Lee Seham, Esq.
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
199 Main Street – 7th Floor
White Plains, NY 10601
Tel: (914) 997-1346

Attorneys for Complainant

UNITED STATES DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
OFFICE OF ADMINISTRATIVE LAW JUDGES

MARK ESTABROOK, **Complainant,** **v.** **FEDERAL EXPRESS CORPORATION,** **Respondent.**	**CASE NO. 2014-AIR-00022** **ADMINISTRATIVE LAW JUDGE SCOTT R. MORRIS**

COMPLAINANT'S POST-TRIAL REPLY BRIEF

INTRODUCTION

Respondent's Post-Trial Brief could have been written without having attended the hearing. Respondent makes no effort to address the evidence presented by Captain Estabrook. Respondent makes no effort to address factual disputes in this record, instead falsely claiming that the evidence is "uncontroverted." FedEx makes only a half-hearted effort to present the "clear and convincing" defense that the Tribunal advised should be the focus of its post-trial brief. In sum, the Respondent's Post-Trial brief confirms that the public interest demands a decision in Captain Estabrook's favor. For facility of reference, Complainant's Reply Brief will track the Respondent's outline contained in its Section III Proposed Conclusions of Law.

A. Elements of an AIR 21 Complaint

The Respondent's brief correctly outlines the elements of a *prima facie* case under AIR 21. Omitted from the Respondent's discussion, however, is the AIR 21 precedent holding that an employer will be unable to satisfy the clear and convincing evidentiary standard where it has resorted to shifting explanations for its adverse action. *See, e.g., Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, -074, ALJ No. 2006-AIR-14 (September 30, 2009)(ARB affirms ALJ finding that shifting explanations for adverse action and disparate treatment precluded satisfaction of the clear and convincing evidentiary standard); *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009)(substantial evidence of pretextual rationale for termination precluded satisfaction of clear and convincing evidentiary standard).

This omission is significant in view of the Tribunal's request that Respondent's post-trial brief focus on the issue of whether there was "clear and convincing" evidence to support the position that Respondent would have taken its adverse employment actions against Captain Estabrook in the absence of his protected activity. Nevertheless, the Respondent consumes more space addressing issues previously resolved by the Tribunal's partial summary judgment decision of May 9, 2016, than it does addressing the applicable legal standard.

B. The August 5 NOQ Decision Constituted Unlawful Retaliation

The Respondent concedes that Captain Estabrook engaged in protected activity by refusing to fly through a line of thunderstorms on April 10, 2013, and by filing an AIR 21 complaint, which he withdrew on May 2, 2013. (Respondent's Brief at 21 n.4). The three-month time span between this protected activity and the August 5 NOQ determination, which the

Tribunal has determined to be an adverse employment action, creates an inference of a causal connection between the two. 29 C.F.R. § 1979.104(b)(2); *Clark v. Pace Airlines, Inc.,* ARB No. 04-150, ALJ No. 2003-AIR-28 (ARB Nov. 30, 2006).

Respondent obliquely attempts to re-litigate the issue of whether Captain Estabrook engaged in protected activity on April 10 by suggesting that the carrier's sole concern was the Complainant's decision to remain at the hotel during the ATC gate hold. (Respondent's Brief at 21). The assertion is belied by both the evidence produced by the Respondent and the evidence that the Respondent declines to address.

The Crook email prompting the Respondent's investigation faults Captain Estabrook for the audacity of his decision to "delay a flight" without "agreement with the dispatcher." (RX 8). Nowhere in the audiotapes attached to the Crook email is there any critique of Estabrook's location at the hotel; rather, Crook's pointed inquiry is "what time are you planning to take off?" (RX 10 at 4). Moreover, Respondent's post-trial brief conspicuously fails to address the clever Crook's resort to an unrecorded phone line to exert coercive pressure by asserting that "everybody else is taking off" and "I am watching you very closely." (Estabrook, Tr. 78-80; Crook, Tr. 270, 292-93).

Respondent not only concedes 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. 359-60). Fisher promised Estabrook that he would counsel Crook regarding his misconduct, but, in fact, never did. (Estabrook, Tr. 90; Fisher, Tr. 316, 360).

Crook did not participate in the adverse employment actions suffered by Captain Estabrook in the instant case; therefore, the more material inquiry is the reaction of Fisher and

McDonald to the Laredo-related protected activity. McDonald and Fisher proceeded with what they characterized as a "disciplinary" investigation of Captain Estabrook despite the fact that, several weeks in advance of the investigative hearing, they were both in possession of all the recorded evidence that cleared Estabrook of any misconduct. (CX 8; Fisher, Tr. 352, 354; McDonald, Tr. 683). After Estabrook advised Fisher that he would withdraw his AIR 21 complaint (Estabrook, Tr. 92; Fisher, Tr. 317), Fisher responded by confessing that McDonald was "upset" that no disciplinary action would be taken against Estabrook. (Estabrook, Tr. 90).

The question of McDonald's reaction to the lack of a formal disciplinary response to the Laredo departure is the first of several credibility issues that the Respondent makes no effort to address. Respondent cites McDonald's testimony to the effect that he got the Laredo resolution he wanted. (Respondent Brief at 22). However, Captain Estabrook's testimony evidences that McDonald was frustrated at being unable to punish Estabrook. (Estabrook, Tr. 90). The Tribunal should resolve this credibility issue in Captain Estabrook's favor.

In the first instance, the Respondent has never provided any rationale for granting Captain Estabrook's testimony anything less than full faith and credit. Indeed, there is no basis for making such an argument. By contrast, there are multiple bases for downgrading the credibility of both Fisher and McDonald, including:

* Fisher, at first, adamantly denied making a statement to the effect that McDonald was upset about the lack of Laredo disciplinary response, but, after being confronted with his deposition transcripts, testified that he had no specific recollection one way or the other. (Fisher, Tr. 363-65);

* Fisher denied to the OSHA Investigator in this matter that he had any knowledge of Estabrook's Laredo-related AIR 21 complaint despite having received written notice from Estabrook's counsel Armstrong and having discussed the Armstrong notification with FedEx counsel, then actually wrote a response to Armstrong. (CX 8 at 3; CX 10, item 3).

* McDonald, after supporting the Company line that the August 5 NOQ designation was merely to "facilitate" a meeting, subsequently altered his testimony – as a result of attorney Tice blurting out something closer to the truth – to assert that Estabrook had been intentionally grounded due to his lack of "situational awareness." (McDonald, Tr. 652-53, 674, 701-02).

Thus, the evidentiary dispute as to whether McDonald expressed his frustrated desire to discipline Captain Estabrook regarding the Laredo matter should be resolved in the Complainant's favor. Nevertheless, irrespective of how this particular evidentiary issue is resolved, there is no dispute that, on the eve of the August 5 NOQ decision, McDonald was gunning for Estabrook based on his suspected Laredo-related communications.

One will search the Respondent's brief in vain for a single reference to Mayday Mark. Nonetheless, McDonald was collecting Mayday Mark postings on the supposition that a pilot posting under this title was Captain Estabrook. McDonald's motivation was to have FedEx labor counsel interrogate Estabrook to determine whether there was a basis for imposing discipline on the Complainant based on these Laredo-related comments. (McDonald, Tr. 711-13; Tice, Tr. 459-60, 495). Indeed, Ondra's notes from the August 9 meeting confirm that the *only matter* discussed during the pre-meeting caucus of Respondent's representatives was how to interrogate Captain Estabrook regarding his purported Mayday Mark postings. (Tr. 495-96; JX 3).

While the time span between Estabrook's protected activity and the August 5 adverse employment action is sufficiently narrow to draw an inference of causation, this is the rare AIR 21 case in which we have undisputed evidence that the employer was brooding about the protected activity immediately prior to the adverse action, **and** that it initiated a surprise disciplinary interrogation related to that activity. Add to this extraordinary mix Respondent's misrepresentations under oath as to the purported reasons for the August 5 NOQ designation.

In mid-trial, the Respondent disavowed its interrogatory response of one year's standing

wherein it asserted that the reason for the August 5 NOQ grounding was to "facilitate the scheduling of a meeting [Estabrook] requested." (CX 19 at C-92). As the Respondent originally explained, the objective of the NOQ was to "clear his work schedule and prevent the scheduling of conflicting activities." *Id*. The deception initiated via this interrogatory response was perpetuated throughout the depositions and into the trial as well. (Fisher, Tr 372). Then the Tice detonation occurred.

Over the red-faced objections of FedEx counsel, Tice blurted out that the Respondent's NOQ designation was, in fact, for the purpose of grounding Captain Estabrook and that the directive emanated from VP of Flight Operations James Bowman, whose authority exceeded that of any other Respondent witness. (Tice, Tr. 465-66, 481-83). Nevertheless, just as the Tribunal will search Respondent's brief in vain for a reference to Mayday Mark, so too will it vainly search for any reference to Vice President Bowman's role in the decisional process.[1]

Instead, the Respondent desperately attempts to make an omelet of its broken eggs. Tacitly admitting its multi-year-long deception, and the magnitude of Tice's explosive disclosure, the Respondent summarizes the rationale underlying the McDonald August 5 NOQ decision in the following manner:

> I thought his August 4th email reflected a lack of situational awareness and that it appeared odd in its presentation. … I felt that there was a disconnect, and I was trying my best to understand that. And the way I tried to address that was to set up a meeting with Captain Estabrook and our security department.

(Respondent Brief at 23). Tucked away in a footnote, the Respondent self-consciously argues:

> Estabrook suggests that FedEx's decision was *motivated* by reasons other than

[1] Consequently, Respondent's credibility deficit is also reflected in its interrogatory response identifying the August 5 NOQ decision-makers, which falsely omits Bowman and falsely includes Tice, Ondra, and Fisher. (CX 22 at C-123-24).

> scheduling. Even if that were true, the evidence only points to the fact that the relevant decision-makers thought the August 4 email remarkably strange.

(Respondent Brief at 24)(emphasis in original).[2]

That the August 5 NOQ grounding was for reasons other than scheduling is not an Estabrook suggestion, but rather a mid-trial FedEx confession. The perception of the "relevant decision-makers" is, in fact, irrelevant since McDonald swore that he made the NOQ decision "alone." (McDonald, Tr. 666-67, 700). And the lone decision-maker had the Laredo departure on his mind to the point that he sent in FedEx labor counsel to press the Mayday Mark issue.

It boils down to whether, at this late stage, Respondent FedEx has provided the Tribunal with clear and convincing evidence that the August 5 NOQ grounding was based on legitimate mental health concerns, or, to use McDonald's artful term, lack of "situational awareness." FedEx dedicates just a single page to this argument and comes up short. (Respondent's Brief at 24).

First, as discussed in section A above, FedEx's wrenching mid-trial shift in rationale for the August 5 NOQ grounding – from merely facilitating a meeting to the purported McDonald/Bowman concern over situational awareness – precludes any satisfaction of the clear and convincing standard.

Second, FedEx's witnesses proved unable to keep up with their lawyers' rapidly evolving

---

[2] FedEx faults the Complainant because he "did not attempt to raise his concerns with anyone in Flight Management, including … the System Chief Pilot Bill McDonald." (Respondent's Brief at 12). This criticism shows the willingness of the Respondent to stretch its credibility to the breaking point. First, FedEx admitted that the tracking issues that Estabrook wanted to raise fell outside Flight Management's jurisdiction and are nowhere addressed in the Flight Operations Manual. (McDonald, Tr. 658-59). Second, Estabrook did, in fact, communicate initially on August 4 to McDonald as a matter of courtesy. (CX 11).

case theory. Every Respondent witness rejected the concept that Captain Estabrook had demonstrated a basis for grounding based on mental health as of August 5, 2013. Fisher testified that he had no fitness for duty concerns with respect to Estabrook prior to August 9, 2013. (Fisher, Tr. 373-74). Tice testified that he had no concern about Estabrook's mental health at the time of the August 5 NOQ determination. (Tice, Tr. 483). Ondra testified that his 15.D recommendation was based *exclusively* on Estabrook's comments during the August 9 meeting. (Ondra, Tr. 578). Even McDonald testified that he did not question Estabrook's mental health until his August 9 teleconference with Ondra. (McDonald, Tr. 705-06). Tice's truthful testimony destroyed FedEx's original rationale, and the evidentiary record provides no support for the substitute rationale.

Under these circumstances, the clear and convincing standard cannot be satisfied. We respectfully submit that the Tribunal must find that the August 5 NOQ decision constituted an unlawful retaliatory action under AIR 21.

C. FedEx's Mandatory Psychiatric Evaluation Constituted Unlawful Retaliation

We note that, in addressing the protected activity underlying the Respondent-mandated 15D psychiatric evaluation, Respondent's brief leapfrogs over Laredo and proceeds directly to its arguments relating to Captain Estabrook's protected activity on August 9, 2013. Of course, the 15D-related retaliatory conduct commenced a mere four days after the August 5 NOQ grounding; consequently, every argument favoring a finding of causal connection between the Laredo protected activity and the August 5 NOQ grounding applies with equal force to the retaliatory 15D psychiatric evaluation.

1. Captain Estabrook's August 9 Communications Regarding the Dissemination of Package and Flight Tracking Data Constituted Protected Activity

As recounted in Complainant's initial brief, the Tribunal's prior decision determined that the subject matter of Estabrook's August 9 communications "clearly relates to air carrier safety…." (Partial Summary Judgment Decision at 17). Nevertheless, the Tribunal withheld a final decision as to whether the Complainant's safety-related communications should be deemed protected activity and sought clarification from the parties as to: (a) whether FedEx was compelled, by law, to release its aircraft tracking information into the public domain, "which would make FedEx incapable of violating FAA regulations on this basis as a matter of law," and (b) insofar as the Complainant's August 9 communications related to package tracking information, whether the reasonableness of his belief in non-compliance with federal aviation safety standards could be credited "if there was no genuine dispute of material fact that the published data were merely historical tracking information." (Partial Summary Judgment Decision at 17, 19 n.18).[3]

[3] Another issue raised by the Tribunal – whether Estabrook had raised the same safety-related concerns with respect to both package and flight tracking data at the August 9 meeting – was put to rest by the Respondent's concession that:

> It is not disputed that Estabrook expressed concerns with a terrorist's ability to use certain package and flight tracking data, and that FedEx could potentially modify its practices to **improve** security by limiting the dissemination of this data.

(Respondent's Brief at 28)(emphasis in the original). Respondent's admission is of particular significance insofar as it reflects an abandonment of the position articulated in FedEx's opening statement that Captain Estabrook did not address the safety-compromising nature of Respondent's package tracking data dissemination during the August 9 meeting. (Tr. 18).

a. Freely Disseminating Valuable Intelligence to Terrorists

As addressed in greater detail in Complainant's initial brief, FedEx had, at all times, complete control over whether its package and flight tracking information was released into the public domain. First, the dissemination of Respondent's package tracking information is **not** regulated by the FAA. Second, whereas Respondent's initial release of flight tracking information to the FAA may be required, FedEx had the unilateral right to restrict the further dissemination of that information to public third-party sources. (Complainant Brief at 24-25).

b. Respondent's Package Tracking Arguments

The evidentiary record resolves the Tribunal's question regarding the intelligence value of package tracking information in the Complainant's favor. First, Managing Director of Aviation and Regulatory Security Ondra conceded that the package tracking information disseminated by FedEx is "close to real time" and, in any event, intelligence sources have confirmed that Al Qaeda valued historical data for the purpose of pre-setting an explosive device's detonation timing. (Complainant's Brief at 25-27).

With the knowledge that the issues raised by the Tribunal in its summary judgment decision had been resolved in the Complainant's favor, the Respondent has raised two fresh objections to the treatment of Captain Estabrook's August 9 communications as protected activity: (1) that Estabrook "never raised any concerns with FedEx's package screening practices…," and (2) that Estabrook should have known that, if FedEx's dissemination practices were violative of federal aviation standards, the FAA would have put a stop to the practice when Estabrook raised the issue 15 years ago. (Respondent's Brief at 26-27).

As to the first argument, the Company's own notes reflect that Estabrook pleaded with FedEx to reduce its public dissemination of package scans to initial pick-up and delivery in order

to deter Al Qaeda's mission of gauging FedEx's shipping timelines. (JX 4 at 1). It is, at a minimum, reasonable to take the position that providing Al Qaeda with precisely the intelligence it coveted to implement its terrorist program is not in conformance with federal aviation standards requiring the carrier to "prevent" and "deter" the carriage of unauthorized explosives. 49 C. F.R. § 1544.205(c)(1); 49 C.F.R. § 1544.205(a).

To argue that a level of prevention and deterrence deemed adequate 15 years ago must be deemed adequate today, irrespective of Al Qaeda's ever-evolving terrorist strategies, is to say that the law demands ignorance of facts on the ground. In 2001-02, FedEx had not been expressly identified by Al Qaeda as a primary target. In 2001-02, Al Qaeda had not yet engaged in bombing trials involving FedEx and UPS aircraft. In 2001-02, British and American intelligence had not yet identified the acquisition of FedEx delivery timelines as a core Al Qaeda objective and as a central element of the 2010 Printer Bomb Plot. On August 9, 2013, however, these facts were an integral part of the world in which Estabrook and FedEx operated. It became reasonable, therefore, for a pilot to challenge his employer as to whether the provision of valuable intelligence to a terrorist organization that had specifically targeted FedEx was still in conformance with the obligation to "prevent" and "deter" the unauthorized carriage of explosives.

As contrasted with the *Hindsman* case cited by the Respondent[4], no FedEx agent tried to convince Estabrook that he was being unreasonable. No FedEx agent suggested that what the

[4] *Hindsman* 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 discovered that the POC was FAA-permitted, she could not have had a reasonable belief that flying with it on board violated air safety regulations. *Id.* at 5.

carrier was doing was lawful. Other than probing to see if he was Mayday Mark, the Respondent's managers kept their mouths shut and then packed Estabrook off to a psychiatrist explaining only that he knew "too much." (Estabrook, Tr. 108; Fisher, Tr. 332).

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, 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 36 (ALJ Mar. 16, 2004) (*citing Nathaniel v. Westinghouse Hanford Co.*, 91 SWD 2 (Sec'y Feb. 1 1995)); *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.").

The Tribunal has already found that Complainant's communications of August 9 "clearly relate[] to air carrier safety…." The Complainant has addressed the Tribunal's concerns as to whether FedEx was under some compulsion to provide Al Qaeda with the intelligence it coveted. AIR 21, and the public policy that undergirds it, require a holding that an air carrier not have a free hand to retaliate against an employee who raises such air carrier safety issues.

2. FedEx Cannot Establish, By Clear and Convincing Evidence, That it Would Have Placed Estabrook Back on NOQ Status and Forced a 15D Psychiatric Evaluation in the Absence of His Protected Activity.

The Respondent's evidence in support of a "clear and convincing" standard defense departs from the following false premise:

> Even if Estabrook had engaged in protected activity on August 9, FedEx clearly and convincingly proved that it would have placed Estabrook back on NOQ status and referred him to Harvey Watt pursuant to 15D of the CBA even in the absence of protected activity.

(Respondent's Brief at 29). Here again, FedEx seeks to eliminate from consideration Captain Estabrook's protected activity of April 10 (relating to the Laredo departure) and April 29 through May 2 (the Laredo AIR 21 filing). In view of the temporal proximity of this protected activity to the August 9 NOQ designation, and Respondent's admissions that the interrogation of Captain Estabrook concerning the Laredo-related postings of Mayday Mark was a primary driver behind scheduling the August 9 meeting, Respondent's attempt to exclude this protected activity from consideration must be rejected.

As to the causal impact of Captain Estabrook's protected activity, Respondent relies heavily on Fisher's disavowal of his sworn deposition testimony:

> Estabrook suggests that Fisher testified in his deposition that the tracking information contributed to the 15D referral. Fisher clarified later in his deposition that Estabrook's concerns about safety and security did not contribute to the 15D referral. [Fisher, Tr. 406-07].

(Respondent's Brief at 29 n.8). The argument in this awkward footnote must fail for two reasons. First, Fisher reaffirmed his deposition testimony concerning the causal link at trial. (Complainant's Brief at 17; Fisher, Tr. at 400). Second, the shifting rationales inherent in the inconstancy of Fisher's sworn testimony precludes any finding that FedEx has satisfied the clear and convincing standard.

Respondent then shifts back to Ondra[5] and the supposed rationality of a decision based on

[5] The fallacy that Ondra played an exclusive, or even predominant role, in initiating the August 9 NOQ grounding and/or the subsequent 15D psychiatric evaluation is discussed at length in Complainant's prior submission. (Complainant Brief at 37-39). Respondent's brief has

Estabrook's alleged comments regarding chasing Russians and the hijacker Auburn Calloway. With respect to the Russian reference, nobody knows what Ondra is talking about. Neither Fisher nor Tice had *any* recollection of Estabrook making comments related to Russians or Russia. (Tice Tr. 440, 507; Fisher, Tr. 384). Moreover, Ondra made no reference to Russia or Russians in his post-meeting teleconferences with Tice or McDonald. (Tice, Tr. 506; McDonald, Tr. 692).

As previously briefed, Ondra's own handwritten notes support Estabrook's account that the reference to chasing Russians arose in the context of Estabrook's service to his country as the Aircraft Commander of an AWACS surveillance aircraft. (Complainant's Brief at 34). In another footnote, Respondent hastens to argue the fact that even Ondra doesn't seem to know what he is talking about should have no evidentiary impact:

> When asked if it was possible that Estabrook said that he chased Russians, Ondra replied that it was possible, but that his recollection was that he was the one being chased. [Ondra, Tr. 548]. Since the trier of fact must evaluate the intent of the parties, it is Ondra's recollection of events that is important.

(Respondent's Brief at 30 n.9). In the first instance, the intent of Ondra is of marginal relevance given that the evidence demonstrates that the August 9 NOQ and 15D grounding were determined, or at a minimum substantially influenced, by McDonald, Bowman and Fisher. (Complainant's Brief at 38). Second, the evidentiary basis for overcoming the inferences of causality arising from temporal proximity and shifting rationales cannot be overcome by a witness whose account is contradicted by every other witness in the proceeding and by his own personal notes. Finally, the standard of clear and convincing evidence cannot be satisfied by an isolated witness mired in his own confusion.

Estabrook never testified nor was he asked by Respondent in any of these deliberations if

addressed none of the arguments exposing the Ondra hoax.

he ever traveled outside of the United States with his father or served a prison sentence in Hungary. Respondent never produced any evidence during discovery supporting Ondra's strange recollections. His personal notes only refer to Estabrook chasing Russians. Again, no other Respondent witnesses gave testimony corroborating Ondra's recollections of Captain Estabrook traveling with his father to Hungary or being sentenced to prison there.

The Respondent then falls back on its final defense: what its own attorney characterized as a passing reference to FedEx hijacker Auburn Calloway. (Tice, Tr. 515). Here again, Ondra's account is contradicted by every other witness, including himself. Captain Estabrook *never* asserted that Calloway had undergone a religious conversion nor that he had engaged in communications with Al Qaeda. (Estabrook, Tr. 96, 113; Fisher, Tr. 395; Tice, Tr. 440, 515; Ondra, Tr. 584). Indeed, Ondra's own notes confirm that Estabrook asserted nothing, but rather merely commented that he had "heard" the rumor twice in six months. (JX-3).

Aside from the conversion rumor, Estabrook merely suggested that, given the similarity of tactics used by Calloway and Al Qaeda, it would behoove the federal authorities to engage in surveillance of Calloway if such a prison cell conversion had taken place. (Estabrook, Tr. 164; Fisher, Tr. 397). With respect to the existence of Calloway-Al Qaeda contacts, Ondra's notes reflect the modest statement from Estabrook: "Don't know if Calloway is using communication path to Al Qaeda." (JX-3).

The unanimous view that Captain Estabrook was merely reporting rumors of Calloway's conversion is of double significance. First, it reflects the undisputed falsity of Respondent's rationale that Estabrook had made "assertions" regarding Calloway's conversion. Second, the Respondent's reliance on Estabrook's report of rumors as the basis for referring him to compulsory examination reflects the deep-seated animus toward the Complainant in view of the

fact that the Respondent engaged in no effort to identify the source of these rumors. (Ondra Tr. 608). If there were any legitimate mental health concern tied to the reported Calloway conversion, it should have been directed to the originator of the rumor rather than towards someone who innocently reported it. Similarly, FedEx had zero interest in identifying the FedEx pilot, posting as Mayday Mark, who admitted to having suffered a stroke, as long as it wasn't Captain Estabrook. (Tice, Tr. 495-497). Far from satisfying the clear and convincing standard, this type of disparate disciplinary approach provides a further basis for a finding of liability. *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, -074, ALJ No. 2006-AIR-14 (September 30, 2009).

Ondra described the Calloway hijacking as one of the most traumatizing incidents in FedEx's history and said that it is known throughout the FedEx community. (Ondra Dep. 607, 622). The Calloway incident has had an "enduring impact" on FedEx operations and still comes up in response to the Company's policy formulation process. (Tice, Tr. 516). Moreover, Ondra himself conceded that Calloway might still have information that would be of use to a terrorist organization. (Estabrook, Tr. 113).

Respondent falsely asserts that Estabrook knew that Calloway was in a "maximum security prison" and, therefore, he had reason to know that Calloway would be unable to share his intelligence with fellow hijackers. (Respondent's Brief at 16 citing Estabrook, Tr. 152-53). However, no testimony to this effect is reported on the transcript pages cited in Respondent's brief and no Respondent representative at the August 9 meeting ever raised the relative security of Calloway's place of incarceration as an issue.

In any event, Tice's Bowman revelation confirmed that Captain Estabrook's passing reference to Calloway on August 9 did not drive the decision to refer him to a 15D psychiatric

evaluation; the Respondent had already decided to take a pretextual mental health angle when Bowman and McDonald grounded him on August 5.

The uncontroverted evidence also firmly establishes the disparate approach taken with respect to mental health in Captain Estabrook's case. Respondent had never before referred a FedEx pilot to a 15D evaluation based solely on passing comments made at a meeting. Indeed, every prior referral was based on operational deficiencies or evidence of substance abuse. (McDonald, Tr. 659-63). Contrary to Respondent's protestations, the weight of evidence also confirms disparate treatment in FedEx's violation of collective bargaining agreement (CBA) restrictions via its demand for a psychiatric evaluation. (Respondent's Brief at 31).

FedEx Aeromedical Advisor Bettes confessed to Captain Estabrook that he had been directed by FedEx to subject Estabrook to a psychiatric examination. (Estabrook, Tr. 117). When asked what the reasonable basis for Captain Estabrook's mandatory psychiatric evaluation was, Dr. Bettes answered: "I don't know." (*Id.*).[6] The manipulation of Dr. Bettes was presaged by Fisher's call to Estabrook, on the evening of the August 9 meeting, to advise him that FedEx would be requiring him to submit to a psychiatric examination. (Estabrook, Tr. 105-06; Fisher Tr. 400). There is no reason not to credit the Complainant's testimony concerning these admissions against interest, particularly in view of the documented confirmation provided by the Respondent in the form of a report from Harvey Watt reporting that "**FedEx Management** and Harvey W. Watt's Senior AME, Dr. Bettes, have recommended an evaluation at Talbott Recovery Campus…." (RX 7 at 1)(emphasis supplied). Bettes was just following orders.

FedEx's final refuge is to ask that the Tribunal not "handcuff" its ability to order pilots

[6] The Fisher/Tice letter of August 16, 2013 also neglects a violation of the contractual requirement that the aeromedical advisor make an "independent evaluation." (JX 6 at 15.G.1).

into psychiatric examination in order to prevent a recurrence of the Germanwings incident. However, Respondent produced no evidence during discovery or the trial process suggesting any reliance on, or comparability to, the incident. The matter is raised as a red herring to distract the Tribunal from its analysis of the facts and legal arguments that were introduced at trial.

The Tribunal is charged with the enforcement of an act by the United States Congress designed to confront the peril to aviation safety presented by employers who bully into silence those employees who raise issues of noncompliance with federal aviation standards. This congressional objective will be irretrievably compromised if the message goes out that employers are effectively free to use the threat of psychiatric examination as an offensive weapon. Airline employees such as Captain Estabrook must be free to properly consider hazardous weather conditions, to access the AIR 21 process, and to report situations where their employer has opened the door to terrorist activity. These are the handcuffs that must be removed. These are the handcuffs that will be slapped on and wrenched tight if the Respondent prevails in this matter, and the detriment to aviation safety arising from these handcuffs will be beyond measure. Air carriers in the United States will be fully licensed by the resulting precedent to order every employee who reports safety violations to a psychiatrist.

D. **Captain Estabrook is Entitled to Damages for Emotional Distress**

As presented more extensively in Complainant's initial brief, AIR 21 authorizes compensatory damages for emotional distress, inconvenience and the like. 49 U.S.C. § 42121(b)(3)(B)(iii); 29 C.F.R. § 1979.109(b). Contrary to the Respondent's argumentation, the ARB has upheld awards of such compensatory damages based on a complainant's own account of his suffering. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, ALJ No. 2006-AIR-22

(ARB June 30, 2009); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004).

Captain Estabrook suffered a four-month ordeal during which his career teetered on the edge of destruction. (Estabrook, Tr. 120-21). For years to come he will have to contend with certificate-threatening psychiatric inquiries from the FAA. FedEx representatives knew that they were subjecting him to upset and anguish (Fisher, Tr. 332; McDonald, Tr. 656), and Respondent instilled a continuing fear of bankruptcy in Estabrook during his deposition. (Tr. 122).

Unlike the above-referenced ARB cases, which based liability on the complainants' account alone, a psychiatric report in the instant matter confirms that Captain Estabrook was plagued by FedEx-induced "fears and sense of being 'targeted' by the company …." (RX-4 at page 5). The evidentiary potency of Dr. Green's observations must be deemed particularly persuasive given that the Complainant's objective during Green's analysis was to vindicate his mental health.

FedEx submits that it should not be held responsible for the humiliation induced by Dr. Glass's hostile probing relating to Captain Estabrook's wife, his libido, and incidents of marital infidelity. (Respondent Brief at 35). However, one needs to look no further than case law cited by FedEx itself, which confirms the contrary legal principle:

> a tortfeasor [is] liable for aggravation of the injury he inflicted, even aggravation brought about by the treatment -- even the negligent treatment -- of the injury by a third party.

Stoleson v. United States, 708 F. 2d 1217, 1223 (7th Cir. 1983).

E. **Respondent Has Waived Its Right to Object to Attorney's Fees**

For the first time in its brief, the Respondent requests additional time and pages to challenge the reasonableness of Complainant's attorney's fees. (Respondent's Brief at 36).

This eleventh hour request, however, is contrary to the process established by the Tribunal.

The Complainant was required to submit his attorney's fees as a trial exhibit. Thus, the authenticity of the exhibit has been accepted and any objections to the exhibit's admission have been waived. The Respondent had the entire duration of the trial to challenge the reasonableness of the fees on an evidentiary basis, but chose not to do so. At the conclusion of the trial, the Tribunal ordered the Complainant to submit any additional fees incurred as a result of the trial as an addendum to its brief, and this was done.

The Complainant was not permitted to follow a bifurcated approach to its fee application. His evidence was presented and the issue of attorney's fees addressed in his brief. Subsequently, Complainant's counsel readily consented to the Respondent's request for an extension in the briefing schedule. We do not, however, consent to a whole new round of argument on the issue of attorney's fees. The Respondent should be deemed to have waived any objection to the attorney's fees submitted.

CONCLUSION

For the foregoing reasons, and those stated in Complainant's original submission, we request that the Tribunal award Captain Estabrook the remedies he has requested. (Complainant Brief at 48-49).

Respectfully submitted on:

Date: October 20, 2016

By: ***/s/ Lee Seham***

Lee Seham, Esq.
Seham, Seham, Meltz & Petersen, LLP
199 Main Street – Seventh Floor
White Plains, NY 10601

Attorneys for Complainant Mark Estabrook