter because: (1) "the FAA,

[16] FedEx Managing Director of Aviation Security Todd Ondra agreed that Estabrook's concerns were rational. (ALJ Decision at 46).

[17] FedEx admitted:

> FedEx admits Complainant raised safety-related issues associated with the industry's package tracking systems. FedEx also admits Complainant express [sic] concern that terrorist groups could use tracking information in carrying out terrorist attacks.

(CX 31 at 1).

TSA, or some other federal agency would have alerted Respondent that such disclosure constituted a violation," (2) "regarding the flight tracking data, Respondent presented evidence that the FAA *requires* the Respondent to transmit that very information to it, and it cannot control the distribution of that information thereafter," and (3) "Mr. Ondra also testified that Respondent was not violating any federal safety law by publishing the information." (ALJ Decision at 49 (citations omitted)). The three-part rationale provided by the ALJ constitutes a reversible error of law.

## A. THE ALJ IMPROPERLY ABDICATED HIS OBLIGATION TO INTERPRET THE LAW

The ALJ did not directly interpret the regulations, but determined that an agency's determination to not enforce the law in a certain manner renders Estabrook's understanding of the regulatory mandate *per se* unreasonable. The ALJ thereby abdicated his obligation to interpret the law. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1221 (2015)("In each case [of regulatory interpretation], the Judiciary is called upon to exercise its independent judgment and apply the law.").

The ALJ's abdication of his obligation in the instant case is particularly unjustified. First, the FAA has never issued an interpretation with respect to this issue; rather, the ALJ determined that the FAA's apparent acquiescence to unsafe

practices that incentivize terrorism must mean that the carrier has fulfilled its legal duty to prevent and deter. However, even if the FAA had issued a formal interpretation of the regulation as permitting a practice inconsistent with the law's plain meaning, such an interpretation would not be dispositive. The Supreme Court in *Perez* not only recognized that the judiciary is the final arbiter of a law's meaning, but also that a federal agency is itself free to re-interpret regulatory law without going through process required under the Administrative Procedure Act for new regulations.

In *Perez*, the Supreme Court held that an agency may issue a new interpretation of a regulation, which deviates significantly from prior interpretations, without following the APA's notice-and-comment procedures. 135 S. Ct. at 1203. Even significant changes in enforcement practice arising from such re-interpretations are permissible because "interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Id.* 1204.

In *Perez*, the Court upheld an agency's ability to re-interpret existing regulations in a manner that "upset settled reliance interests," so long as the new interpretation does not "conflict[] with the text of the regulation the agency purported to interpret." *Id*. at 1208-09. Thus, a new enforcement policy could be

justified by factual findings that contradict those which underlay a prior enforcement policy. *Id.* at 1210.

Could the FAA "wake up" tomorrow and decide that FedEx's regulatory obligation required it, as a known al-Qaeda target, to restrict the dissemination of real-time tracking data that incentivizes terrorists to ship explosives on its aircraft? Unless this interpretation conflicted with the regulation's general "prevent and deter" language, the answer is plainly "yes," because the FAA's interpretation is not the law – the regulation is the law. Because Estabrook communicated concerns relating to the failure to prevent and deter terrorist introduction of explosives that fit squarely within the plain language of the regulations, these communications must be considered protected activity.

## B. THE FAA DOES NOT REQUIRE THE DISSEMINATION OF FEDEX'S TRACKING DATA

The ALJ's second rationale -- "regarding the flight tracking data, Respondent presented evidence that the FAA *requires* the Respondent to transmit that very information to it, and it cannot control the distribution of that information thereafter" (ALJ Decision at 49) – is flawed for at least three reasons.

First, the ALJ notably tailored his observation to "flight tracking data," whereas Estabrook undisputedly raised concerns about both flight *and* package tracking data. (ALJ Decision at 46-47, 49). There is no support in the record for

the contention that FedEx is required to disclose its real-time package tracking data to the general public to the extent that it does on its business website.

Second, the ALJ's reliance on "evidence" that "Respondent presented" to conclude that the FAA requires the disclosure of flight tracking data constitutes yet another abdication of the ALJ's adjudicatory obligation. As discussed in section II.A, no FAA practice could alter the fact that the law imposes a prevent and deter obligation with respect to the unauthorized introduction of explosives into its aircraft and AIR 21 protects Estabrook's right to present concededly rational concerns regarding compliance with that obligation.

Third, the ALJ simply missed the boat with respect to FedEx's inability to control the distribution of its flight tracking data. While the FAA requires the transmission to the agency of Aircraft Situation Display to Industry data (ASDI) through each aircraft's Automatic Dependent Surveillance Broadcast (ADS-B) system, the issue of further data dissemination to the general public is completely in the hands of the carrier.[18] As early as June 3, 2011, the FAA established the Blocked Aircraft Registration Request (BARR) program, which allows aircraft operators to remove their aircraft from the public data systems. (CX 44 at C-279).

[18] When airlines provide ASDI tracking to the public, they allow anyone with an internet connection to track a plane in real time. Simply by going to a website like *flightradar24.com* or *flightaware.com,* any member of the public can find an airplane's flight identification, location, speed, altitude, and directional bearing, and can track all of this information in real time. The ALJ took judicial notice of the scope of *flightaware*'s activity. (Tr. 196).

Initially, the BARR program required that operators provide a Certified Security Concern (CSC) articulating a security rationale for the placement of limitations on the public dissemination of the operator's aircraft tracking data. (*Id.*). Certainly, the fact that al-Qaeda had – in words and deeds – made FedEx a leading target of its terrorist activity would have satisfied the CSC requirement.

Nevertheless, on November 18, 2011, the federal government eliminated the CSC requirement when President Obama signed into law H.R. 2112 (Pub. L. 112-55), which provided in pertinent part:

> Notwithstanding any other provision of law, none of the funds made available under this Act or any prior Act may be used to implement or to continue to implement any limitation on the ability of any owner or operator of a private aircraft to obtain, upon a request to the Administrator of the [FAA], a blocking of the owner's or operator's aircraft registration number from any display of the [FAA's ASDI and NASSI] data that is made available to the public…."

(*Id.*).

In explaining the effect of the program to regulated carriers, and making plain the elimination of the CSC requirement, the FAA stated:

> The FAA will honor each written request of an aircraft owner and operator, submitted in accordance with paragraphs 2 and 3 to block or unblock their aircraft's appearance in the FAA's public ASDI feed.

(*Id.* at C-281). Thus, FedEx's "they made me do it" terrorism defense has no legal foundation regardless of the "evidence" referenced by the ALJ. Under law, FedEx had the unrestricted ability to prevent this intelligence from being placed in the

hands of terrorist organizations. The above legal discussion was presented, almost *verbatim*, in Estabrook's post-trial brief; however, no treatment of the argument appears in the ALJ's or ARB's decisions. Even the earlier and more restrictive FAA opt-out policy tacitly recognizes that the obligation to "prevent and deter" would compel an air carrier to withhold its real-time tracking data from the general public.

## C. THE ALJ ERRED IN TREATING ONDRA'S TESTIMONY AS "EVIDENCE" OF WHAT THE LAW REQUIRED

The law requires FedEx to prevent and deter the unauthorized introduction of explosives into its aircraft. Whether it was reasonable for Estabrook to consider providing valuable intelligence to terrorists, who had specifically targeted FedEx, as being inconsistent with its regulatory obligation, was for the ALJ to decide. Instead, he delegated his legal analysis, in part, to FedEx Security Manager Todd Ondra who "testified" that FedEx was not violating the law. (ALJ Decision at 49). It has been universally held that no witness, not even an expert witness, can present admissible testimony concerning a legal conclusion. *See, e.g.*, *Nieves-Villanueva v. Soto-Rivera*, 133 F. 3d 92, 100 (1st Cir. 1997) (excluding expert testimony because of legal conclusions and describing the use of such testimony as "egregious"); *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992) (requiring the exclusion of expert testimony expressing a legal conclusion); *Peterson v. City of*

*Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (holding witness testimony to be a statement of legal conclusion that was for the court to make and an abuse of discretion to allow the testimony); *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) (emphasizing that a witness cannot be permitted to define the law).

The ALJ's reliance on Ondra's fact testimony as to the nature of the law constitutes "egregious" legal error, especially after the ALJ impeached his credibility. (ALJ Decision at 43)(Ondra testimony concerning the August 9 meeting entitled to "very little weight.").

## D. THE CONGRESSIONAL POLICY EMBEDDED IN AIR 21 REQUIRES THAT ESTABROOK'S AUGUST 9 COMMUNICATIONS BE TREATED AS PROTECTED ACTIVITY

Whistleblower legislation, such as AIR 21, must be read broadly because "[a] narrow hyper technical reading" of the employee protection provision of the Act would do little to effect the statute's aim of protecting employees who raise safety concerns. *Kansas Gas & Electric Co*., 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986). In order to engage in protected activity under AIR 21, an "employee need not cite to a specific violation; his concerns need only relate to violations of FAA orders, regulations, or standards." *Sitts v. Comair, Inc.*, ALJ No. 2008-AIR-7, slip op. at 9 (ALJ July 31, 2009) (*citing Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-081, slip op. at 5 (ARB Mar. 14, 2008)). It is sufficient that the complainant's concern "'touch on' the subject

matter of the related statute." *Weil v. Planet Airways, Inc*., ARB 04-074, ALJ No. 2003-AIR-18, slip op. at *28 (ALJ Mar. 16, 2004) (citation omitted); *Evans v. Miami Valley Hospital*, ARB Case No. 07-118, -121, ALJ Case No. 2006-AIR-022 (ARB June 30, 2009), slip op. at 14 (finding complainant engaged in protected activity despite failure to "identify a specific air safety regulation.").

Both the ARB and ALJ relied on *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013 (ARB June 30, 2010) in support of their contention that Estabrook did not have an objectively reasonable basis for believing that a violation of a federal aviation standard had occurred. (ALJ Decision at 46; ARB Decision at 9-10). The *Hindsman* case involved a flight attendant who attempted to invoke AIR 21's protections based on a communication to the air carrier's safety director relating to carriage of a portable oxygen concentrator (POC) made *only after* she had learned from a captain, gate agent, and her own consultation of the flight attendant manual that no violation had occurred. *Hindsman*, ARB No. 09-023 at 2. The ARB held that, once she was provided with documentary evidence that the POC was lawful, she could not have had a reasonable belief that flying with it on board violated air safety regulations. *Id.* at 5.

On August 9, 2013, Estabrook communicated to FedEx that the carrier was a designated al-Qaeda target and that FedEx was handing over to these terrorists the

information they considered necessary to detonate their explosives to maximum advantage. Unlike the *Hindsman* complainant, Estabrook was met with deafening silence. No one told him that FedEx's conduct was safe or lawful. Indeed, FedEx subsequently conceded that Estabrook's concerns were rational. Given these facts, the *Hindsman* precedent is inapposite and Estabrook's belief that FedEx was failing to fulfill its duties under federal law was objectively reasonable. Indeed, the Federal Aviation Regulations do not specifically give FedEx in this case the authority to enhance al-Qaeda targeting and incentivize the carriage and placement of bombs, as the flight attendant manual in *Hindsman* specifically authorized the carriage of oxygen cylinders.

As the ALJ in this case recognized: "The quickest way to chill the open dialogue in the area of aviation security is to place a person's livelihood at stake for speaking up." (ALJ Decision at 61). Although FedEx was aware of the government's "If you see something, say something" national security campaign,[19] it chose to punish Estabrook when he said something. (Estabrook, Tr. 51; Tice, Tr. 441). FedEx argued for deference in the manner that it proceeded, citing the Germanwings incident in which an aircraft was intentionally crashed into the French Alps by a first officer. However, the ALJ rejected this comparison, noting that "[t]he cases differ in several important respects," namely, that there is no

[19] https://www.dhs.gov/see-something-say-something

evidence in this case that suggests that Estabrook or his treating physician withheld information from FedEx about his mental health. (ALJ Decision at 61). The ALJ warned that "[s]ending someone for a mental health evaluation merely because his statements are odd or because one 'knew too much' is a slippery slope that must be guarded against." (*Id*.) Estabrook was "well justified to raise his concerns and object to [FedEx's] actions." (*Id*.) Based on Captain Fisher's admission that the reason for directing Estabrook to psychiatric evaluation was that he "knew too much" (Fisher, Tr. 330), the ALJ and ARB had substantial evidence to conclude that FedEx retaliated against Estabrook for his protected activity.[20]

The policy underlying AIR 21 will be severely compromised if Estabrook's August 9 communications relating to FedEx's regulatory obligation to prevent and deter terrorist activity are found to be unprotected.

## III.

## THE RULING BY THE ARB AND ALJ ON ATTORNEY-CLIENT PRIVILEGE WAS CLEARLY ERRONEOUS

In evaluating a claim of attorney-client privilege, this Court reviews factual findings for clear error and the application of the controlling law de novo. *In re*

[20] Captain Rob Fisher was the Assistant System Chief Pilot and Estabrook's direct supervisor.

*Itron, Inc.*, 883 F.3d 553, 557 (5th Cir. 2018), citing *In re Avantel, S.A.*, 343 F.3d 311, 318 (5th Cir. 2003).

The attorney-client privilege issue presented to the ALJ and ARB involved the testimony of FedEx attorney Rob Tice. On cross-examination, Mr. Tice testified about the reason for the August 5 NOQ, and stated that "there were some concerns about whether he should be on the jumpseat." (Tice, Tr. 457). FedEx counsel then objected "to the extent that it calls for attorney-client privileged information." *Id*. The ALJ overruled the objection, permitting Tice to answer that "[t]here was a communication from the VP of flight ops, as I recall, questioning is this an appropriate person to be on a jumpseat." *Id*. Tice testified that the VP of Flight Operations was James Bowman, and further explained that Bowman's decision to suspend Estabrook's jumpseat privileges was made "in light of having read [Estabrook's August 4] e-mail asking Fred Smith to give him a call when he wasn't sleeping." (*Id*. at 457-458). According to Tice, the recipients of Bowman's email were "[a] lot of the attorneys. I'm pretty sure my boss and other members of flight management." (*Id*. at 463). Bowman was not identified in FedEx interrogatory answers as one of the persons involved in the decision to place Estabrook on NOQ status on August 5, 2013. (*Id*. at 459). As a concealed decision-maker in this case, Bowman escaped the scrutiny of a deposition. Tice conceded that Bowman should have been included in that interrogatory answer,

and stated that at the time of FedEx's discovery responses, Tice "failed to recall that there was a Jim Bowman e-mail." (*Id*. at 459, 461). Estabrook's counsel requested production of the Bowman e-mail about which Tice had testified, and the ALJ ordered FedEx to produce it for *in camera* inspection. (*Id*. at 463). Despite the fact that the ALJ allowed Tice to testify over FedEx's objection regarding the content of the Bowman email, after *in camera* inspection, the ALJ ruled that the email was either attorney-client privileged or work product information "and not subject to disclosure in these proceedings." (*Id*. at 523). The ARB upheld the ALJ's ruling. (ARB Decision at 13).

Estabrook respectfully submits that this evidentiary ruling was in error. *In re Itron, Inc*., 883 F.3d 553, 558 (5th Cir. 2018) ("By disclosing such [confidential] communications to third parties – such as by revealing them in open court – the client waives the privilege") (citations omitted); *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) ("voluntary disclosure of the content of a privileged attorney communication results in waiver as to all other communications on the same subject."); *Nester v. Textron, Inc*., 2015 U.S. Dist. LEXIS 28182, *15 (W.D. Tex. Mar. 9, 2015) ("When a party waives the attorney-client privilege, it waives the privilege as to all communications that pertain to the same subject matter of the waived communication"); *SEC v. Microtune, Inc*., 258 F.R.D. 310, 317 (N.D. Tex. 2009) (same); *Sky Techs. LLC v. IBM, Inc*., 2006 U.S. Dist. LEXIS 100667, *15-

16 (E.D. Tex. Feb. 13, 2006) (same); *Muncy v. City of Dallas*, 2001 U.S. Dist. LEXIS 18675, *12 (N.D. Tex. Nov. 13, 2001) (same); see also, with respect to work product, *United States v. Nobles*, 422 U.S. 225, 239-40 (1975) ("Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.").

Estabrook submits that Tice's testimony about his communication with Bowman and Bowman's motive for the August 5 NOQ was a waiver of attorney-client privilege, which waived the privilege as to all communications that pertain to the same subject matter of the waived communication. Thus, the attorney-client privilege of the Bowman email is also waived, and that email (and all other emails pertaining to the same subject matter) should have been produced by FedEx. This Court should therefore reverse the ARB's ruling on attorney-client privilege.

## CONCLUSION

For the foregoing reasons, Petitioner Mark Estabrook respectfully requests that this Court (1) set aside the ARB's decision; (2) hold that Estabrook established by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action; (3) hold that Estabrook's discussion of his security concerns about FedEx's operations on August 9, 2013 constituted protected activity; and (4) reverse the ARB's ruling on attorney-client privilege.

Dated: December 16, 2019

Respectfully submitted,

*/s/ Lee Seham*

_____

Lee Seham, Esq.
Seham, Seham, Meltz & Petersen, LLP
199 Main Street, 7th Floor
White Plains, NY 10601
Tel. (914) 997-1346

*Attorneys for Petitioner Mark Estabrook*

## CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2019, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

*/s/ Lee Seham*

_____

Lee Seham
Attorney for Petitioner, Mark Estabrook

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 5th Cir. R. 32.2 because the brief contains 12,903 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: December 16, 2019

*/s/ Lee Seham*
Attorney for Petitioner Mark Estabrook