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

MARK ESTABROOK,	)	
Complainant,	)	
	)	**ARB-2017-0047 (AIR)**
v.	)	
	)	**ADMINISTRATIVE REVIEW BOARD**
FEDERAL EXPRESS CORPORATION,	)	
Respondent.	)	

COMPLAINANT'S REPLY BRIEF SUPPORTING THE PETITION FOR REVIEW

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INTRODUCTION

For facility of reference, Complainant's Reply Brief will track the Respondent's outline contained in its brief under Section IV - Legal Analysis.

A. Standard of Review

The Respondent fails to address case law cited by the Complainant that holds that the substantial evidence standard requires an administrative law judge to fully consider the contradictory evidence submitted by both parties. *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 addition, both the Administrative Law Judge (ALJ) and Respondent have treated as evidentiary issues several matters that present questions of law. ALJ legal determinations are not entitled to deference, but rather, are reviewed by the ARB on a *de novo* basis. *See, e.g., Furland v. American Airlines, Inc.,* ARB Nos. 09-102, 10-130 at 8 and n.5 (ARB July 27, 2011).

B. Elements of an AIR 21 Complaint

Respondent correctly states the elements of an AIR 21 complaint.

C. Fedex Retaliated Against Estabrook in Violation of AIR 21

1. The Laredo Events were Contributing Factors

Brushing to one side AIR 21 law that provides that temporal proximity "normally" satisfies the causal link between protected activity and adverse action (29 C.F.R. § 1979.104(b)(2)), the Respondent endorses the ALJ determination that the Respondent did not care about the Laredo delay per se, but rather its sole concern was that Estabrook waited out the storm at a crew hotel. (Respondent Brief at 17; Decision at 53). Both the ALJ and Respondent defend this position based on trial testimony, given only after the witnesses were fully apprised

of the evidentiary issues. The ALJ made no attempt to reconcile this self-serving trial testimony with the contemporary evidence, from date of the Laredo departure, which confirms that the Respondent's *only* issue concerned Estabrook's determination to delay his departure due to weather conditions:

- Crook condemned Estabrook for taking it "upon himself to delay a flight" (RX 8);
- Crook criticized Air Traffic Control for including Estabrook's flight in a "ground stop" gate hold in Laredo (RX 8);
- Crook lambasted Estabrook for being the "sole source of weather" (*Id.);*
- Crook criticized Estabrook for having "delayed the flight" based on his own appraisal of weather conditions (*Id.);*
- Nowhere in the audiotapes 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).
- The GOC Manager, when advised that Estabrook had complained that he was being "pushed to leave," responded: "It's his damn job." (RX 10 at 8).

Presumably to compensate for the glaring lack of support provided by contemporary evidentiary sources, the Respondent urges the ARB to consider Crook's representations of statements he allegedly made during *unrecorded* phone calls. (Respondent Brief at 5 – "get to the ramp."). Estabrook's more logical account was that Crook exploited the availability of an unrecorded line to engage in blatant pilot pushing: "everybody else is taking off" and "I am watching you very closely." (Estabrook, Tr. 73-74).

The ALJ failed to address the lack of any contemporaneous evidence, in the Crook email or the audiotapes, that the Respondent had a concern about Estabrook's presence at the hotel. The ALJ failed to address the fact that the Crook email evinced hostility toward the flight delay and the weather appraisal, rather than the hotel issue. The ALJ failed to address the Respondent's open hostility to the flight delay expressed in the expletive – "it's his damn job."

The ALJ failed to resolve the credibility dispute raised by Estabrook's and Crook's conflicting accounts of their unrecorded telephone conversations. The ALJ failed to consider Respondent's concession that Estabrook had a good faith belief that he was being pressured to depart into hazardous conditions and that Crook required counseling. (Estabrook, Tr. 84, Fisher, Tr. 315, 350, 356-57). The ALJ failed to consider that Respondent representatives Fisher and McDonald proceeded with a disciplinary investigation of Estabrook based on email and audiotape evidence that solely presented the issue of Estabrook's refusal to depart, rather than his presence at the crew hotel. (CX 8; Fisher, Tr. 349-50, 354; McDonald, Tr. 674).

As discussed in greater detail in Complainant's initial brief, the ALJ also failed to give any consideration to Respondent's potential resentment toward Estabrook's filing of an AIR 21 in response to being summoned for an interrogation related to his Laredo departure. Respondent terminated its Laredo investigation without taking disciplinary action almost immediately after learning of this AIR 21 filing (Estabrook, Tr. 85-86; RX 12) and Estabrook testified that Fisher admitted that McDonald was "upset" that no disciplinary action would be taken against the Complainant (Estabrook, Tr. 84); however, the ALJ did not consider this evidence nor give any reason why Estabrook's sworn testimony should be discounted. At the opposite pole of credibility, Fisher and Respondent counsel falsely represented to OSHA that they had no knowledge of Estabrook's Laredo-related AIR 21filing (Fisher, Tr. 398-99; CX 23 at 3); however, the ALJ gave no consideration to this obfuscation, which we believe could be fairly characterized as perjury pursuant to 18 U.S.C. § 1001, in discounting the Respondent's credibility and/or as evidence of Respondent's desperate effort to cover up its resentment regarding the Laredo AIR 21 filing.

The ALJ also failed to address direct evidence that the Respondent's August 5 grounding of the Complainant was, at least in part, to facilitate an interrogation by Respondent legal counsel as to whether Complaint was the "Mayday Mark" who had posted communications on the internet regarding the Laredo departure, including:

* That immediately prior to the August 5 grounding, McDonald determined that a FedEx pilot had been communicating on the internet regarding the Laredo departure under the name Mayday Mark (McDonald, Tr. 699-701);

* McDonald directed Respondent labor attorney Tice to question the Complainant to determine whether he was Mayday Mark (McDonald, Tr. 705-06; Tice, Tr. 435, 485);

* McDonald considered the Laredo-related postings to constitute a potential violation of Respondent policy. (McDonald. Tr. 702-04);

* Labor attorney Tice's general purpose for attending pilot meetings is to conduct *disciplinary* investigations. (Tice, Tr. 427);

* Despite his own notes reflecting otherwise, Ondra denied that the subject of Mayday Mark was discussed prior to the meeting (JX-3; Ondra, Tr. 584);

* After the Complainant completed his admittedly rational August 9 presentation, the Respondent's legal counsel proceeded with his interrogation as to whether the Complainant was Mayday Mark, without a single question from Respondent's representatives concerning the security issues the Complainant had raised. (Estabrook, Tr. 93-94; Ondra, Tr. 587-88);

* The Respondent terminated its investigation of Mayday Mark's identity as soon as it determined that the poster was not the Complainant (McDonald, Tr. 706);

In view of this welter of evidence connecting the Laredo departure to the August 5 grounding and subsequent meeting, the ALJ's finding that Laredo-related protected activity was only tied to the August 5 grounding by virtue of temporal proximity reflects an abandonment of the evidentiary review required by the substantial evidence standard.

The ALJ also never addressed the hopeless contradictions in the Respondent's trial position regarding the August 5 grounding that reduced the discovery process to a sham. The

Respondent asserted that the August 5 grounding was determined by Fisher, Ondra, Tice, and McDonald. (CX 22 at C-123-24). At trial, however, the Respondent abandoned this premise and held forth that the Laredo-fixated McDonald made the decision "alone." (Fisher, Tr. 414-15; Tice, Tr. 429, 459; Ondra, Tr. 564; McDonald, Tr. 658-59, 690-91). Except this version was also untrue since Tice admitted that Vice President of Flight Operations James Bowman – who, due to Respondent's false interrogatory response, Complainant was never able to depose – directed that Estabrook be grounded. (Tice, Tr. 457-59, 473-75).

Nor did the ALJ address the Respondent's disavowal of its position in interrogatory responses and its summary judgment brief that the August 5 grounding was "merely to facilitate" the August 9 meeting. (CX 19 at 2; Appendix at 255). Here again, the Laredo-fixated McDonald and attorney Tice both recanted at trial and admitted that Respondent utilized the NOQ to ground Estabrook and strip him of his jumpseat privileges based on "situational awareness." (Tice, Tr. 473-74; McDonald, Tr. 666). Nevertheless, the ALJ inexplicably accepted the Respondent's abandoned version of the August 5 grounding – that it was merely to facilitate a meeting – thereby accepting a disproven pretextual rationale for the Respondent's adverse action. (Decision at 53).

In a further remarkable demonstration of the failure to adhere to the substantial evidence standard, the ALJ asserted that the Complainant presented "no evidence" that the Respondent's application of the NOQ designation reflected hostility toward Complainant and actually refused to "second guess the ministerial mechanism" used by the Respondent. (Decision 53 at n. 60). As Respondent's witnesses testified, FedEx typically utilizes the NOQ to ground a pilot due to a health/training issue or to conduct a disciplinary investigation. (Fisher, Tr. 322-324, 365-366, 400; McDonald, Tr. 690-691). Moreover, Respondent placed Complainant 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). The mechanism "typically" used by the Respondent to facilitate a non-disciplinary meeting with a pilot is the RMG (Remove for Management) designation, which would not trigger jumpseat suspension; indeed, Fisher claimed that he did not know why the RMG designation was not used for Complainant's August 9 meeting. (Fisher, Tr. 363-365). Particularly in view of the Respondent's abandonment of its earlier posture that the August 5 NOQ ground was "merely" to facilitate a meeting, the Respondent's utilization of the punitive NOQ designation merited careful scrutiny; however, the ALJ maintained that he was simply not interested.

2. Estabrook's Rational Presentation that the Respondent was Failing to Prevent and Deter Terrorist Actions Constituted Protected Activity

Entirely omitted from Respondent's brief is any citation to the relevant regulatory law or discussion of its language. Rather, Respondent's brief replicates the ALJ's argument that the law's broad "prevent" and "deter" mandate should be read narrowly based on the testimony of Todd Ondra and the inaction of the FAA or what that agency might "believe." (Respondent's Brief at 15, 22-23; Decision at 49). As discussed at greater length in Complainant's original brief, it is within the exclusive province of the court to determine whether the broad language of the law could reasonably be interpreted by a safety-minded airline employee to prohibit providing valuable intelligence to terrorists who had specifically targeted FedEx. (Complainant's Brief at 22-23). Or, conversely, whether the United States Congress intended to permit an air carrier to weaponize psychiatric analysis in response to a pilot who presented rational concerns relating to the carrier's incentivizing of terrorist activity.

We say "rational" because the Respondent's top security official agreed that the Complainant's concerns were rational. (Ondra, Tr. at 601; Decision at 46). Only now, on

appeal, does the Respondent argue that his rational concerns were "unreasonable" because an Al Qaeda shipper might not be able to determine which FedEx plane from Yemen was carrying his package. (Respondent Brief at 14, 22).

Such eleventh hour arguments are to no avail. The Respondent understood that Estabrook was accusing the carrier of failing to deter, and actually incentivizing, the introduction of explosives on to its aircraft by terrorists. (Decision at 46; Fisher, Tr. 362-63). Moreover, no one at the August 9 meeting disputed his contentions. No one proffered an explanation or justification for FedEx's unsafe practices. No one said that he was unreasonable. No one made *any* response to his admittedly rational concerns other than to interrogate him regarding the Mayday Mark postings and consign him to psychiatric review.

Nor did any Respondent representative at that meeting contend that it had no choice but to continue in its practices that incentivized terrorist access. Nevertheless, in addressing a purely legal issue, the ALJ and Respondent once again rely on the testimony of fact witnesses to assert that the dissemination of its flight tracking information was compulsory. (Decision at 49; Respondent Brief at 24). Testimony as to what the law requires is inadmissible and the conclusions that flow therefrom are founded on sand.

Respondent argues that it is lawful for the carrier to punish the Complainant for expressing his rational concerns because the FAA compels FedEx to make its tracking information available to terrorists albeit in apparent contravention of its obligation to prevent and deter terrorist action. However, only the Complainant addressed the *law* – free of inadmissible "fact" testimony and speculation – and the *law* is that that air carriers are *not* required to have their tracking data disseminated. (CX 44 citing H.R. 2112, Section 119A; 78 Fed. Reg. 51804 (August 21, 2013); Complainant's Initial Brief at 24-25). The public policy behind that law is to

allow carriers to respond to potential security concerns. *Id.* Put another way, as of 2011, the law has been re-written to facilitate the Respondent's full compliance with its regulatory obligation to prevent and deter the introduction of explosives into its aircraft by terrorists.

The question remains whether AIR 21 permits the victimization of an individual who rationally raises an issue of compliance that falls well within the plain language of the law. Given the broad interpretation of this protective statute demanded by AIR 21 precedent, the answer must be in the negative.

3. FedEx Cannot Establish by Clear and Convincing Evidence That it Would Have Taken the Same Adverse Action in the Absence of Protected Activity

(a) August 5 NOQ

The Respondent repeats its argument that its NOQ grounding of the Complainant was merely for the purpose of "clearing Estabrook's schedule" and repeats the ALJ's finding that Estabrook offered "no evidence" that rebutted the Respondent's resort to grounding as a simple scheduling tool. As discussed above, Respondent's own witnesses testified that:

* FedEx typically utilizes the NOQ to ground due to a pilot health/training issue or to conduct a disciplinary investigation. (Fisher, Tr. 322-324, 365-366, 400; McDonald, Tr. 690-691);

* Respondent placed Complainant 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);

* The mechanism "typically" used by the Respondent to facilitate a non-disciplinary meeting with a pilot is the RMG (Remove for Management) designation, which would not trigger jumpseat suspension;

* Fisher claimed that he did not know why the RMG designation was not used for Complainant's August 9 meeting. (Fisher, Tr. 363-365).

But most telling of all is attorney Tice's sudden admission at trial, later confirmed by McDonald who had been poring over Laredo-related internet postings, that the Respondent directed the

August 5 grounding due to the Complainant's lack of "situational awareness." (Tice, Tr. 473-74; McDonald, Tr. 666). The Respondent's account that it barred Estabrook from accessing its aircraft fleet-wide as a mere scheduling tool was and is a prevarication to which the Respondent abjectly confessed at trial.

(b) Reinstatement of NOQ and 15D Referral

It is undisputed that McDonald viewed the August 9 meeting as an opportunity to continue the interrogation of Estabrook regarding the Laredo departure and the Laredo-related AIR 21 filing. The reinstatement of the NOQ on August 9 and subsequent compulsory psychiatric review was a continuation of the retaliatory path that McDonald and Bowman had elected on August 4 based on the pretext that Estabrook lacked situational awareness.

In scouring the August 9 meeting for tidbits that would justify further retaliatory action, Ondra took such liberties in making false attributions that it left his credibility in tatters. (Decision at 44, 54 – "the Tribunal accords limited weight to Mr. Ondra's testimony"; Ondra's denial that Mayday Mark was a matter of interest to the Respondent "further undercuts his credibility.").

It was left to Fisher – who was not convinced that placing Complainant back on NOQ was appropriate (Fisher, Tr. 402) – to work with Tice to drum up a rationale for compelling a psychiatric review that neither of them thought was necessary. The ALJ found that Fisher and Tice relied, in part, on Complainant's "statements about security concerns relating to Al Qaeda, and the real-time tracking of Respondent's packages during the August 9, 2013 meeting as reasons for the evaluation request." (Decision at 57 citing JX-5, RX-15). As Fisher explained to Estabrook, the Respondent initiated its second round of adverse actions against the Complainant because "he knew too much." (Decision at 57 citing Tr. at 113, 328-29, 396).

The ALJ correctly determined that McDonald's testimony concerning the purpose of the 15D evaluation "deserves little weight." (Decision at 44). The Respondent steered the Complainant into a psychological analysis and the FedEx medical director confessed that he was *directed* to send Captain Estabrook to a psychiatrist. (Decision at 44; Estabrook, Tr. 117).

Respondent argues that a decision in Estabrook's favor would "handcuff the company's ability to ensure an individual is safe to operate an airplane where erratic behavior is noticed." (Respondent Brief at 29). The argument is an unworthy piece of scaremongering designed to distract the ARB from a rational analysis of the facts.

The fact is that Estabrook was forced into a 15D based on false accounts of his communications. (Decision at 43-44). The fact is that, in violation of the collective bargaining agreement, Respondent representatives without medical background determined that the Complainant should be subjected to psychiatric analysis. (Decision at 44). The fact is that repeated requests that the Respondent disclose the basis for its humiliating decision were met with stony silence. (Decision at 56-57). In the words of the ALJ, the Respondent's actions were a "deeply troubling" response to the Complainant's "demonstrated knowledge of security issues," undertaken with only a "flimsy justification" and with the effect of "chill[ing] the open dialogue in the area of aviation security…" (Decision at 61-62). If the ALJ's decision is left in place, it will signal that employees who raise troubling compliance issues can be silenced by means of Soviet-style psychiatric analysis. It is difficult to conceive of a greater threat to public safety and the integrity of the AIR 21 process.

CONCLUSION

In view of the foregoing, the Complainant respectfully requests that the ALJ's decision be reversed with instructions, on remand, to enter judgment for the Complainant and to

determine an appropriate remedy.

Respectfully submitted on:

July 31, 2017

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

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 31, 2017, Complainants Reply Brief Support Petition for Review was filed electronically and served via email and U.S. mail upon:

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