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

APPENDIX
VOLUME III OF IV

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

TABLE OF CONTENTS

Volume I:

Certified List of Documents

Documents from Certified List (CL)

CL 1

CL 2

CL 3

CL 44

CL 70

Joint Hearing Exhibits (JX)

JX 1 (audio recordings)

JX 2

JX 3

JX 4

JX 5

JX 6

JX 7

Complainant's Hearing Exhibits (CX)

CX 6

CX 7

CX 8

CX 9

CX 10

CX 11

CX 12

CX 14

CX 15

CX 16

CX 17

CX 18

CX 19

CX 20

CX 21

CX 22

CX 23

CX 27

CX 29

CX 30

CX 31

CX 32

CX 44

Respondent's Hearing Exhibits (RX)

RX 1

RX 2

RX 4

RX 6

RX 7

RX 8

RX 9

RX 10

RX 12

RX 13

RX 14

RX 15

RX 16

RX 17

RX 18

RX 20

RX 21

RX 23

RX 24

RX 26

RX 27

RX 28

RX 33

Volume II:

Hearing Transcripts

Day 1, June 6, 2016

Volume III:

Day 2, June 7, 2016

Volume IV:

Day 3, June 8, 2016

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	)	
	)	
MARK ESTABROOK,	)	
	)	
Complainant,	)	
	)	Case No. 2014-AIR-00022
v.	)	
	)	
FEDERAL EXPRESS CORPORATION,	)	
	)	
Respondent.	)	

DAY TWO

Tuesday,
June 7, 2016

CLIFFORD DAVIS AND ODELL
HORTON FEDERAL BUILDING
167 North Main
9th Floor
Courtroom #3
Memphis, Tennessee

The above-entitled matter came on for hearing, pursuant to notice, at 8:30 a.m.

BEFORE: HONORABLE SCOTT R. MORRIS
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

Lee Seham, Esquire
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
199 Main Street, 7th Floor
White Plains, NY 10601
(914) 997-1346
ssmpls@aol.com

On behalf of the Respondent:

K. Phillip Tadlock, Esquire
Daniel Riederer, Esquire
FEDERAL EXPRESS
3620 Hacks Cross Road
Building B, 3rd Floor
Memphis, TN 38125
(901) 434-8600
phil.tadlock@fedex.com
daniel.riederer@fedex.com

INDEX OF WITNESS TESTIMONY

WITNESSES	DIRECT	CROSS	RE-DIRECT	RE-CROSS	VOIR DIRE
CALLED BY RESPONDENT:					
ROB FISHER	308 By Mr. Riederer	337 By Mr. Seham	404 By Mr. Riederer	407 By Mr. Seham	
ROB TICE	423 By Mr. Tadlock	445 By Mr. Seham	508 By Mr. Tadlock	510 By Mr. Seham	

INDEX OF EXHIBITS

EXHIBITS	**IDENTIFIED**	**RECEIVED**	**REJECTED**
COMPLAINANT'S EXHIBITS			
CX-48	375		
CX-49	448		
RESPONDENT'S EXHIBITS			
RX-34	382		

P R O C E E D I N G S

8:35 a.m.

JUDGE MORRIS: All parties present when the hearing last recessed are again present. This is the case of Mark Estabrook versus Federal Express Corporation, Day Two, Case Number 2014-AIR-00022. Respondent's counsel, call your next witness?

MR. RIEDERER: We would call Captain Rob Fisher.

JUDGE MORRIS: Mr. Fisher, would you turn and face me and raise your right hand?

WHEREUPON,

ROB FISHER

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

JUDGE MORRIS: Please take your -- well, you have already taken your seat. Please give your full name and business address for the record.

THE WITNESS: Robert Edward Fisher. Business address is 3131 Democrat Road, Memphis, Tennessee.

JUDGE MORRIS: Go ahead, counsel.

DIRECT EXAMINATION OF

ROB FISHER

BY MR. RIEDERER:

Q Captain Fisher, how long have you worked for FedEx?

A I have worked for FedEx for 26 years.

Q And can you give me an overview of your background before coming to FedEx?

A Before coming to FedEx?

Q Yes.

A I was in the United States Navy from 1982 to 1990. I flew carrier aircraft, and I got out as a lieutenant and joined FedEx a month later.

Q What crew positions have you held while you've worked at FedEx?

A I was a second officer sitting in the back seat of the 727, a first officer in the 727. Then in 1995 I was the first officer in the Airbus. In 1998, I made captain of the Airbus, and I have been a captain ever since. I was a line check airman and standards check airman during that time frame.

Q You worked as a manager for FedEx?

A Yes. From 2000 to 2005, while I was in Subic Bay, Philippines, I served as the regional chief pilot for the Subic Bay and the Asia-Pacific Region. From 2007 to 2011, I was a duty officer, and at the end of 2011, beginning of 2012 until 2014, I was a fleet captain for Airbus. And in 2014 to 2015 I was the assistant system chief pilot. And then from 2014 to -- excuse me, 2015 to the present, I'm the system chief pilot.

Q So in 2013 you were the fleet -- you were a fleet captain?

A Correct. 2013, I would have been a fleet captain for Airbus.

Q What were your job duties as a fleet captain?

A My job duties were to maintain safe, level, efficient operations for my fleet. I also handled all personnel and any discipline issues with the 950 pilots that worked for me.

Q You said how many pilots worked for you?

A Nine hundred fifty at the time.

Q While you were --

A Approximately.

Q While you were a fleet captain, did you supervise Captain Estabrook?

A Yes.

Q You recall an incident involving Captain Estabrook in April of 2013 relating to a flight from Laredo, Texas, to Memphis, Tennessee?

A Yes.

Q What happened on that occasion?

A Captain Estabrook stayed in his hotel rather than report to the airport one hour prior to his scheduled departure time. And that was the question that we had, why he did that.

Q Was there weather issues on that night?

A Yes. As I remember, the line of thunderstorms that were moving west-to-east that was going to affect Memphis, the airport in Memphis.

Q Was there weather over Laredo?

A I don't recall.

Q What are the expectations of pilots in circumstances of bad weather?

A The expectation is that the captain and his dispatcher work out whether it's safe to fly, whether it's legal to fly. They make that decision to take off or operate the airplane. As far as showing up to work on time, that's contractual.

It's also in our FOM that you report to the airport. You report to work to do things like, you know, check the weather, check the -- check with the ramp, the loading, check with maintenance possibly if there's anything being done to the airplane.

You should also do a walkaround of the aircraft, check the -- do your interior checks of the airplane, do all these things while you're -- in case that something happens that in the situation the weather would get better and you're ready to go. That's why we report to work on time one hour prior.

Q While at the airport, are there pilots or the

flight crew, communicating with Memphis GOC?

A Yes.

Q Okay.

A While at the airport, you would probably -- based on if you had any questions about your flight, you would certainly talk to your dispatcher. We follow Flag domestic rules. Flag domestic rules require that there's a joint responsibility between the captain and the dispatcher.

Q So on this occasion Captain Estabrook was staying at his hotel rather than the airport?

A On this occasion, Captain Estabrook stayed at his hotel rather than report to the airport because he said that there's a line of thunderstorms, I'm not going to take off anyway, so I'll stay here at the hotel.

Q Other than Captain Estabrook, have you ever encountered a situation where a pilot makes the decision on his own not to show up at the airport?

A No, we never make a decision on our own to not show up at the airport. There might be a case where you could show up at the airport -- or, stay at the hotel based on your airplane didn't show up so you're obviously not going to go anywhere. So your airplane may be -- there might be a mechanical, therefore -- and, even then, you would probably show up on time.

But, if they are waiting for a part, that part

had, you know, an estimated arrival time of, say, three or four hours, we would occasionally allow the crew member to stay at a hotel. But that would have to be worked out between basically the duty officer and scheduling. But the duty officer can handle all that for you, because they work right next to schedulers.

Q What do you mean by schedulers?

A The schedulers. The schedulers, they're the ones that -- you know, that make your schedule, show you when you have to be to work on time and, you know, all the timing of your flight. So a scheduler would take a look, would have talked to the duty officer. They may not be informed about a possible mechanical problem or the airplane didn't show up, and they could basically change the schedule to a later departure time.

Q After this Laredo event, did you meet with Captain Estabrook?

A Yes, I did.

Q Tell me about that meeting.

A Fairly short meeting, about 15 minutes. There was a question as to whether Captain Estabrook and his dispatcher understood what he was trying to convey. His position was, I told Ms. Hayslett, the dispatcher, that, hey, I am going to stay at the hotel.

I think he made mention, I'm in the lobby, I'm

going to be, you know, taking a car to head to the airport. I think she thought he was heading there, and his expectation was he was going to stay there. So there's communication issues that I work out.

We had tapes that basically corroborated that information. There was two conversations that I had between Captain Estabrook and the dispatchers, and then there was another communication that I had between the duty officer, Captain Mark Crook, and Captain Estabrook. Anyway, yeah, to finish that statement, we concluded that there was a miscommunication.

And then I reiterated to Captain Estabrook that, you know, that we show up to work at the airport and then we make all the decision about whether or not we take the airplane. We don't control when a pilot takes the airplane off. He works that out with his dispatcher. Ultimately, he has the ultimate responsibility, but we do expect you to be at the airport.

Q Was the meeting adversarial?

A No, it was not. In fact, we were in a makeshift office area, and I think the meeting was after -- it was I'm going to say around 1:00, but Captain Estabrook showed up early, and Mitch Matheny, my fleet manager, and I were having lunch.

And Captain Estabrook was eating lunch with us, so

we had lunch together, had the meeting, fairly short, 15 minutes. It was clear there was a miscommunication, and I reiterated to Captain Estabrook that he needs to be at the airport on time one hour prior to his scheduled departure time.

Q During the meeting, did Captain Estabrook suggest that the duty officer was pushing him to fly?

A He did make mention of that, yes.

Q Did you ever speak with the duty officer?

A I don't recall having a verbal conversation, but I did receive an e-mail talking about the event. I think -- and plus we heard the tapes of the conversation between Captain Estabrook and the duty officer. I could not conclude that there was any pushing there. I concluded that Captain Crook, the duty officer, was frustrated. He couldn't understand why he wasn't at the airport. And so the issue was, you're at your hotel, you're supposed to be at the airport.

Q Do you know what an AIR-21 complaint is?

A Not in great detail. I know what it is now. At the time, I did not.

Q During the meeting, did Captain Estabrook mention he was withdrawing an AIR-21 complaint?

A I don't recall that, but it's possible.

Q Did you schedule this meeting with the intent to

discipline Captain Estabrook?

A No, I did not. It was a scheduled 19D hearing, which is a provision in our contract that allows us to investigate a case that we don't have all the answers to. It's just basically a fact-finding mission to find out what happened.

Q We have some exhibits in front of you. Can you look in the red folders at the front, joint exhibit JX-2? It should be tab 2 right there in the front.

A Okay.

Q Take your time to review it.

A Okay.

Q So is this the letter you sent to Captain Estabrook setting up the meeting?

A Yes.

Q And in this letter do you explain the purpose of the meeting?

A Yes.

Q Which was? What was the purpose?

A The purpose was to investigate the circumstances involved with why he was late reporting to work for flight 1317 on 11 April 2013.

Q And it refers to section 19D-1 of the CBA. That's the collective bargaining agreement, right?

A That is correct.

Q Do you know offhand what 19D-1 says?
A You know, it says it's an investigation, it's not discipline, to paraphrase it. But it's part of the investigation and discipline section of the CBA, and it is the investigation part of that section.
Q Can you look at respondent's exhibit RX-1? It's also in the same folder, but it's not the first number 1 tab, it's the second number 1 tab.
A Oh, got you. There are two number 1 tabs, all right. Yes?
Q That exhibit contains excerpts of the collective bargaining agreement, is that correct?
A Correct.
Q Can you find section 19?
JUDGE MORRIS: You said section 19?
MR. RIEDERER: Section 19. Should be page R-31 down the bottom.
THE WITNESS: Okay, yes.
BY MR. RIEDERER:
Q Is that section 19 of the collective bargaining agreement?
A That is.
Q And so, when you cite to section 19D-1, what are you referring to?
A 19D-1, I'm referring to the collective bargaining

agreement, section 19, subsection D, and it says investigation. "The company shall investigate to understand a pilot's performance and conduct before taking any disciplinary action against that pilot.

"Part of a proper investigation may include management talking or meeting with a pilot or a group of pilots to determine the facts the circumstances surrounding a situation. Depending on the circumstances of the particular case, some or all necessary fact-gathering may occur prior to or without the need for a hearing of any type."

Q All right.

A It does say, you know, that you could have representation. I believe he did have representation, and I also had my fleet manager attend that meeting.

Q Did you discipline Captain Estabrook for his conduct?

A I did not. I counseled Captain Estabrook about how our company works, reiterated that, you know, we have to show up on time, but in no way do I direct a pilot to fly through a line of thunderstorms. That is something that is made by -- a decision is made by the pilot himself -- or, excuse me, by the captain and the dispatcher. But the issue here was staying in a hotel instead of showing up at the airport.

Q Who is Bill McDonald?
A At that time in 2013, Bill McDonald was my boss, and he was the system chief pilot.
Q Did you speak to Bill McDonald about this Laredo incident?
A Yes. Captain Bill McDonald did -- I don't know if he called me or we talked verbally, it was a long time ago, but he did say, hey, we need to look into this and find out why he didn't show up for work.
Q Did Captain McDonald instruct you to discipline Captain Estabrook?
A No, he did not.
Q Did you follow up with Captain McDonald after the meeting?
A I did. I believe I may have given him a phone call just saying it's over, and I told him I'd follow up with an e-mail, and I sent him an e-mail --
Q Can you look at --
A -- talking about what we did.
Q Can you look at respondent's exhibit RX-9?
JUDGE MORRIS: It's in the next volume.
MR. RIEDERER: And take your time to read that.
THE WITNESS: Okay.
BY MR. RIEDERER:
Q Is that the e-mail you sent to Captain McDonald

following your meeting?

A Yes, it is.

Q Can you explain in summary form what happened?

A Yeah, in summary form, that it was a fairly short meeting. Once again, we told Captain Estabrook to please work it out with the duty officer if there is -- if you have a good reason to stay at the hotel. Otherwise, it's very rare that you would ever be granted to stay in a hotel.

Therefore, we expect you to report to work one hour prior to your scheduled departure time, that no one is at that point -- once you show up for work, no one is going to push you to fly an aircraft. I reiterated to him once again that it's a joint responsibility between the captain and the dispatcher, and you make a decision based on the safe and legal operation of your aircraft.

Q At FedEx, have you ever instructed a pilot to fly in unsafe weather conditions?

A No.

Q Was Captain McDonald upset that you didn't discipline Captain Estabrook?

A No. It was -- no.

Q Do you know who Fred Smith is?

A Yes. Fred Smith is a founder of FedEx, the chairman and CEO of FedEx Corporation, which is the parent company of FedEx Express.

Q Are you aware that Captain Estabrook sent an e-mail to Captain McDonald in August of 2013 asking Captain McDonald to have Mr. Smith call him?

A Yes.

Q How did you find out about that e-mail?

A Captain McDonald told me.

Q Can you take a look at respondent's exhibit RX-14? Start from the back, and go ahead and take your time to read it.

A Okay.

Q At the time, were you still Captain Estabrook's direct supervisor?

A Yes.

Q What was your impression of the e-mail?

A I certainly felt the e-mail was odd, peculiar, that one of our captains would be asking Mr. Smith to -- or, asking Bill McDonald to call Mr. Smith to have him call him and then also put in there about, you know, I may be sleeping so I may not be able to answer the phone. So it's not something I would say to people. It was odd.

Q Were you copied on this e-mail?

A I'll check. I don't believe I was. No.

Q Did Captain Estabrook ever approach you suggesting he wanted to speak with Mr. Smith?

A No.

Q Prior to this e-mail, did Captain Estabrook ever approach you and express any concerns with the safety or security of the airline?

A No.

Q And did you eventually meet with Captain Estabrook?

A Yes, we did.

Q Do you recall the date?

A Excuse me?

Q Do you recall the date?

A Yes. August 9th was the date we all met.

Q Who was present in the meeting?

A It was myself, Todd Ondra, who was the director of aviation security, and it was Rob Tice, a labor relations lawyer -- or, legal, I should say, and then, of course, Captain Estabrook.

Q At the time of that meeting, what was Captain Estabrook's flight status?

A At the time of the meeting, Captain Estabrook was placed on NOQ, which is not operationally qualified.

Q Who made that decision?

A Captain McDonald.

Q Explain what NOQ means.

A NOQ is something that we use to take a pilot off of his flight duties, with pay, so that we can arrange -- in

this case, arrange a meeting.

Q Are there other reasons why a pilot would be placed on NOQ?

A It's typically when I want to meet with someone. There could be other incidents where, you know, we kind of interchange removing people with RMG based on a specific trip, or we might NOQ based on an indefinite time until we meet with someone.

Q And, if someone has other issues that are questioning their fitness for duty, would they be placed on NOQ?

A Yes.

Q So there's more than one reason why a pilot would be placed on NOQ?

A Yes.

Q How long did the meeting last?

A It was less than an hour.

Q Let me back up. Have you placed pilots on NOQ before?

A In my present position, yes, I place pilots on NOQ.

Q As an overview, can you give us --

A And, actually, in that position, I did, as well, yes.

Q As an overview, can you give me an example of

other times you've placed someone on NOQ?

A Yes. I had a captain call me about a first officer who he believed was experiencing signs of Alzheimer's. He was just very slow in the cockpit. In the interest of safety, we immediately placed him on NOQ. We also had a pilot who was sleepwalking, literally going to get ready to fly an airplane. We obviously took him off NOQ for further evaluation. So, yes.

Q How long did the meeting last?

A It was less than an hour.

Q What do you recall about the meeting?

A I recall -- you know, the high points were, Captain Estabrook was interested in the tracking of our packages. He also made mention of Auburn Calloway had switched his religion to Islam and that he may be communicating with Al Qaeda.

Q What were your impressions of the tracking data comments?

A I thought they were, you know, interesting ideas that he presented to Mr. Ondra. But I'm not a security expert. It's really not something I would understand, you know, how it would affect the security of our operation. So I would leave that in Mr. Ondra's hands.

Q What were your impressions about the Auburn Calloway comments?

A The impression that I had of the Auburn Calloway comments was, once again, it was kind of weird, strange that he would bring up something about a guy who had been in jail since 1994, that he would know that he had switched to Islam and that we should be checking to see if he was communicating with Al Qaeda.

Q Did Captain Estabrook say that he was being chased by Russians when he was a youth?

A I don't recall.

Q Did he ever say anything about chasing Russians?

A I don't recall. It's possible.

Q Do you recall if Captain Estabrook said anything about spending time in prison when he was a youth?

A I don't recall.

Q Is it possible?

A It's certainly possible. It was three years ago.

Q Did Captain Estabrook raise any concerns about live flight tracking data?

A No. I remember him raising concerns about the tracking of our packages. FedEx, obviously we let our customers know. If you have a tracking number, you can type in your tracking number and you can get a good idea of when that package will arrive to your home, even down to a time. So, anyway, we track our packages on our aircraft or the mode of transportation.

Q Is there a difference between package tracking data and flight tracking data?

A Yes, there is. Flight tracking data is something that the FAA provides. In fact, you can even -- through FlightAware, there are some applications you can go and actually track, you know, takeoff time, estimated time of arrival, airspeed, altitude, things like that. We at FedEx to not give that information, but that can be found through information that the FAA provides to the public.

Q What do you know about package tracking data in terms of what information is provided?

A I know very little, other than me as a customer, what I see. So, if I -- you know, I send packages all the time, and when I do I can get a good idea of when it's going to arrive because I'd like to be there when it arrives.

Q On the package tracking data that's provided to customers, does FedEx provide any information about the flights or the trucks that the package is on?

A No, they do not. They do not, no.

Q Did Captain Estabrook explain that he thought FedEx was violating some sort of federal safety law?

A He did not indicate that, as I recall.

Q Did you get the impression that Captain Estabrook thought FedEx was breaching some sort of safety law?

A No.

Q Did Captain Estabrook raise any concerns about our package screening procedures?

A No.

Q Did Captain Estabrook raise any concerns about our efforts to prevent explosive devices from entering the planes?

A No.

Q What was your impression of -- I think I already asked that. Did you have a problem with Captain Estabrook raising concerns about the tracking data in this meeting?

A No, not at all. We get recommendations all the time about -- you know, this is very different because I'm not a security person, but that's why we had Mr. Ondra there. But I recommendations all the time from people, from pilots on the line, suggesting how we could possibly do things differently as far as procedures. Obviously, if we think it's a safety of flight thing, we're going to take care of it right away. But, no, we of course have an open-door policy for all these kinds of complaints, if there are any.

Q Other than Captain Estabrook, has anyone raised any concerns to you about Auburn Calloway and his potential connections with Al Qaeda?

A No.

Q At the conclusion of this meeting -- let me strike

that. What happened at the end of the meeting?

A At the end of the meeting, I told Captain Estabrook that he was removed from NOQ. At that point, I considered the matter closed.

Q At the conclusion of the meeting, did you have any concerns with Captain Estabrook's comments or behavior?

A Well, I mean, you know, other than the e-mail that he gave Captain McDonald on or about August 4th, and then other than the comments about the Al Qaeda and Auburn Calloway possibly communicating, no, I did not.

Q What happened next?

A I was told by -- or, I was called by Rob Tice to put Captain Estabrook back on NOQ. And that was at the recommendation of Mr. Todd Ondra.

Q Did Rob Tice explain to you why?

A Just it was recommended by Todd Ondra and in the abundance of caution we are going to place him on NOQ.

Q Did Rob Tice explain Todd Ondra's position?

A He did not.

Q What was your reaction to Mr. Tice's call?

A I was frustrated. You know, Captain Estabrook is my employee, and I told him one thing thinking that the situation was over, and he was -- at the time, I believe he was catching a flight back to his home, so I knew I had to call him when he got home about a reversal of what I had

told him, so that not only that he was placed back on NOQ but that I was directing him to see an aeromedical advisor. So it was frustrating.

Q After the phone call with Mr. Tice, did you speak with anyone else about this matter?

A Well, yes. I immediately called my boss, Captain McDonald. The reason I called my boss is because I was a senior manager. I don't talk to Todd Ondra who is the director of another department. I talk directly to my director, which is Captain McDonald.

To Captain McDonald I said, you know, why, why are we doing this? Captain McDonald said, Rob, look, you know, in the interest of extreme safety, our expert in aviation security, Todd Ondra, if he says that we -- that he recommends a 15D, then that's the direction we're going to go. I agreed, and that's when I shortly thereafter made a phone call to Captain Estabrook.

Q Did Captain McDonald explain to you what Todd Ondra's reasoning was at that point?

A No. The only information he gave me was that he recommended that we go through and direct Captain Estabrook to a 15D.

Q What was your reaction to Captain McDonald's position?

A I was resolute. Once I spoke to Captain McDonald,

my boss, I felt better. And I was resolute as to what we needed to do, in the interest of the abundance of safety to recommend Captain Estabrook to see an aeromedical advisor.

Q And you called Captain Estabrook next?

A Yes.

Q What was his reaction?

A Well, he was very upset.

Q Did you tell him the reason he was getting evaluated was because he knew too much?

A It was similar to that. Actually, the conversation was -- Captain Estabrook said, Rob, is it because I knew too much? I made a regrettable comment and said, perhaps. It was probably a 15-minute conversation, but it felt like an hour because there was a lot of anguish on the phone, and I think I wanted to end the phone call quickly. It was not an easy phone call.

Q And, at the time you made those comments, did you know Todd Ondra's reasoning?

A No. I do not know his reasoning. I never called or talked to him.

Q If Mr. Ondra had concerns, was it reasonable to send Captain Estabrook through a 15D exam?

A Would you repeat that? I'm sorry.

Q If Mr. Ondra had concerns, was it reasonable to send Captain Estabrook for a 15D exam?

A Yes. If he had concerns, since he is the director of aviation security, if he had concerns after that meeting, then my boss agrees, and that's the direction we're going to go --

Q Yeah.

A -- in the interest of safety.

Q Are you -- as his supervisor, were you the one who directed Captain Estabrook to do a 15D exam?

A Yes. As Captain Estabrook's supervisor, I did direct him to a 15D. I just want to make it clear that I believe in 2011, when the contract was made, we hadn't had this new reorganization. So the contract -- 15D says that a regional chief pilot, among several other people, can direct a 15D.

My position as a fleet captain was a senior manager, which is the equivalent of a regional chief pilot, which we had done away with that term. So I was the person, his direct boss, to make that move, as a provision of the contract.

Q Did you direct Captain Estabrook for a 15D evaluation because he had raised concerns about safety or security?

A No, I did not.

Q Do you encourage your pilots to report safety and security concerns to you?

A Absolutely.

Q Are there methods through which a pilot can report safety and security concerns to you?

A Yes. In our website, you know, if you don't want to make a phone call, you can do it via security. We have a security part of our website. You know, we'll get things like a lot of laser reports, people are being hit with lasers. Sometimes you'll get someone walked on the airplane without an ID. We'll hear those kinds of things. So, yeah, we have a way of -- either through the internet, through phone calls, e-mail, or face-to-face.

Q Is there a position that's called a flight safety coordinator, or something to that effect?

A We have a flight safety duty officer that's on 24/7 that we can call. I'm not sure what you're referring to.

Q A flight operations threat awareness program.

A No, I understood what you're saying. Our crew, our captain, is basically designated as the flight safety coordinator, as per the FOM. And that's -- as the flight safety coordinator, they're responsible for the cockpit only. Everything after the cockpit is either by ramp, certain people from ramp, or maintenance. I don't know who has what, but I just know that we own the cockpit area, and we do a security check every time before we fly.

Q What are ASR's?

A Aviation Safety Reports? Those are reports that you can file to -- anytime you have a safety-related incident while you're operating an aircraft or even, you know, while you're walking around the airport getting ready to fly. It's pre and during. We also have the ASAP program, which has really kind of replaced the ASR program which -- and actually provides more protection for the crew member.

Q Do you know who Chuck Yannizzi is?

A Yes. Chuck Yannizzi is our threat awareness coordinator, I believe is his title.

Q And do you know what his job duties are?

A He is the liaison between flight operations and aviation security. He's the one I guess that makes sure that we're compliant as per what aviation security needs, what the FAA needs, and Homeland Security. He checks our processes to make sure we're doing everything correctly and legally.

Q In your role as the fleet captain, and setting aside the allegations by Captain Estabrook, have you ever taken any action against one of your pilots for reporting safety or security concerns?

A No.

Q When was the decision made to refer Captain

Estabrook for a 15D exam?

A The decision was made, you know, after we had the meeting on August 9th, after the meeting, I would say 30 minutes after the meeting I think -- and I'm guessing -- when Rob Tice called me and told me to place Captain Estabrook back on NOQ and that we were going to direct him to a 15D.

Q Can you take a look at joint exhibit JX-5?

A Okay.

Q What's the date of that letter?

A August 16th.

Q And that's the letter referring Captain Estabrook for a 15D exam?

A Correct.

Q Why is it dated a week after you conveyed to him that he was going to go back on NOQ and have a 15D exam?

A By the way, the contract gives us five working days to follow up with a letter.

Q Did you prepare the letter?

A I did, with Rob Tice.

Q When I say prepare, are you the one who typed it?

A No, I did not prepare the letter. I did not type it.

Q Tell me about that 15D process.

A The 15D process, in the interests of safety, we

may direct a pilot -- if we have a reasonable basis to question a pilot's fitness for duty, we will direct that pilot to see an aeromedical advisor.

Q And is the aeromedical advisor an employee of FedEx?

A No. The aeromedical advisor works for a separate company, in this case Harvey Watt, and it's -- no.

Q What happens once a pilot is referred to Harvey Watt?

A Once a pilot is referred to Harvey Watt, the aeromedical advisor will make an assessment. They may recommend further evaluation, but it is really out of my area. All we do is recommend, and then we go and they do their part.

Q Once a pilot has been referred to Harvey Watt, are you involved in the process?

A I'm not involved in that process.

Q Does Harvey Watt keep you informed with what -- well, let me back up. If a pilot goes to Harvey Watt and Harvey Watt recommends additional evaluation, are you given copies of the additional evaluations?

A I don't know. I don't think so.

Q In this case, did you provide a statement to Harvey Watt?

A Yes. Harvey Watt requested that we require [*sic*]

a statement why we were recommending Captain Estabrook to a 15D, and I did. With Rob Tice, we wrote a letter to them.

Q And can you take a look at respondent's exhibit RX-15?

A Okay.

Q Is this a statement that you submitted to Harvey Watt at Harvey Watt's request?

A Yes.

Q And in this statement did you mention anything about Captain Estabrook's concerns with package tracking data?

A No, I did not.

Q Do you get copies of medical reports generated during the 15D process?

A I'm sorry? Say that again.

Q Do you get copies of medical reports generated during the 15D process?

A I don't think so. I don't recall ever seeing medical reports.

Q Do you recall what the result was of Captain Estabrook's 15D?

A I do know that he returned to flying.

MR. RIEDERER: Your Honor, those are my questions.

JUDGE MORRIS: Counsel?

\\

CROSS EXAMINATION OF

ROB FISHER

BY MR. SEHAM:

Q Would you agree that your job position requires you to be knowledgeable of the Federal Aviation Regulations relating to flight operations?

A Yes.

Q And would you agree with a captain has the final say as to whether weather conditions require rerouting, delay, or termination of a flight?

A Yes. As I said before, in the Flag domestic arena, it's actually a joint responsibility between the captain and the dispatcher. But ultimately the captain has the final say.

Q I'm trying to understand that it's a joint decision but the captain has the final say. So the dispatcher has no ability to veto that decision?

A Well, let's talk about that. If the captain and the dispatcher have a disagreement, I would say that that's a no. If the captain says I want to go from point A to point B, and the dispatcher says I don't think that's safe or I don't think that's legal, then they would both have to agree with a positive before they could go.

Q In terms of a reroute?

A In terms of anything requiring the operation of

the airplane.

Q I'm not -- I didn't understand the answer. If a captain says it's too dangerous to fly, I don't want to fly at this time --

A Correct.

Q -- does he need a joint agreement of a dispatcher?

A No, because by definition, by him saying no, that would basically veto what the dispatcher would want. Having said that, let's toss that around. If the captain said I believe I am safe and the dispatcher said no, as a captain I would be very wary of operating that flight. I'd have to find out why the dispatcher is not in agreement with me flying.

Q Uh-huh.

A So it is a joint responsibility. I would not be flying the airplane if the dispatcher had reservations about safety or the legality of that flight.

Q So the captain has no obligation to have a joint agreement with a dispatcher about the hazards of flying, correct?

A The captain has to work it out with the dispatcher whether that flight is safe to continue or whether they should take off on that flight.

Q So the dispatcher -- because that sounds like a different answer than what I got before. The captain has an

obligation to reach an agreement with the dispatcher. And so the dispatcher --

A I would say that's a good statement, yes.

Q Yes. So, if the dispatcher says I think it's perfectly safe, that captain has to fly?

A No, that's not what I'm saying. If the dispatcher says it's perfectly safe, and the captain doesn't think it's safe, then you don't go flying.

Q Okay.

A If the captain thinks it's safe and the dispatcher says it's not safe, I would not go flying.

Q So, in fact, there is no obligation of the captain to reach a joint agreement on the hazardness [*sic*] of a flight, correct?

A You have to jointly agree that it's safe to fly that flight.

Q That's not the question I asked.

A I don't understand your question, then.

Q So I'll repeat it, and you tell me when you understand it. The captain has no obligation to reach a joint agreement as confirming his conclusion that it is too hazardous to fly?

A Okay, that's true. If the captain feels that it's unsafe, that's true.

Q So he can make that decision unilaterally?

A That is a true statement.

Q Now, when do you get -- with what frequency do you have discussions with your pilots concerning their operations?

A I would say every day there's something I'm -- in that capacity in 2013, I was a direct manager for the pilots in my fleet. I got them quite often.

Q And so quite often, when --

A Sorry.

Q I'm kind of squeezed for space here. When do you get lawyers involved in your communications with your pilots?

A I get lawyers involved if I have -- you know, anytime I'm engaging, I would say, in section 19 of the contract.

Q And why do you get lawyers involved in that context?

A Standard. It's a standard operation for us. We're not experts in that area, if you will.

Q Uh-huh.

A And so we always talk to them about how the process -- to make sure we don't mess that process up, if you will.

Q And you had lawyers involved from the very initiation of your first contact with Captain Estabrook as

it related to Laredo, correct?

A I had to get a lawyer involved to send my 19D letter or e-mail to Captain Estabrook requesting a meeting.

Q And 19D's always have the potential to turn into 19E's on the spot, isn't that correct?

A Certainly there is a potential, yes.

Q And 19E is a disciplinary process?

A That's correct.

Q And that's why you have union representation at these meetings, correct, because there's a potential of the process leading to discipline, correct?

A I would say that's one of the reasons, yes.

Q Now, with respect to the April 10th, 2013 Laredo departure, Bill McDonald ordered you to conduct an investigation with Captain Estabrook, correct?

A That's correct.

Q And if you could turn to complainant's -- well, hold on --

JUDGE MORRIS: Complainant's exhibits will be the white books.

MR. SEHAM: Yes.

JUDGE MORRIS: Oh, sorry.

BY MR. SEHAM:

Q And you yourself at this time, you considered what you were initiating to be a disciplinary process, isn't that

true?

A That is not true. That was totally an investigation part of section 19D. And, more importantly, it was a fact-finding meeting.

Q Do you remember Captain Estabrook requesting that he be permitted to be represented by legal counsel at your investigatory meeting?

A Vaguely I do recall, yes.

Q And you refused that request, correct?

A Yes. On counsel of our legal labor relations, I refused because a 19D is an investigation and not a discipline. So a lawyer was not needed to be present in a fact-finding meeting, as per our contract.

Q Was not needed. Was not permitted?

A Correct.

Q Is that the better term, permitted?

A Sure. It is not permitted.

Q And, in responding and denying this request for legal representation at this investigatory meeting, you worked with Rob Tice, correct?

A Yes, correct.

Q Now if you can turn to complainant's exhibit CX-8?

MR. RIEDERER: The white notebook.

THE WITNESS: You said CX-8?

MR. SEHAM: Uh-huh.

BY MR. SEHAM:

Q Are you at the exhibit?

A Yes.

Q Just to move it along, I'm going to refer at this moment to the first paragraph. This is an e-mail from you to Katherine Walker, correct?

A Correct.

Q And you are copying Alan Armstrong?

A Correct.

Q And that would be a response to the attached letter that begins at C-37, this letter dated April 29, 2013?

A Yes.

Q So you read this letter from Mr. Armstrong of April 28th, 2013, and then responded with this covering e-mail, correct?

A That is correct.

Q And the first sentence says, "I acknowledge receipt of your letter. In accordance with established practice at FedEx, pilots participating in disciplinary processes under section 19 of the FedEX ALPA collective bargaining agreement are entitled to representation by ALPA. No outside attorneys are permitted or attend or otherwise participate in these processes. The interview will not be rescheduled. Mr. Estabrook is welcome to bring an ALPA

representative to the interview, as he was previously informed." Now, did you -- this was written for you by Rob Tice?

A Yes.

Q And the reason you deferred to Rob Tice is, he knows the contract better than you?

MR. RIEDERER: Objection.

THE WITNESS: He knows section 19.

MR. RIEDERER: Objection. He lacks personal knowledge of that.

JUDGE MORRIS: Overruled.

MR. SEHAM: And what was your answer?

THE WITNESS: Could you ask the question again? I'm sorry.

BY MR. SEHAM:

Q I think the question I asked was, the reason you deferred to Rob Tice here is because he knows the contract better than you do?

A In all legal matters, I always -- I have labor relations help me, assist me, to make sure I'm making the right moves and then doing the right things as per the contract.

Q Do you review the drafts that you get from legal counsel?

A Yes, I do.

Q Okay. So you take ownership of that letter ultimately when you sign it and/or send it under your name, correct?

A That is correct.

Q So you certainly with intent communicated to Captain Estabrook's legal counsel that this was a disciplinary process, correct?

A No, it was not a disciplinary process. It was part of the section 19 investigation and discipline, but we were using 19D --

Q Uh-huh.

A -- which is the investigation portion of that.

Q Well, if it wasn't a disciplinary process, why did you tell Mr. Armstrong, Captain Estabrook's counsel, that it was a disciplinary process?

A Because part of the process of section 19 is, you do an investigation --

Q Oh, okay.

A -- which is what we were performing.

Q But you didn't explain that in this e-mail, did you?

A I did not.

Q And why did you tell Mr. Armstrong that he could not attend Captain Estabrook's disciplinary process?

A Under the counsel of Mr. Tice, we told him --

MR. RIEDERER: Hold on.

THE WITNESS: Yes, sir.

MR. RIEDERER: If I may, Your Honor, when we're talking about your conversations with Rob Tice, some of those are going to be privileged. So just tread lightly, and do not disclose any attorney-client privileged communications.

THE WITNESS: Yes, under counsel -- you know, once again, this was not discipline. This was an investigation. As per our contract, we allow a ALPA representative to be present.

BY MR. SEHAM:

Q Now if you could turn to respondent's exhibit RX-8, please?

A Okay.

Q Now, you received this e-mail, the one attachable or the covering e-mail, this e-mail of April 10th, 2013?

A Yes.

Q And you received it from Mark Crook on April 10th, correct?

A Yes.

Q And did you read it on April 10th?

A I probably read it the next morning, April 11th.

Q And you never responded to Mr. Crook via e-mail, correct?

A I don't recall.
Q You never got any subsequent e-mail communications from Mr. Crook, correct?
A I don't know. It was a long time ago.
Q Did anyone at FedEx ever ask you to look for any correspondence you might have had with Mark Crook other than respondent's exhibit RX-8?
A No.
Q Now, there were three conversations attached to this e-mail, correct?
A I don't know.
Q If you could read -- let's see if -- the second paragraph up, the second full paragraph up from the bottom. Do you see where it says, I have attached Sherrie's first conversation with Captain Estabrook, my conversation, and then Sherrie's second conversation?
A Oh, yes, okay.
Q Okay.
A Yes, I agree, there were three conversations.
Q And you listened to these recorded conversations before you had your scheduled interview with Captain Estabrook, correct?
A That is correct.
Q You actually received these three e-mailed conversations, these three recorded conversations, three

weeks before you had your meeting with Captain Estabrook, correct?

A I don't recall.

Q You don't recall?

A I don't recall how long prior to the meeting that I received those recordings, if that's what you're asking.

Q You don't know the date on which you had your meeting with Captain Estabrook?

A I don't. I'd have to look that up.

Q Okay.

A It was I think several weeks later. In May, I think.

Q So several weeks?

A Your question was -- as I remember, you said that I heard these recordings three weeks prior. I don't know when I heard the recordings. The recordings don't -- they are hard to produce right away.

Q Okay.

A So I probably heard them a week after this.

Q They are hard to produce? Weren't they attached to the e-mail. They were already produced, isn't that correct?

A I don't recall. If that was the case, I don't recall that.

Q Okay, let's --

A I'm sorry, it says here, I have attached Sherrie's first conversation, all right. I'm sorry, yes, you are correct, they were attached.

Q So you received the calls several weeks before you had your meeting with Captain Estabrook, correct?

A Yes.

Q And, in fact, you didn't send your demand for an investigative interview until April 23rd? That's joint exhibit JX-2. Correct?

A Joint exhibit JX-2?

Q That's dated April 23rd. Is that when you sent that e-mail?

A Could I see that first? I'm sorry. That's correct.

Q So it was about two weeks after you got the recorded conversations that you sent this 19D letter, correct?

A That's correct.

Q And that it schedules a meeting for May 1. Is that -- would you agree with me that's the day that you held your meeting with Captain Estabrook?

A Yes.

Q So it was then three weeks after you got the recorded conversations that you actually interviewed Captain Estabrook?

A Yes.

Q And you don't recall having any conversation with Mark Crook during this period?

A I may have had a phone call conversation, but I don't recall. But the e-mail was what I based my information on.

Q And you listened to these recorded conversations before you ever had this meeting with Captain Estabrook on May 1, correct?

A That is correct.

Q And, when you listened to those conversations, you determined that there was not enough information to determine whether or not Captain Estabrook had communicated that he was remaining at the hotel, correct?

A I determined that there was a miscommunication between Sherrie Hayslett, the GOC dispatcher, and Captain Estabrook. Therefore, based on that miscommunication, I needed to find out more information about what happened.

Q Well, wasn't it based on the tapes that you concluded that Captain Estabrook -- well, let me back this up. You ultimately concluded that Captain Estabrook had a good faith belief that the dispatcher had approved his remaining in the hotel, correct?

A I agree with that.

Q And you based that conclusion on the tapes,

correct?

A Correct.

Q Now if you can turn to -- or, you still have it in front of you, perhaps -- respondent's exhibit RX-8?

A Respondent's?

MR. RIEDERER: It's in the white books.

MR. SEHAM: Yeah. Respondent's exhibit RX-8.

THE WITNESS: Okay, yes.

BY MR. SEHAM:

Q And you read -- I'm going to direct you to that last full paragraph that starts, in my two and a half years as DO, you see where that is towards the end?

A Yes.

Q "In my two and a half years as DO, I have never had a captain take it upon himself to delay a flight without coordinating and coming to an agreement with the dispatcher." Was that part of the reason for your initiating this investigation of Captain Estabrook, to see whether he had failed to come to an agreement with the dispatcher on a delay of a flight?

A No, that was not the reason. The reason that we got together for the meeting was why he didn't show up at the airport.

Q Didn't you fault Captain Estabrook for not reaching a joint agreement about the delay of the departure?

A No, I did not fault Captain Estabrook for not coming to an agreement with the dispatcher. I faulted Captain Estabrook for not showing up to the airport one hour prior to the departure time, the scheduled departure time. And I counseled him on that after the meeting -- or, during the meeting. The question of whether or not the dispatcher and he agreed to take off was never part of that. The question was whether the dispatcher and he agreed to stay at the hotel or not.

Q Uh-huh.

A So there's two different things. One is reporting to work, and one is operating an aircraft. And the question was never about operating the aircraft. The question was, why did you decide to make your decisions at the hotel and stay at the hotel rather than show up at the airport.

Q I understand the distinction, Captain. The question is what you actually communicated to Captain Estabrook. Didn't you communicate to Captain Estabrook that any decisions to depart later or earlier than the scheduled departure should be made jointly between him and the dispatcher? Didn't you counsel him on that and warn him that the failure --

A Well, once --

Q -- to proceed in that manner would -- or, might result in future discipline?

A Yes. You're talking about operating the aircraft and not showing up at the airport? Are we talking about operating the aircraft?

Q I'm talking about the departure of the aircraft.

A Okay, when we talk about the departure of the aircraft, I'm talking about actually flying the aircraft from point A to point B. That decision to take off that aircraft has to be jointly made between the captain and the dispatcher. I just want to make sure that I'm clear what I'm saying here.

Q You said -- my prior question was -- or, I think your prior testimony was that the entire basis of the counseling had to do with his time of arrival at the airport, correct?

A That's correct.

Q But, in fact, you did counsel him on the scheduling of departures?

A I counseled him on making sure that he is clear why he's staying at the hotel, which is very rarely done. I counseled him that he must show at the airport on time, that showing up to the airport on time and pushing a crew member to fly the aircraft are two way different things. We never force crew members to operate an aircraft in an unsafe or non-legal manner. We do expect our crew members to show up at the airport and show up to work one hour prior to the

departure time.

Q I'm going to ask you again to look at respondent's exhibit RX-8, and that portion which reads, "I have never had a captain take it upon himself to delay a flight without coordinating and coming to an agreement with the dispatcher." Now, you got this e-mail, and you initiated a section 19 investigation, correct?

A Stand by. I just want to read this, what you're talking about. "I have never had a captain take it upon himself to delay a flight without coordinating and coming to an agreement with the dispatcher." I'm going to assume that Captain Crook, who wrote this, meant delaying himself getting to the airport. The frustration that Captain Crook had, by the way, he got called by the Laredo ramp saying the crew has not showed up for this airplane.

Q And you're basing that -- this testimony you're basing on what, a telephone call that you don't recall, or you're basing it on this e-mail?

A I'm basing it on this e-mail.

MR. SEHAM: I'm going to object to the testimony because the e-mail says what it says, and he's going beyond that e-mail.

JUDGE MORRIS: Well, the answer is in the record.

BY MR. SEHAM:

Q Now, if you based your determination that Captain

Estabrook had operated in good faith, that he was authorized to stay at the hotel, and you had made that decision based on your review of the audio tapes which you had reviewed prior to your meeting with Captain Estabrook, why did you require him to be summoned for a 19D investigation?

A I wanted to hear his side of the story verbally.

Q Did you make any effort to communicate with Captain Estabrook prior to your May 1 meeting to assure him that you had already determined that he had been operating in good faith?

A I wouldn't think so, but I don't recall.

Q And why did you need to hear his side of the story if you had already determined that he had done no wrong?

A I did not say that I had determined that he had done no wrong. I said that I wanted to meet him and, based on the tapes, I did know that there was a -- I could tell that there was a miscommunication between he and the dispatcher.

Q So what did you hope to learn from Captain Estabrook by calling him into an investigatory interview that you did not already know by listening to the tapes?

A I wouldn't have known. That's why we have investigations. It's what I didn't know. I wanted to hear everything. Now, the main part of that meeting was --

Q What didn't you know? What did you not know?

A I don't recall what I didn't know. But I will say this, the main part of that meeting --

MR. SEHAM: Object, object, object, non-responsive.

JUDGE MORRIS: Sustained.

BY MR. SEHAM:

Q Now, during your interview of him, Captain Estabrook told you that Mark Crook was pressuring him to depart into hazardous weather conditions, correct?

A I recall Captain Estabrook saying that, yes.

Q And you concluded during your investigation May 1 or your interview of Captain Estabrook on May 1 that Captain Estabrook believed he was being pressured to fly into hazardous conditions, correct?

A I would say that's correct that he believed that, yes.

Q And you promised Captain Estabrook that you would counsel Mark Crook concerning his conduct, correct, concerning Mark Crook's conduct, correct?

A I believe I said that I would talk to Captain Crook about his demeanor on the phone, yes.

Q Uh-huh.

A But I want to make it clear that Captain Crook, in my estimation, never tried to push Captain Estabrook to fly. His position was, why are you not at the airport.

Q His position was, why are you not at the airport? And did you ever talk to Mark -- and Captain Estabrook identified to you that he had gotten several calls from Mark Crook, correct?

A I don't recall. I know of one call.

Q And you never called Mr. Crook to inquire with him about the nature of the additional calls beyond the one recorded call that you had?

A No.

Q Now, isn't it true that Captain Estabrook was subject to an air traffic control gate hold on April 10th in Laredo?

A As I recall, yes, that is a true statement.

Q Now, referring back to exhibit CX-8, complainant's exhibit CX-8 --

MR. RIEDERER: In the white notebook.

BY MR. SEHAM:

Q I believe you said that you received this e-mail from Katherine Walker that starts halfway down the page?

A Oh, okay. Okay, I must be at the wrong area here. You said I received a letter from Ms. Walker?

Q Yes.

A And where is that?

Q We're looking at complainant's exhibit CX-8, halfway down the page. It's paginated at the bottom C-36.

A C-36? Okay, let's see, Katherine Walker to me, "Please see attached letter." I see that, yes.

Q And you testified that you received this e-mail, correct?

A Yes.

Q You're responding to it, correct, in the upper half of this page?

A In the upper half, yes.

Q And you said you read the attached letter, correct?

A Correct.

Q It's not a very long letter. Did you read the entire letter?

A It's been a long time, but, yes, I read it.

Q You read it. And you read it at the last paragraph, "At my direction, an AIR-21 complaint has been filed pursuant to 49 U.S.C. Section 42121 with the United States Department of Labor/OSHA and the Federal Aviation Administration. See exhibits A and B attached." You read that at that time, correct?

A Yes.

Q And then at the meeting that you had on May 1, 2013, you advised Captain Estabrook that no disciplinary action would be taken against him, correct?

A At the end of the meeting, yes.

Q And, if you said that to him, it was because it was in your mind at that time that there might be disciplinary action against him, correct?

A Well, there's always a possibility that you may -- this may lead to a hearing. It didn't look like that was what this was going to lead to, if that's what you're asking.

Q Uh-huh.

A So there was never intent to think that I was going to be disciplining Captain Estabrook.

Q Uh-huh.

A There was some counseling that was going to be needed about when we show up to work, that we don't make our decisions from the hotel, and if we do we need to get everyone involved and it has to be very clear what we are doing.

Q You never put this counseling that you purported to make, you never put that in writing to him, correct? To him?

A To him? No.

Q No. And, if you had put that counseling in writing to him, he would have been able to grieve it through the grievance process, correct?

A I don't know the answer to that.

Q And, when you told him that there would be no

disciplinary action against him, he responded by telling you that he would drop his AIR-21 complaint that you received on April 29th, 2013, correct?

A I don't recall that, but it's possible that he said that.

Q And at that time you also told Captain Estabrook that Bill McDonald had wanted to discipline him over the Laredo delay, isn't that correct?

A That is not correct.

Q Do you recall being deposed in this matter, Captain?

A Yes.

Q On March 24th, 2016?

A I remember being deposed, yes.

Q And do you recall testifying at that time -- or, you recall that you took an oath to tell the truth?

A Yes.

Q You recall that?

A Yes.

Q And do you recall testifying that you didn't recall if you had told Captain Estabrook that Captain McDonald wanted to discipline him?

A I'm sure it's in the deposition, and I can say that I don't recall, but it's three years ago. I am quite sure that I would not have been directed to discipline

Captain Estabrook.

Q But somehow your recollection has firmed up from March until now, correct, on this matter?

A I can only say that it happened three years ago and that I can't imagine someone would be telling me to do an investigation and then also telling me to discipline him. That's not our process.

Q Well, you don't have any specific recollection one way or the other, correct?

A I don't have any specific recollection.

Q At the August 9th meeting, Captain Estabrook raised safety-related issues associated with the industry's package tracking systems, correct, with the cargo industry's package tracking systems?

A The package tracking system, yes.

Q And Captain Estabrook expressed concerns that terrorist groups could use tracking information to carry out their terrorist attacks, correct?

A As I recall, that was one of his concerns, yes.

Q And Captain Estabrook expressed his concern that terrorist groups like Al Qaeda might use shipping companies like FedEx as a vehicle for carrying out their attacks, correct?

A As I recall, that was mentioned by Captain Estabrook.

Q And Captain Estabrook also said at this August 9th meeting that Federal Express was not doing enough to deter terrorists from utilizing FedEx aircraft as a potential weapon?

A I recall that he said that we could do more or, you know, I have suggestions. I don't remember those words. But, once again, it was a long time ago.

Q I'm going to hand you a copy of your deposition testimony of March 24th, 2016.

A Okay.

Q I'm going to ask you to turn to page 39. I'm going to start from line 2 where it reads, question, "Okay, the FedEx mission continues, quote, this has the, quote, the unfortunate result of encouraging terrorists to view FedEx as a particularly effective means of utilizing explosive incendiary and other destructive devices by placing in the terrorists' hands the ability to select the most optimum timing for detonation.

"Did Captain Estabrook express during the August 9th, 2013 meeting that Federal Express was not 00 in terms of its dissemination of tracking information, was not doing enough to deter terrorists from utilizing FedEx aircraft as a potential weapon?" Answer, "I recall, you know, basically that was the conversation." Now, was that your testimony on March 16th?

A That is my testimony.

Q Oh, excuse me, March 24th. And does that refresh your recollection that Captain Estabrook was communicating to you on August 9th 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?

A Well, let me just say this --

Q And I'm asking you whether that -- I'm asking you a question as to whether you would agree, as you did on March 24th, that that was what was communicated by Captain Estabrook?

A Yes. I would like to make a distinction here, though.

Q I'm asking you a yes or no question.

A Yes.

JUDGE MORRIS: Counsel will give an opportunity for you to elaborate, if he feels it's necessary.

THE WITNESS: Yes, sir.

BY MR. SEHAM:

Q Now, there is -- are you familiar with the pilot status designation code RMG?

A Yes.

Q And does that stand for removed from management?

A Yes.

Q And would you agree that RMG status is typically used to take a pilot off his scheduled flight so that he can attend an important meeting?

A Yes, we have used it for that.

Q Okay.

A And also we can use RMG for a special project, if I needed someone to do a special project during a flight day.

Q Uh-huh.

A It's a specific time frame.

Q And RMG can be used to schedule a meeting with an individual pilot, correct?

A It can be, yes.

Q And not only can it be used that way, but it's typically used that way, isn't that correct?

A I would say it can be used that way.

Q I'm going to ask you to turn to page 57 of your transcript, and looking at line 17. The question reads, "In what circumstances does the company resort to an RMG schedule?" Answer, "Typically if -- let's say you want to have a meeting with someone and they had a flight during this very important meeting that you want them to be a part of, you would RMG them from that trip." Is that your testimony?

A That's my testimony, yes.

Q And would you agree with that today, that RMG is typically used to assist a pilot to attend a very important meeting?

A Yes. If I know exactly what date that meeting is and the date falls exactly on a certain trip, I would use that, that is correct.

Q And isn't it true that you don't know why the RMG designation wasn't used for Captain Estabrook for the meeting on August 9th, 2013?

A I can make an assumption, but --

Q No, I'm asking you if you know.

A I do not know.

Q You participated in the decision to put Captain Estabrook on NOQ status on August 5th, 2013, is that correct?

A That is correct.

Q And you don't know why the NOQ designation was used instead of the RMG designation, correct?

A I believe the NOQ designation was used --

Q I'm asking you if you know.

A I think I know, yes.

Q I'm going to ask you to turn to page 58 of your deposition, and turn to line 16, which reads, question, "So why wasn't the RMG status used for Captain Estabrook's meeting on August 9th on 2013?" Answer, "I don't know, I --

no." Captain Fisher, you don't know why the NOQ designation was used on August 9th instead of the RMG designation, isn't that correct?

A I can probably give you a better answer now, but at the time I answered at the deposition --

Q Okay. And at the time of the designation on August 5th, would it be your testimony that you didn't know why the NOQ designation was being used rather than RMG?

A That's probably -- yes, that is correct.

Q Now, the NOQ designation is frequently used to remove pilots for investigation, such as a 19D investigation, correct?

A It can be used for that, yes.

Q And the jumpseat -- when you are placed on NOQ, the jumpseat status is eliminated as a cautionary action when you bring that pilot in for an investigation, is that correct?

A I believe that is true most of the time. I don't know if that's activated every time.

Q But in this case -- and maybe I didn't lay something of a foundation -- attendant with an NOQ designation is that pilot's loss of his jumpseat access, correct?

A I actually don't know the answer to that.

Q Okay.

A I don't think it triggers that, if that's what you're asking.

JUDGE MORRIS: Counsel, I have a question. Jumpseat to me means riding inside the cockpit. Are you talking about the crew in the back in the coach where there's a seat available, or are you actually talking about the administrator's seat in the cockpit?

MR. SEHAM: That's a good question. We are talking about either seat.

JUDGE MORRIS: Thank you.

MR. RIEDERER: On a FedEx plane?

THE WITNESS: On a FedEx plane.

BY MR. SEHAM:

Q I want you to turn to the deposition transcript on page 43 -- no, hold on, excuse me, page 44, starting at line 23. At line 23, the question is, "And in your experience under what circumstance is an NOQ invoked in a flight with pilot?" Answer, starting on the top of page 45, "We apply it whenever the company has to remove a pilot from flying status for investigations. So we make the person whole and pay for any trips that he might miss."

Question, "You also eliminate their jumpseat status, correct?" "That is true. That is correct." "And why do you do that?" "It's done -- you know, it's done out of an abundance of caution." Was that your testimony during

the deposition on March 24th, 2016?

A That is my testimony.

Q So, when Captain Estabrook was placed on NOQ status, he lost his jumpseat status, correct?

A Yes.

Q And you had to buy him a air ticket to travel to the meeting in Memphis, correct?

A That is correct.

Q Now, it's your contention that the NOQ status designation was to facilitate the scheduling of a meeting Captain Estabrook had requested, correct?

A That is correct.

Q And the NOQ designation was unrelated to the Mayday Mark issue or any issue related to Mayday Mark, is that -- would that be your position?

A Yes. I was not part of the Mayday Mark issue.

Q So it's your position that the reason for the NOQ designation was to give Captain Estabrook time to meet with the company representatives, correct?

A Yes. It was to allow flexibility in getting four people together to meet at one time.

Q But, in point of fact, Captain Estabrook never asked for a meeting, correct?

A I believe his e-mail on August 4th to Bill McDonald said, I would like to speak to Mr. Smith.

Q Uh-huh.
A And that's what I know, yes.
Q So, in fact, he never did ask for a meeting?
A I think Captain McDonald offered the meeting instead of contacting Mr. Smith, and I'm assuming that he accepted to have the meeting.
Q So there was no intent on the part of the company representatives at this time -- or, it would your position that there was no intent on the part of the company representatives at this time to investigate Captain Estabrook, correct?
A No, there was -- no, we were not investigating Captain Estabrook.
Q And, with respect to Captain Estabrook at this time, during this time frame of August 4th, August 5th, you had no fitness for duty concerns, correct?
A That is correct.
Q You had no fitness for duty concerns at any time prior to the August 9th meeting, correct?
A That is correct.
Q And there was no discussion between you and other company representatives prior to August 9 concerning Estabrook's fitness for duty, correct?
A That is correct.
Q And you had no concerns prior to August 9 that

Captain Estabrook had manifested behavior that would warrant a 15D examination, correct?

A That is correct.

Q You had no contact with Mr. Ondra after the August 9th meeting concerning Captain Estabrook, correct?

A That is correct.

Q And, in fact, after the August 9th meeting, you had reinstated Captain Estabrook to flight status?

A That is correct. Rob Tice and myself had a very short talk, and we released him from NOQ.

Q And why did you think it was appropriate to release him from NOQ?

A We thought it was appropriate because what we heard were not security experts, and we wrongly made the assumption that he was fine to be placed off of NOQ.

Q That's -- but you -- okay, that's not quite responsive, but, in any case, I'll follow up with a question. You determined after the conclusion of the meeting that Captain Estabrook had presented no fitness for duty issue, correct?

A I did determine that.

Q And it was for that reason that you released him from the NOQ status, correct?

A That is correct.

Q And then subsequently Mr. Tice told you that you

were required to put him back on NOQ status, correct?

A That is correct.

Q And that made you uncomfortable, correct?

A That is correct.

Q Did you anticipate that Captain Estabrook would have a negative reaction to being placed back on NOQ?

A Yes. Yes, I did.

Q Why did you anticipate that Captain Estabrook would have a negative reaction to being placed back on NOQ?

A Well, I'm his boss, and, you know, I like to instill trust between my employees and myself, and I had told him that he was released from NOQ. I knew it was going to be a very, very difficult phone call, so I did anticipate a very difficult phone call.

Q Well, what is it about NOQ that would upset a pilot?

A No, what was going to upset this pilot was the reason we were going to place him on NOQ. The reason we were placing him on NOQ is, we were directing him to see the company aeromedical advisor.

Q I'm going to ask you to turn to -- give me one second -- I'm asking you to turn to page 51, and starting at line 4, question, "So there was -- there is some substance to this conversation with Captain McDonald?" Answer, "It was, yes."

Question, "So what advice can you ask from him?" Answer, "My advice was, we had just told Captain Estabrook that we are finished and you're no longer on NOQ, and now I got to call him back and say you are on an NOQ. And I said, you know, I'm a little bit uncomfortable so I need more information about what happened with Mr. Ondra." Is that the substance of a conversation you had with -- well, first of all, let me ask you, did you give that testimony?

A I did.

Q Well, let me move on, because that prompts another question. Did Captain McDonald ever give you a specific reason for putting Captain Estabrook back on NOQ status?

A The reason he gave me -- or, I should say the reason was because our security -- or, our aviation security director, Todd Ondra, recommended that we use the provision of the contract to direct a 15D.

Q Uh-huh.

A Based on his recommendations -- once again, he is not my boss, he's in a totally different department -- I had to confer with my boss, who is a director, his equal, before I was going to move in that direction. It's uncomfortable because he's a director in another part of our company. He's asking, you know, our department to direct a 15D for one of our employees.

So I wanted to make sure that my boss knew about

it, and I tried to get the reason for it, and the reason that I received was, in the abundance of safety, we have to be -- you know, we owe it to the public, we owe it to our people, our equipment, our corporation to check things out if someone in the company says that there is a problem.

Q Captain McDonald said all those things, the equipment and the public?

A No, I don't --

Q You're elaborating when recounting --

A I'm elaborating the fact that --

Q He didn't actually say those things, though, did he?

A -- in the interests of safety --

Q Uh-huh.

A In the interests of safety, yes.

Q Well, could you turn to joint exhibit JX-6, and we'll take a look at 15D and what it says.

JUDGE MORRIS: While you're doing that, I'm going to mark this as complainant's exhibit for identification purposes only next in order. And, in that light, I need -- for identification purposes only, the deposition that you showed yesterday to I believe it was --

MR. SEHAM: Captain Estabrook?

JUDGE MORRIS: -- Captain Estabrook. Again, these are not admitted substantively, but just for the record,

okay? So what's the next in order for CX?

MR. SEHAM: This is a JX, actually. It's a joint exhibit.

JUDGE MORRIS: The deposition?

MR. SEHAM: Oh, I'm sorry, what's the next in our order?

JUDGE MORRIS: Yeah.

MR. SEHAM: I did not understand.

JUDGE MORRIS: I think it's RX-48.

MR. TADLOCK: Would you like a tab?

JUDGE MORRIS: Yeah.

MR. SEHAM: I have the last one as CX-45, so I think it would be CX-46.

JUDGE MORRIS: My recollection is, CX-47 is your attorney's fee. So, if you don't want the attorney's fees to be --

MR. SEHAM: Oh, son of a gun.

JUDGE MORRIS: -- in the record, I'll be happy to withdraw those.

MR. RIEDERER: I like that.

MR. SEHAM: You know what? It's because I didn't bring that binder because I have that exhibit memorized.

JUDGE MORRIS: So this will be CX-48.

\\

\\

[WHEREUPON, the document identified as COMPLAINANT'S EXHIBIT CX-48 was marked for identification.]

MR. SEHAM: Thank you, Your Honor. So we're at --

JUDGE MORRIS: Again, this is for identification purposes only.

MR. SEHAM: Yes, sir.

BY MR. SEHAM:

Q Okay, so we're at joint exhibit JX-6, and I'm asking you to move to -- let's see, I think it's four pages into that, coming to a page that's marked at the bottom 15-3, and starting with the paragraph D, company-mandated medical examinations. Could you let me know when you get there?

A Okay, I'm there.

JUDGE MORRIS: I'm not there. Where are you?

MR. SEHAM: At D-1, four pages into that joint exhibit.

JUDGE MORRIS: Okay.

BY MR. SEHAM:

Q And at D-1 it says, under company-mandated medical examinations, "The VP of flight operations, the system chief pilot, a regional pilot, or a chief pilot may direct a pilot to contact or see the company's aeromedical advisor if the company has a reasonable basis to question whether a pilot

has developed or recovered from an impairment to his ability to perform his duties as a pilot." Is that -- did I read that correctly, Captain?

A Yes.

Q And would you agree with me that that is a provision of the pilot collective bargaining agreement with Federal Express?

A It was at that time, yes.

Q And, going back to these titles, VP of flight operations, the system chief pilot, a regional chief pilot, or a chief pilot, Todd Ondra didn't have any of those titles, correct?

A That is correct.

Q And would you agree with me that ultimately you did participate in the 15D decision?

A That is correct.

Q And that, in fact, you took ownership of that decision as Captain Estabrook's boss, correct?

A That is correct.

Q And, because you never had any conversation with Todd Ondra concerning that might have been his rationales, you developed your own rationales independently as to why a 15D was a reasonable process to follow, correct?

A It is correct that we wrote a letter to Harvey Watt, and we gave them our basis for the questioning of

Captain Estabrook's fitness for duty. But I want to reemphasize that the 15D movement was caused by a recommendation by the director of aviation security, Todd Ondra.

Q When you said we -- well, first of all, Harvey Watt, that's the company's aeromedical advisor, correct?

A That is correct.

Q And that's the entity that was fulfilling the role under 15D-1, as referenced here in this exhibit JX-2, correct?

A They are the company's aeromedical advisor, yes.

Q Correct, okay. And you said, we provided reasons to Harvey Watt. That's because Harvey Watt -- did Harvey Watt ask the company to justify why it was going forward with a 15D?

A Yes.

Q And a response -- or, that request was directed to you, correct?

A That is correct.

Q And you developed a response to the company's aeromedical advisor in response to their request?

A I did. I developed that response with Rob Tice, labor relations lawyer.

Q And neither you nor Rob Tice consulted with Todd Ondra in preparation of that response to Harvey Watt,

correct?

A I don't know what Rob Tice did, but I know that I did not.

Q Okay.

A And my belief is that he did not.

Q Now, during the August 9th meeting, Captain Estabrook advised you that he was well versed in military intelligence, correct?

A I don't recall.

Q And isn't it true that he advised that -- well, let's pause there.

JUDGE MORRIS: Counsel, we're going to take a break at 10:30.

MR. SEHAM: Okay. I want to direct your attention to your deposition. Would you now prefer that I refer to that by exhibit number?

JUDGE MORRIS: If you please. It's CX-48.

MR. SEHAM: CX-48. So I'm referring you to CX-48.

JUDGE MORRIS: For identification.

MR. SEHAM: For identification.

BY MR. SEHAM:

Q And I'm directing your attention to page 58, starting at line 24, which reads, question, "Would you agree that Captain Estabrook brought up during the meeting that he was well versed in military intelligence issues?" Answer,

"I recall something in that area, yes." Did you give this sworn testimony during your deposition?

A Yes.

Q Does this refresh your recollection that Captain Estabrook, in fact, told you at this meeting that he was well versed in military intelligence?

A Yes.

Q And he also told you that he served in the United States Air Force, correct?

A Yes.

Q And isn't it true that you have no recollection of Captain Estabrook ever making any reference to Russia or Russians, correct?

A I don't recall that.

Q Uh-huh.

A It's certainly possible, but I don't recall.

Q I'm going to refer you to joint exhibit JX-3. I'm going to refer you to the first page, about halfway down the page, where it says, I've chased around -- appear to be Russian, et cetera.

A Okay.

Q And that on four pages in we have that -- in terms of the typed-up notes, we have it again here as, I've chased around Russians, et cetera. You see where that is on page 4 about halfway down?

A [No audible response.]

JUDGE MORRIS: I don't have any typewritten notes in my binder.

MR. SEHAM: Oh, that should be -- we brought in the joint -- we have our own version of the joint exhibits.

MR. RIEDERER: It would be in the white notebooks.

MR. SEHAM: Yeah. There should be a separate white notebook of joint exhibits.

THE WITNESS: It's not.

JUDGE MORRIS: I don't have it.

MR. RIEDERER: Mr. Seham, do you have an extra of the joint exhibits?

MR. SEHAM: I have a copy.

MR. RIEDERER: It's on the table.

MR. SEHAM: Oh, it's right here.

JUDGE MORRIS: Oh, okay.

MR. SEHAM: I usually don't find my glasses when they're on my head. It's a big problem.

JUDGE MORRIS: Joint exhibit JX-3?

MR. SEHAM: Uh-huh.

BY MR. SEHAM:

Q In fact, what Captain Estabrook said at this meeting was that he had chased around Russians, correct?

A I don't --

Q This doesn't refresh your --

A I do recall seeing this at the deposition. This is not something I had ever seen before the deposition. I saw it at the deposition, and this is not something I was privy to. Are you asking me what that sentence says and what I think it means?

Q No, I'm asking you whether this refreshes your recollection about what reference, if any, was made to Russians?

A Oh, it does.

Q It does refresh your recollection?

A It refreshes -- no, no, no.

Q I'm sorry.

A It refreshes my recollection that you showed me this piece of paper --

Q Okay.

A -- at the deposition.

Q And that's not the question. The question is, does this refresh your recollection as to whether the word Russia or Russians was referenced during this meeting?

A I don't ever recall in that meeting on August 9th a reference to Russians.

JUDGE MORRIS: So I understand, is this your writing?

THE WITNESS: No, sir.

MR. SEHAM: That's Todd Ondra's writing.

JUDGE MORRIS: All right. Can we take a break now?

MR. SEHAM: Oh, sure, yeah. I'm sorry.

JUDGE MORRIS: Let's take 15 minutes and be back at 10 of 11:00.

[WHEREUPON, there was a brief recess.]

JUDGE MORRIS: All parties present when the hearing last recessed are again present. Before you begin, during the recess I was handed the deposition of Mark Estabrook. That's going to be marked as respondent's exhibit RX-34 for identification purposes only.

[WHEREUPON, the document identified as RESPONDENT'S EXHIBIT RX-34 was marked for identification.]

JUDGE MORRIS: Go ahead, counsel.

MR. SEHAM: Okay.

BY MR. SEHAM:

Q Going into the meeting on August 5th, 2013, did you consider that to be an important meeting?

A The meeting was August 9th.

Q Pardon me, August 9th, thank you. And same question with respect to the meeting of August 9th, 2013, did you consider that to be an important meeting?

A Yes.

Q And why did you consider it important?

A There were some security concerns that Mark -- or, excuse me, Captain Estabrook wanted to talk about. I was interested in hearing them.

Q And, when you go into an important meeting addressing security concerns, would it be your practice to take notes?

A In this particular event, because I'm not a security specialist, I did not take notes.

Q Okay.

A I mean -- okay, yeah.

Q Now I'm going to turn your attention to joint exhibit JX-7. That's a letter dated August 13th, 2013, on the letterhead of Alan Armstrong, attorney at law.

JUDGE MORRIS: Well, wait a minute. The copy I have, there's nothing for exhibit JX-7. So I will use the respondent's exhibit RX-7.

MR. SEHAM: Okay.

BY MR. SEHAM:

Q And you see it's a letter from Alan Armstrong. And you understood Alan Armstrong at this time to be Mark Estabrook's attorney, correct?

A Correct.

Q And it's addressed to Robert Tice and James Ferguson. And, going to the final page of the letter, page 4, you see it's copied to Rob Fisher, Todd Ondra, and

Captain William McDonald, you see that?

A Yes.

Q And you received this letter of August 13th, 2013, correct?

A Correct.

Q And, in fact, you -- and you read it?

A Yes.

Q And you actually had consultations with Rob Tice concerning this letter, correct?

A Correct.

MR. RIEDERER: To the extent that --

JUDGE MORRIS: Hold it. I get to do that. That's my job. Do you have an objection?

MR. RIEDERER: Well, he hasn't approached it yet. But, if he goes into the attorney-client privilege arena, then I would have that objection.

MR. SEHAM: No, I have respect for that relationship but to some extent in that that was really the only question I was going to ask about that, whether there were consultations with his attorney, not to go into the substance of those consultations.

JUDGE MORRIS: Do you have an objection to that question?

MR. RIEDERER: No.

JUDGE MORRIS: You may answer.

MR. SEHAM: I think he did.

THE WITNESS: I'm sorry, I don't get --

MR. SEHAM: I think you did. The answer is, yes, you did have consultations with Rob Tice concerning this letter, correct?

THE WITNESS: Yes.

BY MR. SEHAM:

Q Did you give any consideration -- your directive of August 16th -- or, your 15 directive, the 15D written directive to Mark Estabrook came out three days after this, correct?

A Yes.

Q And did you give any consideration to this letter in coming to your decision of August 16th to send out that 15D letter?

A We did.

Q And you see in this letter on page 3 at 12-B it says here that Federal Express -- it's a demand that, quote, "Federal Express withdraw any request made by and through chief pilot Rob Fisher that my client undergo a psychiatric evaluation," this being in a letter dated three days before the issuance of the 15D. And the question is, isn't it true that on August 9th, 2013, when you spoke to Mark Estabrook via telephone, that you told him that he would be subject to a psychiatric evaluation?

A I don't recall saying that. And it would be -- excuse me.

Q Yeah, go ahead.

A And it would be unlikely for me to use those words.

Q You say it's unlikely for you to use those words? Can you -- well, strike that. Okay, moving to CX-25, you have before you complainant's exhibit CX-25, correct? You have that in front of you?

A Yes.

Q And you wrote this together with Rob Tice, correct?

A That is correct.

Q And the purpose of this letter was to spell out FedEx's reasonable basis for the 15 referral, correct?

A Correct.

Q And would you agree that this is not a verbatim transcript of the meeting that transpired on August 9th?

A I'm sorry, would you repeat that, please?

Q That this document at C-145, and I think it's just two more lines of text going on to the subsequent page, this is not a verbatim account of what transpired at the meeting on August 9th, 2013, correct?

A That's not verbatim.

Q No, okay. So you were focusing on the reasons why

you were making the 15D referral to the company's aeromedical advisor, correct?

A That is correct.

Q Now, I believe you testified before that the August 4th e-mail that you got from Captain Estabrook did not prompt you to have any concerns about his mental health, correct?

A That is true.

Q It didn't --

A That is correct.

Q It didn't prompt you to have any concerns about his fitness for duty either, correct?

A I thought it was odd, but I did not use that -- I did not question that, no.

Q But you later changed your view of that August 4th letter and decided that it was indicative of a mental health problem, correct?

A Correct.

Q And that's why you reference it in this letter, because you changed your view and decided that it was indicative of a mental health problem?

A I said that that, along with talks about Auburn Calloway and Al Qaeda communication information, provided a reasonable basis to question fitness for duty.

Q So it became one of the contributing factors for

your reasonable basis referral -- excuse me, because one of the contributing factors for your 15D referral, the contents of the August 4th e-mail?

A Yes.

Q And then you went on in the letter that it was also his comments concerning Auburn Calloway. Now, Auburn Calloway was a FedEx pilot who hijacked Flight 705 and attacked the pilots with claw-hammers, correct?

A Correct.

Q And he brought a spear gun onto the plane, as well, correct?

A Yes.

Q And there was a life-or-death struggle during the flight, and none of those pilots ever flew again because of the damage that they suffered to their brains, right? Correct?

A That's correct.

Q And part of the reason that the company has the jumpseat policy that it has today has to do with Auburn Calloway and that hijacking, correct?

A I would say that's correct.

Q Now, you write in this third paragraph at the last line, and I'm reading, "Captain Estabrook stated that he has heard rumors that Mr. Calloway has converted to the Muslim faith and he is concerned that Calloway might be secretly

communicating with Al Qaeda terrorists." Did I read that correctly?

A You read that correctly.

Q And am I correct that that's the one sentence that you have in this letter by way of explanation as to why the Calloway comments prompted the 15D referral?

A Auburn Calloway's name is mentioned several times in this paragraph.

Q Okay.

A But, yes.

Q But, in terms of the content of what Captain Estabrook said with respect to Calloway, it's all subsumed in that single sentence, correct?

A Yes, but I would say that -- yes. The reason -- that was one of the reasons that we questioned the fitness for duty, based on this information that Auburn Calloway changed his faith and there might be a connection because he changed his faith with Al Qaeda, yes.

Q Well, I'm asking you about this sentence. That one sentence is the sentence that addresses this issue in terms of the substance, correct?

A [No audible response.]

Q Everything preceding that has to do with the background of who Mr. Calloway is, correct?

A [No audible response.]

Q Well, you know, I'll withdraw the question. The e-mail speaks for itself.

A Yeah. I would agree.

Q You reference that he was -- that Captain Estabrook stated at the August 9th meeting that he heard rumors that Mr. Calloway had converted to the Muslim faith, correct?

A Correct.

Q And that's how he phrased it at the August 9th meeting, that it was a matter of having heard rumors?

A As I recall.

Q So Captain Estabrook never asserted that Auburn Calloway had converted to Islam, correct?

A As I understand it, that is correct.

Q And did you ever ask -- or, did anyone ever ask Captain Estabrook at that meeting what the source of these rumors were?

A I don't recall.

Q Did anyone at that meeting conduct a subsequent investigation as to the source or originators of those rumors?

A I am not privy to that information, if it did happen.

Q Now, you would assert that this one-sentence referral, you consider that the principal reason for

referring Captain Estabrook to a 15D evaluation?

A I consider that, in combination with the e-mail.

Q With the e-mail that you previously saw no problem with. Now, that Auburn Calloway reference, can you explain if that's why the hearer of a rumor and the reporter of a rumor should be subjected to a 15D evaluation, why the company made no effort to determine who the originators of that rumor were, who presumably would also require a 15D evaluation?

A Let me just back up here, first of all. The reason -- at the urging of Todd Ondra is the reason Bill McDonald and myself directed the 15D. Our reasonable basis was based on these two events that we thought were odd that he talked about.

So talking about Auburn Calloway, an event that happened in 1994, and possibly transferring information, communicating, sounds -- doesn't sound like -- it's not a normal thing that I would think someone would bring up. Auburn Calloway hasn't flown since '94. If I do the math, it's a long time.

Q Uh-huh.

A Twenty-two years.

Q Now, he never said that he any information as to Calloway transferring information to Al Qaeda, did he?

A I seem to recall he said that he was going to try

to -- that he may be communicating with Al Qaeda.

Q Didn't he suggest at that meeting that perhaps the federal authorities -- it would behoove the federal authorities to engage in surveillance of Calloway to determine if that might be happening? Isn't that how he phrased it?

A He may have said that.

Q Okay.

A I don't recall.

Q Now, you also state here in the first sentence of the third full paragraph that, "The meeting was held on August 9th, 2013. Captain Estabrook proceeded to describe a number of security concerns that he has, many of which relate to Al Qaeda and the possibility that FedEx Express could be a target for Al Qaeda terrorists acts." And you were communicating this to Harvey Watt, the company's aeromedical advisor, as another part of your reasonable basis or the company's reasonable basis for ordering a 15D, correct?

A That is correct.

Q And the statements that you're referring to -- or, the security concerns that you reference here, quote, "Captain Estabrook proceeded to describe a number of security concerns," the security concerns that you're referencing here relate to his statements relating to Al

Qaeda and the realtime tracking of FedEx packages, correct?

A No. We were referencing Al Qaeda and the relationship with Auburn Calloway as our basis for questioning his -- it was one of the reasons for the basis of questioning his fitness for duty.

Q Isn't it true that it was the combination of the references to Fred in the August 4th, 2013 e-mail, the references to Mr. Calloway, and the references to Al Qaeda and the live tracking issues that, together as a whole, constituted your basis for referring Captain Estabrook to a 15D evaluation?

A No. It was the e-mail to Bill McDonald asking Mr. Smith to contact him, and it was also the reference to Al Qaeda and Auburn Calloway.

Q And I'm going to ask you to turn to page 71.

JUDGE MORRIS: Of CX-48?

MR. SEHAM: CX-48.

JUDGE MORRIS: For identification.

MR. SEHAM: Do I need to say that each time?

JUDGE MORRIS: Please.

MR. SEHAM: Okay.

JUDGE MORRIS: I want to make absolutely clear it's not in evidence.

MR. SEHAM: Okay, CX-48 for identification.

\\

BY MR. SEHAM:

Q And I'm going to direct you to page 71, line 3. Question, "And then what did he say about -- he described a number of security concerns, many of which relate to Al Qaeda and the possibility that Federal Express could be a target for Al Qaeda terrorist attacks. To the best of your recollection, what were these statements that he made?" And your answer, Captain Fisher, was, "We had talked about this earlier, about tracking, the realtime tracking of our packages."

"And so that is part of the reasoning -- or, these statements were part of your rationale for the 15D referral, as well?" Answer, "That was the least part of it, but it was one of them, yes." Was that your testimony during this deposition under oath?

A That is my testimony.

Q Now I'm going to ask you to turn to page 72.

A Can I just -- can I make a statement, please?

Q I'm going to have another question here. I'm going to ask you to go to the next page at line 12 where the question is, "I don't want to leave anything out, I just want to get the whole basket. And, if I misrepresent anything, please, please tell me.

"So, as I understand your testimony, it was the combination of the references to Fred in the August 4th,

2013 e-mail, the references to Mr. Calloway, and the references to Al Qaeda and the live tracking issues that, together as a whole, constituted your basis for referring Captain Estabrook to a 15 evaluation, is that correct? Correct?" "Correct." Is that your testimony?

A That is my testimony.

Q Isn't it possible that during the August 9th to August 13th time frame, up until the time that you got the August 13 letter, JX-7, from Attorney Alan Armstrong, isn't it possible that during this time frame you told Captain Estabrook he had to submit to a psychiatric examination?

A It's unlikely that I would have said that.

Q Okay.

A But is it possible? Anything is possible.

Q I want to direct your attention to your testimony on page 74, starting at line 16, question, "Is it possible that during that time frame you might have mentioned to Captain Estabrook that there was a psychiatric evaluation that he would be required to undergo?" Answer, "I don't recall. It's possible." "Is it possible?" Answer, "It's possible." Was that your testimony?

A That's my testimony.

Q You never said during the deposition that it was unlikely, did you?

A No.

Q Now, it's your testimony -- and if I mischaracterize it, please correct me -- that Captain Estabrook, when he received your call on August 9th putting him back on NOQ, that he was very upset, correct?

A Correct.

Q And, according to you, you didn't say it was because he knew too much? It was your testimony that Captain Estabrook asked you whether it was because he knew too much?

A That was my testimony, yes.

Q And what did you understand him to be referring to when he said he knew too much?

A I can tell you I was exhausted at the end of that conversation. It was a long day.

Q So you had no idea?

A I had -- no. I made a statement, perhaps. I wanted to get off the phone. It was a regrettable comment. I think I mentioned that in my deposition.

Q Why was it regrettable?

A Because it brings up questions like this, like, you know, would it be something that FedEx is hiding? Of course we're not hiding anything. I mean, of course, we're not -- it was a comment I shouldn't have made.

Q The bulk of that meeting on August 9th was Captain Estabrook's presentation concerning the ability of

terrorists to use FedEx tracking information to facilitate their terrorist attacks, correct?

A I remember that part of the meeting, yes.

Q But that was -- most of the time was spent discussing that issue, correct?

A Yes.

Q And isn't it -- wouldn't it be expected that, if Captain Estabrook asked you whether he knew too much, that's what he was referring to?

A I can see how he would make that assumption, yes.

Q Uh-huh.

A That's not what my intent was.

Q Did you examine Captain Estabrook's flight medical certificate on August 9th, during the August 9th meeting?

A No.

Q You didn't?

A [No audible response.]

Q And do you recall the questioning by Mr. Tice regarding whether or not Captain Estabrook was Mayday Mark?

A I do remember that, yes.

Q And what do you recall, specifically?

A That Mayday Mark was a monitor on a pilot internet forum, and I think there was some information that Mr. Tice wanted to investigate. He wanted to see if Captain Estabrook was Mayday Mark.

Q And you don't know specifically why these questions were being posed?

A It seemed like there was some kind of a medical thing there that that person had posted, and Mr. Tice wanted to look into it.

Q Did he ask him any questions, any medical questions?

A I don't recall any medical questions.

Q Now, Captain Fisher, subsequent to Captain Estabrook's filing of an AIR-21 complaint in this matter, you were interviewed at some point by a representative of the Department of Labor/OSHA Division, correct?

A Yes.

Q And you were the only one from the company who was submitted by the company for an interview by OSHA?

A I don't know that that's true.

Q Okay.

A I vaguely remember that meeting.

Q And can you identify anyone else who was ever interviewed?

A No. I was -- I believe I had an attorney next to me, and that's all I remember.

Q Oh, and you didn't remember the name of that attorney?

A David Knox.

Q And if you could turn to complainant's exhibit CX-23?

A Okay.

Q Have you arrived at that page, C-129?

A Yes.

Q You see it says Captain Rob Fisher at the top?

A Yes.

Q And you see there's a date of April 30th, 2014 right under your name?

A Yes, I do, April 30th.

Q Would you agree that that's approximately the date of your interview by the OSHA investigator?

A Yes.

Q And you see the first line under that, it says, "NOQ happens once per month, I would say." Would you agree with that statement, that an NOQ happens about once per month?

A Well, it's a handwritten note, so who knows what I actually said.

Q Well, I'm asking you. That's not the question.

A Uh-huh.

Q I'm asking, do you agree with that statement? Is that your experience as Captain Rob Fisher?

A That NOQ happens once per month? I would say that's a pretty fair statement, yes.

Q And you're familiar -- would you agree that you're familiar with NOQ being invoked for psychological issues in the past?

A NOQ is invoked --

Q I'm asking you whether you have experience with NOQ being invoked --

A Right.

Q -- for psychological purposes --

A Sure.

Q -- in the past?

A We don't make --

Q This is a yes or no question, sir. I'm asking you, do you have that experience, that NOQ has been invoked as a designation when there has been suspicion of a psychological issue?

A No.

Q You have no experience with that?

A No.

Q Now, at the bottom of this first page it says, "In hindsight, we probably should have kept him off flight status and conferred with Todd Ondra rather than make the decision on our own." Is it your feeling that on August 9th, when you reinstated Captain Estabrook to flight status, that you should have conferred with Todd Ondra rather than make the decision on your own?

A That is our feeling, yes.

JUDGE MORRIS: Before you go on to the next one, I need to have a clarification. When you talk -- this note here talks about NOQ happens once per month. Is that once per month out of the nine hundred and some that you supervise, or once per month per pilot?

THE WITNESS: I would probably -- see, it's probably a little bit more than once per month out of 4,200 pilots.

JUDGE MORRIS: Okay.

THE WITNESS: Yeah, that would be --

JUDGE MORRIS: I just wanted to understand the context.

THE WITNESS: Yes.

JUDGE MORRIS: Thank you.

BY MR. SEHAM:

Q All right, turning to the next page, about two-thirds of the way down where it says, "Rob called me and gave me the news." Would you agree with me that Rob Tice called you and gave you the news that Captain Estabrook had to be placed back on NOQ status again?

A Yes.

Q And you see under that it says, "I had to make the difficult call to Mr. Estabrook. I was not completely convinced." And it was you who made the call to Captain

Estabrook, sir, to advise him of the NOQ status?

A Yes. I did call.

Q And would you agree at that point you were not completely convinced that this was an appropriate action to take?

A Yes, I was not convinced.

Q And then you see down from there it says, "I called Mark and told him in the interest of caution he had to be placed back on NOQ." Did you do that?

A I did that.

Q And after that it says, "He was very upset." Would you agree that that was your experience, he was very upset?

A Yes.

Q And if you go to the next page, starting at the second paragraph, it says, "I did not know Mark filed a whistleblower complaint until you just told me." Well, you know what, to give more background --

A Yeah.

Q -- I want to refer --

A Please.

Q -- up at the top of the page it says, "May 2013, I brought Mark in and counseled him about the weather incident." And then back to the sentence I read, "I did not know Mark filed a whistleblower complaint until you just

told me."

Captain Fisher, isn't it true that you told an investigator of the United States Department of Labor that you had no prior knowledge of Captain Estabrook AIR-21 complaint contained in the April 29th letter that was addressed to you during your interview with that OSHA investigator?

A I can only say that --

Q I'm asking you a yes or no --

A -- a whistleblower and an AIR-21, these are not things I understood and knew what they were. So I didn't know they were both one and the same thing.

Q That's a shame, but I'm asking you, did you say this to an OSHA investigator?

A It's certainly possible, yes.

Q Yes. And you said that with a FedEx attorney sitting right next to you, correct?

A Correct.

MR. SEHAM: No further questions.

MR. RIEDERER: I have a couple of follow-up questions for you.

JUDGE MORRIS: Before you get there, do you know whose notes these are?

THE WITNESS: I'm assuming they are the OSHA --

JUDGE MORRIS: No, do you know?

THE WITNESS: No, sir, I do not.

JUDGE MORRIS: All right, thank you. Go ahead.

MR. SEHAM: May I make a representation? These were notes that we obtained through a FOIA request from the United States Department of Labor.

JUDGE MORRIS: Okay.

MR. SEHAM: That was identified in our initial -- I think the pre-hearing order says that authentication is considered established if no one raises an objection.

JUDGE MORRIS: If no one raises an objection, that's correct. Go ahead, counsel.

REDIRECT EXAMINATION OF

ROB FISHER

BY MR. RIEDERER:

Q In reference to the Laredo incident, can a dispatcher direct a captain to take off?

A No.

Q In reference to section 19 of the collective bargaining agreement, does 19E require notice?

A 19E?

Q Yes.

A Yes.

Q With respect to the Laredo incident, does a gate hold prohibit a pilot from preparing an aircraft?

A No.

Q In your cross examination, you were asked if Captain Estabrook said something to the effect that FedEx had not done enough to deter, and you wanted to make a distinction. Can you go ahead and explain what you wanted to say?

A I think Captain Estabrook wanted to make -- he was trying to make suggestions about what we should do with the tracking information. So his point was, the information that FedEx provides to its customers, tracking of packages, is probably something we shouldn't be doing.

And that's not the same as tracking aircraft and trucks and delivery, all the modes of delivery that we use to move our packages. So we thought it was an interesting suggestion, but that in no way played a part in later recommending Captain Estabrook to a 15D.

Q With respect to RMG, that can be used in circumstances when there's a meeting, is that correct?

A It can be, yes.

Q If the date of the meeting is uncertain, would you use RMG?

A No. If the date is uncertain, we wouldn't want to pay for a trip that the meeting wouldn't fall under, so we would probably use NOQ if we needed a bigger swath of time.

Q I want to ask you questions about the decision to place him on NOQ the second time and to refer him to the

15D. When was that decision made?

A That decision was made shortly after the meeting on August 9th.

Q Meaning the same day, or the day after?

A The same day.

Q I want to ask you a question about your basis for referring him to the 15D. What role did Todd Ondra's recommendation have in that decision?

A It had a great role in it. A director in security, which is why this meeting was put together, if the director says in the abundance of caution that we should direct this employee to a 15D, that played a great role, his recommendation.

Q And you --

A So, through his recommendation, that's when I followed up with the call to my boss.

Q And in your deposition you stated that -- or, you said something to the effect that the tracking data was considered in that decision, is that right?

A If that was said in deposition, it was a mistake. I later -- I believe later in the deposition I corrected that. And it's also noted in the letter that we sent to Harvey Watt.

Q Did the tracking data contribute to the 15D in any way?

A It did not.

Q Let me make it clear. Did Captain Estabrook's concerns over FedEx's tracking data contribute to the 15D evaluation decision?

A It did not.

MR. RIEDERER: I have no additional questions.

MR. SEHAM: Just a couple of questions to follow up on the redirect.

RECROSS EXAMINATION OF

ROB FISHER

BY MR. SEHAM:

Q How familiar are you with the information that's made available to customers with respect to package tracking?

A I mean, I'm fairly familiar with it. I mean, I send packages every once in a while, and I will track my package, yes.

Q Okay.

A But they weren't recently.

Q Is the package tracking information provided -- does it go beyond the original customer pickup and the final recipient receipt?

MR. RIEDERER: Your Honor, I object to this redirect [*sic*]. It's outside the scope of my --

JUDGE MORRIS: Overruled.

MR. SEHAM: You can answer.

JUDGE MORRIS: You may answer.

THE WITNESS: Okay, I'm sorry. Could you repeat the question?

BY MR. SEHAM:

Q Is there more information than just when the package is handed over by the shipping customer --

A Yes.

Q -- and when it's received by the recipient?

A That is true.

Q What additional junctures of information are there?

A As I understand it, they let you know when it arrived at the city that you live in --

Q Uh-huh.

A -- and an estimated time of when it might get to your house.

Q So, in other words, there will be a time when it's being sorted at the destination city?

A I believe so.

Q And isn't it true that Captain Estabrook -- one of the things he said during this meeting was, in the interest of deterring terrorists from using FedEx as a means of delivering explosive devices, that there should be only scans on shipments at the time of pickup and the time of

delivery?

A I don't recall specifically.

Q Uh-huh.

A I don't recall that specifically.

Q Well, if you could turn to joint exhibit JX-4? And you see at the top it says -- oh, tell me when you're there.

A Okay, I'm there.

Q And you see at the top it says, August 9th, 2013, AOD flight hearing, Mark Estabrook, and at the bottom of this page four lines up it says, "Estabrook advised the only scans on shipments should be the pickup and the deliver scan." Does that refresh your recollection?

A I still don't recall this.

Q Uh-huh.

A And I don't recall those specifics.

Q Did anyone other than Todd Ondra take notes at this August 9th meeting?

A I do remember him taking notes.

Q I'm saying, did anyone other than Todd Ondra take notes?

A I don't remember.

Q And you said Todd Ondra played a big role in the 15D decision, is that your testimony?

A He played a big role in the recommendation.

Q Okay.
A Yes.
Q But, with respect to the letter of August 16th that you sent to Harvey Watt, to the company's aeromedical advisor, there was no consultation with Todd Ondra as to what would be the content of that letter, correct?
A That is correct.
MR. SEHAM: No further questions.
JUDGE MORRIS: And I've got several questions. As I'm hearing your testimony, Mr. Ondra -- is that how you pronounce his name -- didn't play a big role, he played a decisive role in that letter going out on August 16th, is that correct?
THE WITNESS: Yes, sir.
JUDGE MORRIS: Does FedEx have a tool in its contract or its policies where security in and of itself can suspend or ground a pilot pending an investigation?
THE WITNESS: I would say yes. If we have a security issue with a crew member, which happens, which happens, we will take him off of flying status immediately.
JUDGE MORRIS: Do you have any knowledge as to why that wasn't done in this case since it was security in this matter that appears to have had the concern?
THE WITNESS: The concern was made after the meeting, is that what -- so after the meeting we did put him

on NOQ after the meeting.

JUDGE MORRIS: At the request of security?

THE WITNESS: At the request of security, yes.

JUDGE MORRIS: So why didn't security do their own investigation -- as opposed to getting involved the chief pilot through the 15D, as I'm understanding it -- if you know?

THE WITNESS: Well, yes, because Captain Estabrook doesn't work in the security department. So we have to go through the regular channels. So it would have to go through Bill McDonald, my boss, the system chief pilot of all 4200 pilots, and then down to me, of the 950 pilots in this area. Our contract allows the 15D to be directed by us, the system chief pilot, the regional chief pilots, which in my case, I was.

JUDGE MORRIS: And I've seen the 15D. But my question is, is there a mechanism where security, independent of 15D, for safety reasons or whatever can suspend an employee for FedEx for a security issue?

THE WITNESS: Yes, only when they go through the system chief pilot.

JUDGE MORRIS: On JX-5, if you would turn to that, the first sentence --

THE WITNESS: Yes, sir?

JUDGE MORRIS: -- although you signed it, it says,

"The company has a reasonable basis to question whether you have developed an impairment to your ability to perform the duties as a pilot." As I understand your testimony, you don't know what the basis was at this point because security hadn't told you what the basis was at this point, is that correct?

THE WITNESS: That's correct, only his recommendation that we do so.

JUDGE MORRIS: At the time that you were conducting the investigation in the Laredo incident, were you aware that there was an additional conversation between Captain Crook and Captain Estabrook that was not recorded?

THE WITNESS: No, sir.

JUDGE MORRIS: Did Captain Crook ever tell you that he had two conversations, as opposed to one conversation, with Captain Estabrook, one recorded and one not recorded?

THE WITNESS: He did not tell me that.

JUDGE MORRIS: Concerning the incident -- again the April 2013 incident where you wanted to hear his story verbally, why did you do an NOQ as opposed to a telephone call?

THE WITNESS: Why did I see him face-to-face rather than a telephone call?

JUDGE MORRIS: Yeah.

THE WITNESS: We sent the letter as per -- well, it was as per the 19D process.

JUDGE MORRIS: Okay.

THE WITNESS: So if the question is, why did I do the 19D process, that was, you know, recommended by counsel and recommended by my boss.

JUDGE MORRIS: You're a former Navy aviator, right?

THE WITNESS: Yes, sir.

JUDGE MORRIS: So you don't have the ability -- I'll use military parlance -- to give someone a butt-chewing over the phone outside the 19D?

THE WITNESS: How I wish I could.

JUDGE MORRIS: Okay. That's what I needed to know.

THE WITNESS: Yes, sir.

JUDGE MORRIS: On the April 2013 incident, why did you use the NOQ process rather than the RMG code for this incident?

THE WITNESS: For the April --

JUDGE MORRIS: April 2013 Laredo incident.

THE WITNESS: I don't know -- I'm sorry, I'm mixed up now -- I don't know that I used NOQ, but, if I did, it was to clear up a schedule. I don't know.

JUDGE MORRIS: Okay.

THE WITNESS: I don't recall what I used for that, unfortunately, whether it was NOQ or RMG or it was a free day.

JUDGE MORRIS: Okay.

THE WITNESS: It seems like I recall it was before he flew a trip, and that's why we met before he flew the trip, because I think he was in uniform.

JUDGE MORRIS: Well, maybe I've got it wrong. So let me rephrase it, then.

THE WITNESS: Yes.

JUDGE MORRIS: Let's talk about the August interview.

THE WITNESS: Okay.

JUDGE MORRIS: Why did you use the NOQ versus the RMG for the August meeting?

THE WITNESS: It was directed to me by Captain Bill McDonald to place him on NOQ. I can assume that they used it because we had to juggle the schedules of four people, including Captain Estabrook, so he placed on NOQ until we found a good day for all of us to meet, and then we all got together.

JUDGE MORRIS: So you do not make the decision for NOQ versus RMQ?

THE WITNESS: I can make a decision. At that point, I did not --

JUDGE MORRIS: You did not?
THE WITNESS: -- in that specific incident.
MR. RIEDERER: It is RMG.
JUDGE MORRIS: RMG, okay. The Mayday Mark discussion occurred during which meeting?
THE WITNESS: That happened at the end of the August 9th meeting.
JUDGE MORRIS: And do we -- what's the exhibit that refers to the notice that was provided for the August 9th meeting? What's the exhibit number? Do the parties know?
MR. SEHAM: Your Honor, respondent's exhibit RX-14 includes e-mail correspondence related to that.
JUDGE MORRIS: Okay, looking at respondent's exhibit RX-14 where you notified him of this meeting, was there ever a formal letter that was submitted notifying him that this meeting was to occur?
THE WITNESS: It's August?
JUDGE MORRIS: In August.
THE WITNESS: I am -- no, sir, there was not a formal letter.
JUDGE MORRIS: Unlike the April incident, the Laredo incident, where there was a letter, you just did this by e-mail?
THE WITNESS: Yes, sir.

JUDGE MORRIS: So why the difference? Why a formal letter in the Laredo incident versus e-mail for this meeting?

THE WITNESS: This meeting was just an open-door fact-finding meeting that Mark wanted to express to security. The other one was, I had a question I needed to investigate as to why he didn't show up to the airport on time. So one fit under section 19, if you will. The other did not really fit under the investigation and discipline area.

JUDGE MORRIS: And Mr. Tice participated in the meeting that was generated by an e-mail, correct?

THE WITNESS: Yes, sir, he was part of that meeting on August 9th.

JUDGE MORRIS: Did counsel participate in the meeting that occurred in April as a result of the Laredo incident?

THE WITNESS: No, sir, they did not participate. They were not present at the meeting.

JUDGE MORRIS: So at a formal proceeding you don't have counsel present, but at a meeting via e-mail you do have counsel present?

THE WITNESS: Right.

JUDGE MORRIS: But it's not an investigatory meeting?

THE WITNESS: In this particular event, yes, sir, that's what happened?

JUDGE MORRIS: And it's during this meeting where there's no formal letter notifying him and there's a counsel present that there's a discussion about Mayday Mark?

THE WITNESS: Correct.

JUDGE MORRIS: Questions based on mine?

MR. SEHAM: Yes.

RECROSS EXAMINATION OF

ROB FISHER

(resumed)

BY MR. SEHAM:

Q The company was surprised that Mark Estabrook didn't bring union representation to the August 9th meeting, correct?

A I don't recall that.

Q Well, you reviewed -- prior to your having your May 1st teleconference with Captain -- excuse me, meeting with Captain Estabrook May 1, 2013, you say you reviewed all the audio tapes, correct?

A That is correct.

Q All right.

A But it was a face-to-face meeting, not a teleconference.

Q Yes. And then at that meeting Captain Estabrook

discussed how, in his view, Mr. Crook had engaged in pilot-pushing, correct?

A He did say that.

Q And did he elaborate in terms of what Mr. Crook had said to him specifically?

A I don't recall that he elaborated exactly what was said, why he thought he was being pushed.

Q You don't recall one way or the other?

A I don't recall.

Q And then you say that with respect to -- is it your view or was it your -- or, let me put it this way, it is your testimony that Mr. Ondra played a decisive role in your issuance of the 15D letter on August 16th?

A His recommendation did play a big role --

Q Okay.

A -- yes.

Q But that recommendation was not communicated directly to you from Todd Ondra, correct?

A That is correct.

Q In fact, the person that you spoke to directly about your obligation to issue a 15D, that was Captain McDonald, correct?

A Correct.

Q And I'm going to ask you to turn to -- yeah, I'm asking you to turn to complainant's exhibit CX-20. You see

at the top, it's an e-mail from Rob Tice?

A Okay.

Q Okay?

A Yes.

Q He's the attorney that you regularly consulted with on potential disciplinary issues during this period, correct?

A Correct.

Q And you were copied on this e-mail, sir?

A Yes.

Q So you received this e-mail thread?

A On August 7, 2013, yes, correct.

Q And you see where it says, "To my surprise, Rob Fisher advises that Estabrook told him he doesn't want ALPA representation at the meeting. Let me know if you wish to discuss with me." Does this refresh your recollection that you asked Captain Estabrook whether he wanted to have his union representing him at the August 9th meeting?

A It's standard procedure, so, you know, I probably would have asked him that. I don't recall.

Q Standard procedure?

A But obviously it happened.

Q Standard procedure whenever a pilot wants to say something to management representatives, is that you have the union come, as well?

A I would say, anytime you have a meeting with a management person that you can always have a representative there.

Q Uh-huh.

A Yes.

MR. SEHAM: No further questions.

MR. RIEDERER: No questions.

JUDGE MORRIS: I just have one area of clarification. Again, as you talk about flight operations, I want to get this clear in the record. I'm pretty sure I know what you're talking about. 14 C.F.R. 121595 says that the air carrier cannot conduct operations unless the aircraft is released by the dispatcher or authorized by the dispatcher. Is that your understanding, as well?

THE WITNESS: Yes, it is.

JUDGE MORRIS: So the pilot can -- even though the dispatcher can release the aircraft, the pilot still has to say okay, it's safe to fly?

THE WITNESS: Correct.

JUDGE MORRIS: So he can say or she can say no, even if the dispatcher says it's good to go?

THE WITNESS: That is a true statement.

JUDGE MORRIS: What can't happen is, the pilot is going to say I'm going to go, and the dispatcher says no, or if he does he's committing a FAR regulation violation for

himself and the company?

THE WITNESS: Correct.

JUDGE MORRIS: Okay, thank you. Counsel? No? All right, thank you.

THE WITNESS: Thank you, sir.

JUDGE MORRIS: You are excused.

[WHEREUPON, witness Rob Fisher was excused.]

JUDGE MORRIS: Lunch?

MR. RIEDERER: Your choice.

JUDGE MORRIS: Do we have a witness here?

MR. RIEDERER: Yeah.

JUDGE MORRIS: All right, we're going to take lunch, since I have been pushing you guys pretty hard for a day and a half now. How much time do you guys want? You want 12:30?

MR. SEHAM: That's plenty.

MR. RIEDERER: That works.

JUDGE MORRIS: 12:30, it is.

MR. SEHAM: Excuse me, may I ask who the next witness is?

MR. RIEDERER: Rob Tice.

COURT REPORTER: Are we off the record, Your Honor?

JUDGE MORRIS: We're off the record.

[WHEREUPON, the hearing was recessed for lunch at 11:50 a.m., to be reconvened this same day at 12:30 p.m.]

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

\\

A F T E R N O O N S E S S I O N

12:30 p.m.

JUDGE MORRIS: All parties present when the hearing last recessed are again present. Call your next witness.

MR. TADLOCK: We'll call Robert Tice.

JUDGE MORRIS: Mr. Tice, please raise your right hand.

WHEREUPON,

ROB TICE

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

JUDGE MORRIS: Please take your seat. And please give me your full name and business contact information.

THE WITNESS: Robert Tice, you spell that T-I-C-E. And my address is 3620 Hacks Cross Road, Building B, Third Floor, Memphis, Tennessee, 38125. Do you need the phone number, sir?

JUDGE MORRIS: No, that's all right. Go ahead, counsel.

MR. TADLOCK: Okay.

DIRECT EXAMINATION OF

ROB TICE

BY MR. TADLOCK:

Q Are you currently employed by FedEx Express?

A Yes.
Q And what is your current position?
A Lead counsel.
Q And how long have you held that position?
A Since about 2010.
Q And as lead counsel what are your job duties?
A I am involved in the pilot collective bargaining agreement administration at FedEx Express.
Q Which, which -- can you tell the Court what group you fall under or you fall within?
A In the labor relations law department.
Q And what's the function of a labor relations law department?
A That department is involved in the collective bargaining process and in the administration of the pilot agreement that results from that collective bargaining process.
Q And can you tell the Court about your background prior to arriving at FedEx?
A I had a similar position at Northwest Airlines from 1989 to 2006.
Q In your position at FedEx, are you familiar with the process of referring pilots to a medical evaluation pursuant to 15D of the parties' collective bargaining agreement?

A Yes.

Q And you might want to refer to -- or, turn to what I believe has been marked as joint exhibit --

A In one of these books?

Q Yes, joint exhibit JX-6.

A I'm sorry? Yeah.

Q Can you please explain to the Court the section 15D process?

A Certainly. Pilots at FedEx are required to have a first class medical certificate issued by the FAA. The company, of course, is not involved in the issuance or the monitoring of the issuance of that. And, if it comes to the company's attention that there may be an issue of flightworthy or eligibility or fitness for flight duty, the company has negotiated this provision in the contract that permits the company to send a pilot to the company's own aeromedical advisor.

And there's a process set forth in here for retaining the pilot on payroll, having the company's aeromedical advisor do an evaluation, and then there's a process for how to handle disagreements that might result in the event that the pilot doesn't agree with the decision of the company's aeromedical advisor that a pilot is either fit or not fit for duty.

Q And so what purpose does section 15D serve at

FedEx?

A Well, it's an ability of the company to make sure that there is a safety check on a pilot who only has an FAA exam every six months or so. And sometimes pilots don't know what their issues are, and so the company has -- this is the company's ability to find out if a pilot is fit but not to delve deeply into the details of a pilot's issues. That's for the company's aeromedical advisor to handle.

Q Is there any contractual process whereby security can refer -- can ground a pilot and refer him to a medical evaluation?

A No. You're talking about the security organization with FedEx?

Q Uh-huh.

A No.

Q So would that have to be done through a section 15D?

A Yes.

Q And it's fair to say that flight management would be the one that would have to direct the pilot to a 15D and not --

A Yes. There are specific job descriptions or titles in 15D as to who would be directing a pilot to see the company's aeromedical advisor.

Q And when did you first learn the name -- and,

actually, I'm going to ask you a different question. In your role as lead counsel in the labor relations group, have you had occasion to attend meetings involving company management and pilots?

A Yes.

Q What sort of circumstances might that -- excuse me, strike that. When might that occur?

A Well, I think there's probably two main occasions for that. One would be a 19E disciplinary hearing, and another might be a 19D investigation process. And sometimes 19D doesn't really involve a concern about potential discipline as much as it involves a concern that a pilot might have some issues going on inside that need to be attended to. And so occasionally I have attended those kinds of meetings.

Q When did you first learn the name Mark Estabrook?

A I believe it was in April of 2013.

Q And in connection to -- do you recall what brought his name to your attention?

A Yes. There was a failure to report to work on time issue. However, I was deeply involved in preparing for an arbitration, and my involvement in that matter was just preliminary at the front end. I didn't get involved in it later on.

Q Were you aware of Captain Estabrook's background

during the time of this issue?

A Back in April of --

Q 2013.

A -- 2013? No.

Q When was the next time you were involved in any company business involving Captain Estabrook?

A That was not until August of 2013.

Q And how did you become aware of Captain Estabrook then?

A My boss sent me an e-mail that had been sent by Captain Estabrook to Captain McDonald.

Q And can I direct your attention to company exhibit CX-13?

JUDGE MORRIS: You mean complainant's exhibit?

MR. TADLOCK: I'm sorry, yes, complainant's exhibit. I'm having the same problem that Mr. Seham has had.

THE WITNESS: Complainant's?

MR. TADLOCK: I'm sorry, let's say respondent's exhibit RX-13.

THE WITNESS: What book am I supposed to be looking in?

JUDGE MORRIS: It's a red one.

MR. TADLOCK: Yeah.

THE WITNESS: Is this my copy?

JUDGE MORRIS: No, that's mine.
BY MR. TADLOCK:
Q Is that a copy of the e-mail that you received?
A Yes.
Q And you reviewed that e-mail?
A Yes.
Q What was your impression of it?
A Well, it was weird, strange that a line pilot would ask to speak to the top guy at the parent company of FedEx Express.
Q Did you ultimately attend a meeting with Captain Estabrook?
A Yes.
Q And were you involved in the -- or, did you make the decision to place him into NOQ status prior to that meeting?
A I didn't make that decision. I was involved in the process of that result.
Q And that meeting occurred on August 9th?
A Correct.
Q Who else was in attendance in that meeting?
A Captain Estabrook, Todd Ondra, Rob Fisher, and myself.
Q Mr. Tice, why were you invited to attend that meeting?

A I was instructed to attend by my boss.
Q Do you understand why he instructed you to attend it?
A I don't think there were any particular instructions given. It was just attend to be the legal representative, along with the other two members of management.
Q Was ALPA representation invited to attend that meeting?
A I tried to work with them to set up a schedule, because frequently we'll have scheduling conflicts that need to be resolved at the front end. So I thought I was being proactive in trying to give Captain Estabrook the opportunity to have union representation present, yes.
Q So why would you want union representation in a meeting like this?
A I would not want the meeting to be interrupted because somebody said I want to have a union rep present, and then we would have to reschedule the meeting.
Q At FedEx Express, is it common to invite a union representative to be present at a meeting involving management?
A Certainly.
Q And a pilot?
A Certainly.

Q And why is that generally the case?
A Well, it's in the nature of good labor relations to have the union be present when one of their represented members is meeting with management. And there are some times a pilot will say he doesn't want to have a union rep present, and then the meeting goes forward without a union rep.
Q I'd direct your attention to complainant's exhibit CX-20.
A I missed that?
Q Complainant's exhibit CX-20. Please open that document.
A This is the CX book?
Q You got it.
A I'm there.
Q Can you describe to the Court -- or, can you tell the Court what that document is?
A This is an e-mail thread, started apparently by me, to an ALPA attorney, Terry McTigue, and it continues with a couple of back-and-forths. I guess it was all in the same day.
Q Okay.
A All in the afternoon.
Q And would you direct your attention to the e-mail at the top of that page where you e-mail Terry McTigue, who

looks like he's part of the FedEx MEC, which I understand to be master executive council?

A Yes.

Q And Latasha Sago, who also has a FedEx MEC designation. And you state to them, "To my surprise, Rob Fisher advises me that Estabrook told him he doesn't want ALPA representation at the meeting. Let me know if you wish to discuss with me." Why were you surprised?

A I don't have a clear recollection on that. I can just try to piece it together.

MR. SEHAM: Objection to any further testimony.

JUDGE MORRIS: I know what the follow-up question is, so overruled.

MR. SEHAM: Okay.

BY MR. TADLOCK:

Q Can you tell me what was said at the August 9th meeting or can you tell me what was discussed at the August 9th -- actually, let me strike that. Can you tell me what Captain Estabrook told you at the August 9th meeting, told the group?

A Well, he primarily directed his comments, at least from my perspective, to Todd Ondra, who was the managing director of corporate security for FedEx Express. I don't remember his exact title. And I remember a number of subjects, not very distinctly.

Number one, he gave a bio, which was all new information to me, having to do with his flying experience, his military experience. And then he went to the subject of concern about terrorists perhaps being able to get information about FedEx's flight operations and put them on airplanes and use that flight information to potentially place explosives on the airplanes. And he was suggesting that that information should not be on the internet.

Then he said that there were rumors that he had heard that a former FedEx pilot by the name of Auburn Calloway, who is serving a life sentence in prison, had perhaps converted to Islam and may be secretly communicating with Al Qaeda. And he suggested that there should be communications with somebody in the government to eavesdrop on him in his cell.

Q Do you recall Captain Estabrook talking about being chased around Russia?

A I don't recall.

Q Is it possible he did?

A Sure.

Q Is it something you think you would remember?

A Well, since I don't really remember it, I guess not.

Q Can you explain to the Court who Auburn Calloway is and his history with the company?

JUDGE MORRIS: He already did.

MR. TADLOCK: And you're comfortable with that?

JUDGE MORRIS: Yes.

BY MR. TADLOCK:

Q What was your impression of Captain Estabrook's behavior when speaking about Auburn Calloway communicating with Al Qaeda?

A Well, like his e-mail, it was odd. But I didn't think that it merited me following up, because I had a security expert I felt at the table, and that was going to be within the security organization's decision-making to decide what to do about concerns that had been brought to the meeting.

Q Did everyone stay through the entire meeting?

A No.

Q Who left?

A Todd Ondra.

Q And was anything discussed after Todd Ondra left?

A To the best of my recollection, that's when I raised the issue of the Mayday Mark Airline Pilot Central postings.

Q Can you tell the Court what the Airline Central website is?

A It's kind of referred to as APC, and there are a lot of folks who apparently are pilots, based on the content

of the chat room or whatever, the forum that is publicly accessible. And they complain about FedEx and they praise FedEx, and they relate different concerns about all kinds of issues. I think that's a description of the website.

Q And who is Mayday Mark?

A I have no idea.

JUDGE MORRIS: So I'm clear, is this a blog?

THE WITNESS: You're talking to somebody who is not real knowledgeable --

JUDGE MORRIS: It's a forum for --

THE WITNESS: -- about blogs.

MR. SEHAM: But it's more like a bulletin board.

JUDGE MORRIS: A bulletin board, okay. Okay, go ahead.

MR. TADLOCK: Thank you, counsel.

BY MR. TADLOCK:

Q Why did you ask Captain Estabrook who is Mayday Mark?

A Captain McDonald asked me to.

Q Did you review any postings by Mayday Mark on the Airline Pilot Central website before attending the meeting?

A I did.

Q Okay, would you --

A We printed them out.

Q Would you turn to complainant's exhibit CX-21?

A I'm there.
Q Are those the postings you printed out?
A I haven't gone through every page, but it looks like a complete collection to me.
Q Did Captain McDonald seem agitated that Mark Estabrook might be Mayday Mark?
A No.
Q Did Captain McDonald say to you that he was interested in Mayday Mark because of some information related to the Laredo incident?
A No.
Q Did Captain McDonald show you any posting by Mayday Mark that caught his interest?
A I don't think so. I found one that was of interest to me, though.
Q And did you ask Captain Estabrook whether he was Mayday Mark at the August 9th meeting?
A Yes.
Q And what did he say?
A He said no. And I accepted his word for it. He had given a lot of information about prior involvement in the internet process and stuff. I thought he was being accurate and truthful about that.
Q How did the meeting conclude?
A Captain Fisher informed Captain Estabrook that he

would be returning to flight status.

Q And what happened next?

A Well, after the meeting was over, I drove back to my office because we had met at a location near the airport. And sometime during the remainder of that day Todd Ondra called me.

Q And what did Todd Ondra state to you?

A Well, I should say that he had left due to some other scheduling issue, and we didn't have an opportunity to chat after he left. And so he called and inquired about what did I think. And I told him that I thought that he was an unusual person, Captain Estabrook, but that I didn't have any safety of flight concerns. And then he said that he did. Mr. Ondra said that he did have some concerns and would like to know if there's anything under the collective bargaining agreement that could be done to have him checked out.

Q And what concerns -- did he specify what his concerns were?

A Yes, and my best recollection is that he said the comments about Auburn Calloway were of the most concern to him.

Q Did he state that he was concerned about Captain Estabrook's statements as they related to package tracking or flight tracking?

A I don't remember.

Q Do you recall him saying anything else to you regarding his concerns about Captain Estabrook?

A Not in that phone conversation. He had previously expressed a concern similar to mine, that it was an unusual request to make of your boss to have Fred Smith give you a call when you're not sleeping.

Q Okay. And what did you do after talking to Todd Ondra?

A I'm fairly certain that I called Rob Fisher right away.

Q And what did you say to Rob Fisher?

A I relayed Todd Ondra's concerns that we might need to have an evaluation of Captain Estabrook conducted, and Captain Fisher wasn't happy about that because he had previously told him that he would be returning to flying. And we discussed how to contact Captain Estabrook and inform him that plans had changed.

Q Was the purpose of the August 9th meeting to discipline Captain Estabrook?

A No.

Q Is there a disciplinary process within the collective bargaining agreement?

A Yes.

Q And what part? Where does that fall under?

A It's all under section 19.

Q What section specifically?

A Well, if you were going to have a hearing under section 19E, which is -- and you are required to issue a preliminary hearing notice and certain documents that are set forth in that section of the contract. That didn't take place here.

If it was going to be a 19E meeting, there would have been an invitation of that nature, and I understand there was that kind of a letter sent out in connection with the thing that happened with the no-show or the late show in the spring.

And I don't believe there was a 19D letter that went out in this case. In fact, the pilot was asking for an opportunity to provide some what he regarded as security-related information to the company, and he was accommodated with a meeting, so that there's no way this was a section 19 meeting.

Q Are you aware who communicated the company's decision to Captain Estabrook? To send him to a 15D, I should say.

A I'm fairly certain it was Rob Fisher, but I didn't participate in that call.

Q Do you have an understanding of when the decision to refer Captain Estabrook to a section 15D medical

examination occurred?

A Well, I was involved in the front end of it, and then it must have taken place in the flight management office after I spoke with Captain Fisher. I don't know who else he might have conferred with, but my impression from speaking with him was that he was going to accede to the request of Mr. Ondra to follow this up with an evaluation under the CBA.

Q And do you understand that -- actually, I would direct your attention to joint exhibit JX-5.

A I'm there.

Q Is that a copy of the 15D referral letter that was sent by the company?

A Yes.

Q I would next like to direct your attention to -- actually, let me ask you another question. Prior to the delivery of this letter, did you receive a letter from Alan Armstrong on or around April 13th?

A August 13th?

Q August 13th, excuse me.

A Yes.

Q And is a copy of that letter found at joint exhibit JX-7?

A Yes.

Q Do you understand a decision to refer Captain

Estabrook to a 15D to be already made at the time you received that letter?

A Well, it certainly had been made, yes.

Q And what did that letter ask for?

A I believe the operative request is under numbered paragraph 12 on page 3 of the letter. And he was asking that there be a retraction of an accusation about Mayday Mark. He was asking that FedEx withdraw any request that Captain Estabrook undergo what this letter calls a psychiatric evaluation. And then there was another request having to do with this "If You See Something, Say Something" issue.

Q Did you respond to that letter?

A Yes.

Q And is a copy of that response found at complainant's exhibit CX-26?

A Yes.

Q What did you state in -- or, can you summarize what you stated in that letter?

A Yes. We disagreed -- speaking on behalf of the company -- we disagreed -- or, strike that. We quibbled with the retraction of accusation request because that had been taken care of, I thought, to both my satisfaction and Captain Estabrook's at the meeting, at the tail end of the meeting on August 9. I accepted what he had to say, and

that's what I put in the letter.

Then there was a request to cancel the medical examination that had been requested. And, first of all, this was not a direction to undergo a psychiatric evaluation. I know that that's kind of been bandied about in this case.

The contract does not permit FedEx flight management to require that a pilot undergo that kind of evaluation. Rather, it says that you use the provisions of section 15D and ask the company's aeromedical advisor to evaluate.

And so, in order to accomplish that, it has been our standard practice in my office to send factual information to the aeromedical advisor's office and then let them decide what kind of evaluation, if any, is going to be conducted.

And I guess that was the third point that I raised, which is that we felt that as an air carrier we had an obligation to provide the highest degree of safety in the public interest, that we needed to make sure that what we were dealing with was a pilot who is fit to fly.

And, as far as the concern that there had been a violation of this federal statute, I wrote what I wrote at the end of the paragraph at the bottom of the first page, that we didn't feel that there had been a report of a

violation or an alleged violation.

Q Did you subsequently receive a letter from complainant's counsel asking for the company's reasonable basis for the 15D decision?

A Yes.

Q And could I direct your attention to complainant's exhibit CX-27?

A Yes. I'm there.

Q Did the company provide its rationale to complainant's counsel?

A No.

Q And can you explain why the company made the decision not to provide the reasonable basis for its decision to complainant's counsel?

A Yeah, that was made in the context of a representation that there was a grievance being filed, and we had a back-and-forth about the proper way to have a grievance on file. And, in the course of that process, there would have been an opportunity for discovery under the applicable provisions of the contract. And I don't think the grievance ever really got processed. We never got to that point.

But I did not see any value in continuing a war of words with Mr. Armstrong at that point. The company had made the decision to have a 15D exam. We were going to

follow through with it, regardless of what the outside attorney might think about it.

Q Does the company have a habit of -- or, does the company have a practice of providing the basis for its 15D referrals to the union that represents the pilots?

A When they ask.

Q And is that -- do they often ask?

A Oftentimes, it's pretty well understood what the reasoning was, so it's not very common to ask. But sometimes they'll ask, and I'll tell them.

Q And does the company have a practice of providing the reasonable basis for its 15D decisions to outside counsel?

A No.

Q As far as you're aware, is there a contractual requirement in section 15D to provide either the association, ALPA, or outside counsel with the company's basis for a 15D referral?

A Not that I know of.

Q Are you aware whether the company corresponded with Harvey Watt regarding the 15D referral?

A Yes.

Q And why did the company correspond with Harvey Watt about this?

A Because we needed to provide information upon

which the discussion and evaluation could proceed, and that's why I worked on the draft that was sent by Captain Fisher.

Q Did you correspond further with Harvey Watt about this matter?

A Never.

Q Did you correspond further with Dr. Bettes about this matter?

A No.

Q Did you or anyone at FedEx, to the best of your knowledge, try to interfere or influence Harvey Watt's fitness for duty determination?

A Certainly not.

MR. TADLOCK: No further questions.

MR. SEHAM: Actually, may I have a two-minute hand-washing break?

JUDGE MORRIS: Yes. We will take a recess in place.

[WHEREUPON, there was a brief recess.]

JUDGE MORRIS: All parties present when the hearing last recessed are again present.

CROSS EXAMINATION OF

ROB TICE

BY MR. SEHAM:

Q Referring to complainant's exhibit CX-8 --

A Yes?

Q -- you received this letter -- or, this e-mail dated April 29th, 2013 from Rob Fisher, correct?

A That's what it indicates.

Q Uh-huh. And attached thereto is a letter from Alan Armstrong dated April 29th, which you listed as a copy on the last page, C-38. So you received this -- the attached letter -- as well, from Mr. Armstrong on or about April 29th, correct?

A I assume so.

Q And you discussed this letter with Captain McDonald and Captain Fisher, the Armstrong letter, correct?

A I don't remember.

Q And could you turn to -- well, and you -- well, if you could turn to CX-10, at page C-45, item 5, dated April 29th, e-mails between Director W. McDonald and Attorney R. Tice regarding Manager R. Fisher letter to Attorney Armstrong.

JUDGE MORRIS: What exhibit are you on?

MR. SEHAM: Complainant's exhibit CX-10.

JUDGE MORRIS: CX-10?

MR. SEHAM: C-45.

BY MR. SEHAM:

Q You see that reference that I've made, correct, at item 5?

A I see that reference.
Q No, no, does this refresh your recollection that you had consulted with McDonald and Fisher concerning how to respond to Armstrong's April 29th letter?
A Doesn't refresh my recollection.
Q Do you dispute the representation of this document that you consulted with Fisher and McDonald at this time in terms of --
A No.
Q -- how to respond to the --
A It's consistent with my direct testimony, that I was involved early on in the process. So it's consistent with that.
Q And you received -- looking back at complainant's exhibit CX-8 -- the e-mail at the top from Rob Fisher, you participated in the drafting of that response to Alan Armstrong, isn't that correct?
A I don't know.
Q You don't know?
A [No audible response.]
Q Would it be standard practice for someone in FedEx's legal department to review a letter from a chief pilot before it went out to an attorney?
A A letter like this -- or, an e-mail like this, yes.

Q Now, you note that in Fisher's letter or e-mail at the top it refers to the investigation of Captain Estabrook as part of a disciplinary process?

A Yes.

Q And would you agree with me that it was your recollection of this event that there was a 19E investigation that was converted to a 19D investigation contemporaneously with the Armstrong letter of April 29th?

A I don't remember the details and the sequence of events.

MR. SEHAM: I'm going to ask you to turn to -- this would be?

JUDGE MORRIS: CX-49.

MR. SEHAM: For identification.

[WHEREUPON, the document identified as COMPLAINANT'S EXHIBIT CX-49 was marked for identification.]

BY MR. SEHAM:

Q Okay, I handed you, sir, a copy of your deposition transcript. This is going to be referred to as complainant's exhibit CX-49 for identification purposes only. And do you recall that you were deposed in this matter on March 24th, 2016?

A I'll accept your representation of the date. I remember being deposed.

Q Do you recall that you took an oath to tell the truth?

A Yes.

Q And did you during that deposition, to the best of your recollection, tell the truth as best you could?

A Yes, sir.

Q I'm going to turn your attention to the top of -- well, to the bottom of page 37, starting at line 19, which starts with, question, "Did you -- or, do you recall that there were -- do you recall the reasons for the initiation of an examination of Captain Estabrook in 2013 by Rob Fisher?"

Answer, "I have a sketchy recollection, yes." "And what is the best of your -- could you share with us, please, your best recollection?" "My best recollection is that I was involved in some other pending matter and was only tangentially involved in this matter.

And so early on I was aware that there was a failure to report to an airport issue, and I didn't get involved further. And what started out to perhaps be a 19E hearing under the CBA at some point I think, contemporaneous with the Alan Armstrong letter, that changed to just a meeting under what we call 19D, an interview. And I don't know what happened there because I didn't participate." Now, having -- did you give this testimony during your

deposition?

A I think you read it accurately.

Q And did you give -- you gave that testimony, therefore?

A Yes.

Q And would you agree today that this portion that I read, that that would constitute your best recollection?

A I think so.

Q Now, you said you received the letter August 13th from Mr. Armstrong that has been identified as joint exhibit JX-7.

A This one?

Q Yes.

A I'm there.

Q You received this letter, correct?

A Yes.

Q And as you'll note at the last page it was copied to Rob Fisher, Todd Ondra, and Captain William McDonald, do you see that on the final page?

A I do.

Q And you received this letter and you discussed it with Messrs. Ondra, Fisher and Tice, correct?

A I'm Mr. Tice.

Q Excuse me. With Ondra, Fisher and McDonald?

A I don't remember having done so, but I may have

and probably did.

Q I want to direct your attention to page 30 -- or, excuse me, page 40 of your transcript.

JUDGE MORRIS: CX-49?

MR. SEHAM: Yes, CX 49 for identification purposes only.

BY MR. SEHAM:

Q And starting at line 11, "Does that -- in view of that entry, would you agree that you not only received Mr. Armstrong's August 13th letter on August 13th but that you also discussed it with Mr. Ondra and Captain Fisher and Captain McDonald, or at least communicated with them via e-mail on August 13th?" And the answer is, "Yes." Would you agree with me that you at least discussed this via e-mail, this August 13th letter from Mr. Armstrong marked joint exhibit JX-7?

A Yes, and I think it was because you had showed me the privilege log that indicated something along those lines.

Q Now, I believe you testified on direct that Bill McDonald brought to your attention his concern that Captain Estabrook was posting on the Airline Pilot Central forum under the name of Mayday Mark, correct?

A Yes.

Q And you discussed the Mayday Mark identity issue

in the context of setting up a meeting with Captain Mark Estabrook after the August 4th e-mail was received, correct?

A You might want to have question repeated?

Q Yeah, sure.

A There was a noise that I think distracted me.

Q No, no, no problem. And you and Captain McDonald discussed the Mayday Mark identity issue in the context of setting up a meeting with Captain Estabrook on August 4th, 2013 -- and now I've bolluxed it up. You discussed the Mayday Mark identity issue in the context of setting up a meeting with Captain Estabrook after the company had received the August 4th, 2013 e-mail, correct?

A I think I could say yes to that.

Q Okay.

A Yes.

Q And so it was at the request of Captain McDonald that you asked Captain Estabrook if he was Mayday Mark?

A Yes.

Q And you didn't know -- it's your testimony that you didn't know why Captain McDonald had this interest?

A Right. I highlighted something that drew my attention.

Q That drew your own attention?

A Yes.

Q But he didn't -- those are copies of -- what you

were referring to before, those were copies of postings that you obtained for yourself, correct?

A Yes.

Q So Captain McDonald never provided you with copies of postings?

A He did not.

Q Okay.

A To the best of my recollection, he did not.

Q And I think those are in CX-21. Yes, CX-21. If you could turn to CX-21, I think you referred to them on direct.

MR. TADLOCK: You're in the wrong book.

THE WITNESS: I'm there.

BY MR. SEHAM:

Q Would you agree with me that you don't know for certain whether these were the pages of the -- well, let me back up. You brought to the meeting on August 9th, 2013, you brought copies of postings on the Airline Pilot Central forum that reference Mayday Mark, correct?

A Yes.

Q Okay.

A They contained postings by Mayday Mark.

Q Fair enough. And would you agree with me that you're not certain whether these pages under CX-21 are precisely those pages that you took to the meeting?

A That's true, because I gave my originals to the paralegal, and I presume these are those.

Q Uh-huh.

A I certainly didn't memorize every posting that's on --

Q Okay.

A -- all of these pages.

Q And there could have been more or less in terms of quantity with respect to what we see in CX-21?

A I don't think so. I don't know how it would be less. It's a lot of pages.

Q Yeah. There could have been more?

A I don't think so, but maybe.

Q If you'll turn to your deposition, please, CX-49 for identification purposes only? Now, you see at the bottom starting at line 24 it says --

A What page?

Q Seventeen.

A Okay.

Q The question reads, starting at line 24, "Okay, does this -- in terms of volume, there are 24 pages -- that approximate the volume as you recall that you brought to the meeting that day? Could it have been more?" Answer, "Sure, it could have been more or less. They weren't -- they certainly didn't have this marking, the numbering on them,

so I'm not sure how many pages I had." Do you recall giving that testimony?

A You read that accurately.

Q But, beyond that, you recall giving that testimony, correct?

A This is a better source than my memory. I'm sure it's accurate.

Q Okay, thank you. And would you agree with me that, as you sit here today, would you concede that there could have been more pages that you brought to that meeting on August 9th?

A Yeah. I think I said that already.

Q So the answer to that is yes?

A Yes.

Q Okay. Now, the purpose of an NOQ is to ensure that a pilot will not be utilized to operate airplanes, correct?

A In part, that's correct.

Q Okay.

A It also involves non-flying activities.

Q I'm sorry, what was the last part of your answer?

A It can also involve non-flying work activities, such as training.

Q But will you agree with me that it's a way of removing someone from various FedEx pilot systems so that

they are not going to be utilized to operate airplanes?

A That is one of the purposes and effects, yes.

Q And the effect of an NOQ designation is -- among other things, is to suspend an individual's jumpseat access, correct?

A I guess I don't know all of the possibilities that exist there. I know that in the case of -- I guess I just don't know the systems that well.

Q Okay.

A I think I'm familiar enough to say that a consequence of NOQ is -- there's a jumpseat consequence, yes.

Q Well, would you agree with me that in your experience the standard reason for a jumpseat suspension is that the person under investigation -- is that the person is under investigation for a significant matter?

A I think so, yes.

Q Now, you understood at the time -- is it your testimony --

A It depends on the -- I guess I would want to add to that. It depends upon the reason for the NOQ, and there's -- as I understand it, there's different kinds of NOQ's and different reasons for NOQ's. In the case of someone who is under investigation for a serious potential disability matter, because of the Auburn Calloway case, we

limit their access to jumpseats. And, in order to have the meetings that are associated, they are purchased airline tickets. But there are other kind of NOQ's that don't involve disciplinary matters.

Q You understood -- your understanding at the time of this August 9th meeting was that the purpose of the meeting was to provide an opportunity for Captain Estabrook to explain to the company security expert what his -- what Captain Estabrook's concerns were?

A It was a meeting that he had requested, that he wanted it to be with Fred Smith.

Q Uh-huh.

A But we substituted for Fred Smith, I guess. And there were some concerns about whether he should be on the jumpseat.

Q What were the concerns?

MR. TADLOCK: Objection, to the extent that it calls for attorney-client privileged information.

JUDGE MORRIS: Overruled.

MR. TADLOCK: Okay.

THE WITNESS: There was a communication from the VP of flight ops, as I recall, questioning is this an appropriate person to be on a jumpseat.

BY MR. SEHAM:

Q And who was the VP of flight ops?

A James Bowman.
Q Did you get involved in the discovery responses with respect to this case?
A I recall looking at some. I don't know how much involvement I had.
Q Okay.
A But I probably had some input.
Q So there was a contact from James Bowman.
A I think it's in the privilege log.
Q And what did he express as his concern?
A I think I testified to that, should this individual be on the jumpseats.
Q But did he identify why, other than just a generic reference to the August 4th e-mail?
A I think that contextually it was in light of having read the e-mail asking Fred Smith to give him a call when he wasn't sleeping.
Q So it's your understanding that the NOQ designation on August 5th was motivated by safety consideration?
A In part, I think. In part, yes. But also in an effort to make sure we had a meeting that didn't get interrupted by scheduling issues.
MR. SEHAM: Could I have the first set of interrogatories, please?

BY MR. SEHAM:

Q I'd like you to turn to complainant's exhibit CX-22, and look at the interrogatory number 6 at the bottom of that page. And that interrogatory reads, "Identify any persons involved in the decision to place the complainant on not qualified NOQ status on August 5th, 2013."

The answer is, "Respondent identifies the following individuals who may be contacted through undersigned counsel." And it lists Robert Fisher, William McDonald, Todd Ondra, and Rob Tice. Now, that answer should have also included James Bowman, correct?

A To the extent that he wrote an e-mail asking that question, I think that's probably true.

Q And, in fact, Todd Ondra did not participate in the decision to place Captain Estabrook on NOQ status on August 5th, 2013?

A Yeah. I think that -- wasn't there a supplemental interrogatory answer here?

Q I'm asking you that question right now as you sit here. Isn't it true that Todd Ondra did not participate in that decision on August 5th, 2013?

A I don't know for sure, but I don't think he did.

Q Okay.

A And I think you would have to look at the supplemental interrogatory answer for an explanation --

Q Right.
A -- of the confusion.
MR. SEHAM: Let's try to find that now.
BY MR. SEHAM:
Q It is your belief -- if you would turn to complainant's exhibit CX-19 -- so you were aware that there was a supplemental response in terms of the interrogatories?
A I'm aware that there was to -- I think there was to that question, to that interrogatory.
MR. SEHAM: Just for the record, complainant's exhibit CX-19 is paginated from C-91 to C-94, so that's four pages, the latter two of which are just a certification and a verification by -- verification from Maryanne Miller.
JUDGE MORRIS: It does not address interrogatory number 6.
MR. SEHAM: No, it doesn't, does it?
THE WITNESS: Well, let me catch up with -- if I might, what was the other exhibit number we were looking at before?
JUDGE MORRIS: CX-22.
THE WITNESS: I stand corrected. The supplement was having to do with the reasons, interrogatory 7.
BY MR. SEHAM:
Q And let's focus on that, now that we're here, is that the interrogatory question reads -- and this is for

number 7, "State the reasons why the complainant was placed on NOQ status on or about August 5th, 2013." And you see that the first answer was that, "Complainant was placed on NOQ status on or about August 5th, 2013 because he had been referred for examination under 15D of the collective bargaining agreement between respondent and the Air Line Pilots Association." And, in fact, that answer was incorrect, Mr. Tice, wasn't it, because there was no 15D determination anytime earlier than August 9th?

A That is correct.

Q Correct?

A [No audible response.]

Q And then it goes on that the company in effect withdrew this and below provided a supplementary response, "That this supplement responses [*sic*] supersedes respondent's original response. Complainant was placed on administrative NOQ status on or about August 5th, 2013 to facilitate the scheduling of a meeting he requested. The effect of the placement on NOQ status was to clear his schedule and prevent the scheduling of conflicting activities." This was an incomplete response, correct?

A At the time, I was unaware, failed to recall that there was a Jim Bowman e-mail.

Q Okay.

A I just saw that this past week.

JUDGE MORRIS: We're referring to CX-22 and CX-19 and dealing with interrogatories number 7?

MR. SEHAM: Yes.

JUDGE MORRIS: You just said something, you just saw what this week?

THE WITNESS: The e-mail by James Bowman asking the question that I testified to earlier, is this a person who should be on jumpseats. And at the time this interrogatory was supplemented I had not reviewed or been aware -- didn't have a recollection that I had participated in that e-mail exchange.

BY MR. SEHAM:

Q So you prepared this interrogatory response?

A No.

Q Oh, sorry, I must have misunderstood your testimony. I thought you said that you weren't aware of Mr. Bowman's --

A I did not prepare this. I remember reading it. And, if I had remembered that the James Bowman e-mail had been sent, this would have read differently.

U.S. MARSHAL: Judge, if you're busy -- I'm with the marshal's service. I just want to give you a card in the event you need anything while you're here.

JUDGE MORRIS: Yeah.

U.S. MARSHAL: I apologize.

BY MR. SEHAM:

Q And you said you just recently reviewed this Bowman e-mail?

A Yes.

Q You said that just a week ago?

A Within the past week, yes.

Q And who else was a recipient of this e-mail?

A I'd have to look at it. A lot of the attorneys. I'm pretty sure my boss and other members of flight management.

MR. SEHAM: I would ask for the immediate production of that e-mail.

MR. TADLOCK: I will restate my privilege objection.

JUDGE MORRIS: Your privilege objection is noted, but you will produce it for me for *in camera* inspection.

MR. SEHAM: Well, listen, I want to be very open about this, and if there's a preference to go -- well, maybe I shouldn't be off-record.

JUDGE MORRIS: No, we're not off record.

MR. SEHAM: This was -- what?

JUDGE MORRIS: No, we're not off record.

MR. SEHAM: Okay, fine. I think it's only fair to say that our demands at all time were for the disclosure of all e-mail correspondence related to the decision-making

process, that FedEx said it was not obligated to disclose any e-mails in which Mr. Tice was participating because of attorney-client privilege.

And our response to that was, well, he was one of the decision-makers, he's listed as an August 5th NOQ decision-maker, and that, when an attorney acts as a corporate decision-maker, his decisions are relevant. Now, this tribunal sided with FedEx and said that that document did not have to be -- and I'm assuming this was -- yeah, you said it was in the privilege log, Mr. Tadlock?

MR. TADLOCK: I am not aware. I don't know what document he is specifically referring to. My best guess is that it's probably a document that's contained within our privilege log.

MR. SEHAM: Well, here's my concern, I don't know the tribunal has -- or it might have been your predecessor, and that's why --

JUDGE MORRIS: It was?

MR. SEHAM: -- this is a difficult situation. And maybe --

JUDGE MORRIS: Well, I have a separate concern in that, why wouldn't privilege be waived since we now have an attorney testifying at these proceedings?

MR. SEHAM: Well, that, as well.

THE WITNESS: Your Honor, I think you handled the

privilege consistently.

MR. TADLOCK: We have an interesting situation here because he's a fact witness because he participated in the August 9th meeting. But, before and after the August 9th meeting, he served in his role as a lawyer for the company, advising flight management and other members of management in the legal department.

So there has been -- I mean, we've got a little bit of both. We have him as a fact witness and as a lawyer, and we have addressed some of his communications in this case through briefing, and it was determined that some of his communications were, in fact, privileged. Some of his communications were not.

And here he has testified, and we have raised some privilege objections that have been overruled. But I don't think that we have waived any privilege with respect to Mr. Tice's communications as a lawyer representing the company with advice of counsel.

MR. SEHAM: Well, I don't mean to be -- well, I guess I am being the respondent's advocate to some point, but I don't -- I would like everything to be on the table. Referring to complainant's exhibit CX-10, block 11, I imagine that this might be -- and I'm really being an accomplice, again, of my adversary -- but it says here, "E-mails with advice of counsel between Attorney Tice, VP, and

Attorney J. Maxwell, VP, J. Bowman, Director W. McDonald, Director T. Ondra, and managers R. Fisher and T. Arnett and cc to VP T. Harris regarding Estabrook 08/04/13 e-mail."

I imagine -- and perhaps counsel will be able to say whether that's the e-mail that this witness is referring to -- I have a dual problem, even having assisted them to this point, is that, number one, the lawyers are obviously key decision-makers in this process.

Number two, a waiver in our view has occurred. Number three, this is arising in the context of, to our view, very stark misrepresentations in two interrogatory responses. We have now gone through a two-and-a-half-year process and over two years of discovery. And all this time it has been represented to us that it was those four individuals. In fact, it wasn't those four individuals. It was only perhaps three of them.

And we've got James Bowman and the representation that was made that this was to facilitate a meeting, and now we're hearing this person who wasn't identified in interrogatory 6 instigated this NOQ for reasons that are in conflict, direct conflict, with interrogatory response number 7.

And, frankly, I'm at a loss of where to go from here because we should have had a right to depose Bowman. We should have had these documents provided to us. And I

don't know how to say -- I'm on the verge of stammering a lot. But I think that that misrepresentation is obvious, that prejudice is obvious, that credibility impact is obvious. And I'm not sure where we go from here, because I have never, ever had this situation before.

JUDGE MORRIS: Counsel?

MR. TADLOCK: The testimony from Mr. Tice was only that Mr. Bowman questioned whether he should be on a jumpseat. It doesn't indicate that he was a decision-maker, so there's no indication that there's any testimony from Mr. Tice that we did anything nefarious in our discovery. You know, if he wanted to take Mr. Bowman's deposition, he could. The guy was identified. He's not an attorney, he's in management, flight management.

JUDGE MORRIS: All I'm understanding, he really had no reason to until now.

MR. TADLOCK: Right. But, I mean, he could have asked additional questions in discovery to determine that. I mean, I don't know how to answer why he didn't take this guy's deposition.

JUDGE MORRIS: Right.

MR. RIEDERER: I would also note that I believe -- and I don't want to double-team you with two attorneys coming at you. I want this proceeding to be fair. I would also note, I think we can elicit testimony -- and I think

Mr. Tice has testified to this -- that I don't believe that the NOQ decision process itself is necessarily tied to the removal of jumpseat status. And so there could have been -- and so, if that's the -- if he's testifying to the jumpseat issue, there could be two separate decisions that are being made.

MR. SEHAM: I would respectfully submit that, at a minimum, we might need another *in camera* review of this item. I'm trying to figure out how we go forward at this point, and I'm really --

JUDGE MORRIS: This is what we're going to do.

MR. SEHAM: -- trying to buy this.

JUDGE MORRIS: The document that was referred to shall be produced *in camera*. If it's not that, you will also produce *in camera* item 11. I will reserve -- that's in CX-10 -- I will reserve ruling on whether or not the complainant will be given -- until I review this and I hear all the evidence -- reserve whether or not I will give complainant an opportunity to conduct deposition and potentially continue this hearing for purposes of eliciting additional testimony on this issue. But I'm not going to stop in the middle of this.

And I'm going to allow the parties -- and remind me when we close tomorrow about this -- an opportunity to brief this issue again. My predecessor Judge, if I recall

correctly, had made some rulings on this. I don't have that with me. I want the opportunity to go back and look at the ruling that was made, as well. But, in the interim, I don't have access to these documents, and I'm going to want to see them, okay? Counsel?

MR. SEHAM: Yeah, I'm going to request a 10-minute break.

JUDGE MORRIS: All right, we're in recess until 10 minutes of 2:00.

[WHEREUPON, there was a brief recess.]

JUDGE MORRIS: All parties present when the hearing last recessed are again present. Go ahead, counsel.

CROSS EXAMINATION OF

ROB TICE

(resumed)

BY MR. SEHAM:

Q Mr. Tice, I just want to clarify this. It was your understanding that, effective August 5th, Captain Estabrook's jumpseat privileges were suspended, correct?

A I believe so, yes.

Q And then I'm going to ask you to turn to page 65 of complainant's exhibit CX-49.

A That's my deposition?

JUDGE MORRIS: Yes.

MR. SEHAM: Correct.

THE WITNESS: What was the page?

MR. SEHAM: For identification purposes only, page 65, starting at line 20. Are you there, sir?

THE WITNESS: Yes.

BY MR. SEHAM:

Q Read along with me, if you would. "Under what circumstances would a pilot be deprived of his jumpseat authority?" Their answer, "There are -- I guess there are several circumstances." "What circumstances are you familiar with?"

Answer, "I don't know that I know them all, but I can give you off the top of my head a list." "Okay." "There are some sick leave issues. If you -- and I don't know the details of when you are able to use the jumpseat privilege.

"But my understanding roughly is that if you call in sick you shouldn't be traveling around on a jumpseat. If you are under investigation for a significant matter, then the jumpseat privilege is withheld and we bring you to the place of the investigation or hearing with commercial airline travel at the company's expense.

"Now, if you fail to follow some of the rules associated with jumpseat reservations and cancellations, et cetera, you can, I guess, have some loss of jumpseat privileges for the -- for some period of time. That's all I

can think of off the top of my head." And was that your testimony at your deposition?

A You read that correctly.

Q And Captain Estabrook, on August 4th he didn't have any sick leave issues, did he?

A No.

Q Okay.

A Not that I know of.

Q Okay.

A He was planning to fly a trip.

Q And there were no issues related to his abuse of jumpseat protocols, correct?

A Correct.

Q But he was, in fact, at this point under investigation as to whether he had a mental health issue or a fitness for duty issue, isn't that correct?

A Not really. I mean, there was an e-mail.

Q Uh-huh.

A There were concerns expressed about the author of the e-mail.

Q Uh-huh.

A He wanted to talk security issues, and a meeting was held and should he be jumpseating, and the decision was made that he shouldn't be jumpseating.

Q Okay.

A So he was purchased an airline ticket --
Q Okay.
A -- to the meeting.
Q He shouldn't be jumpseating because?
A There were concerns about the e-mail that he had written.
Q Concerns that raised a question as to whether he was fit for duty?
MR. TADLOCK: I trust that, to the extent -- I have a standing objection at this point with respect to privilege, to the extent that Mr. Tice learned about those concerns in the course of giving legal advice.
JUDGE MORRIS: Overruled.
THE WITNESS: Now I don't remember the question.
MR. SEHAM: And I meant to ask, we don't have the capacity to have questions read back?
COURT REPORTER: Can we go off the record for a second?
JUDGE MORRIS: We'll go off the record.
[WHEREUPON, there was a brief recess.]
JUDGE MORRIS: All parties present when the hearing last recessed are again present. Go ahead.
MR. SEHAM: Okay.
JUDGE MORRIS: Counsel, you were asking questions about the --

BY MR. SEHAM:

Q At least part of the reason behind the NOQ designation and the suspension of jumpseat privileges at this time was because there was a concern within Federal Express as to whether Captain Estabrook had a fitness for duty issue, correct?

A All I can recall is that the VP of flight ops asked that question in an e-mail, and the tie-in the context was the e-mail that was being discussed and is this somebody that should be on a jumpseat. That's the best I can do for you as far as my memory --

Q Well, how do you --

A -- having been served by the e-mail that I described that I had read within the last week.

Q That question was raised -- just to confirm what you just said -- the question was raised, is this a person that should be on the jumpseat, correct?

A Or words to that effect, in an e-mail, yeah.

Q That was a question that was discussed among --

A It was a question posed by Captain Bowman in an e-mail.

Q Uh-huh.

A I'm sorry, I can't be any more specific than that.

Q And what did you understand the reasoning to be behind that question?

MR. TADLOCK: To the extent --
JUDGE MORRIS: Overruled.
THE WITNESS: I think I gave --
JUDGE MORRIS: Go ahead.
THE WITNESS: My turn?
JUDGE MORRIS: Yes.
THE WITNESS: I think I gave the context of it.
BY MR. SEHAM:
Q Whether -- the context being whether this person based on the August 4th e-mail, had a fitness for duty issue?
A Yes.
Q Now, as of August 5th, 2013, did you have any concern about Captain Estabrook's mental health?
A I don't believe that I did. But I believe I acceded to the VP's concerns, and he made that decision or provided that input. I didn't know enough about Captain Estabrook to form any judgments about that.
Q In your discussions with -- did you have discussions with Mr. Ondra, McDonald and Fisher at this time concerning the NOQ designation?
A I don't remember. All I remember is that e-mail that I described to you.
Q Do you have any recollection of Ondra, McDonald or Fisher expressing any concerns with respect to Captain

Estabrook's mental health prior to the August 9th meeting?

MR. TADLOCK: I'm going to object. I don't think that the privilege has been waived with respect to anything relating to those individuals.

JUDGE MORRIS: Who are those individuals?

MR. SEHAM: Ondra, McDonald and Fisher? They are the persons identified in the company's interrogatories as the NOQ decision-makers. And this question and answer has already been posed and answered.

JUDGE MORRIS: Overruled.

THE WITNESS: Well, let me be as complete as I can, because that's my obligation here. Those individuals were on the e-mail, all right? My recollection is that their names were among the persons who received Jim Bowman's e-mail.

JUDGE MORRIS: While he's doing that, since it's going to be *in camera*, can I get those e-mails tomorrow?

MR. RIEDERER: Yes.

JUDGE MORRIS: Okay.

MR. TADLOCK: Anything else?

BY MR. SEHAM:

Q I'm going to ask you to turn to your deposition, CX-49 for identification purposes only, and can I ask you to the bottom of page 26? Now, line 25 on page 26, the last line, question, "Well, I just want to be clear, as of August

5th, there was no concern about Captain Estabrook's physical health?" "No." "And as of August 5th, 2013, did you have any concerns about Captain Estabrook's mental health?" And the answer is, "No." Now, those were -- was that your testimony during your deposition?

A You read that accurately.

Q And those were pretty definitive responses.

A That was my recollection at the time.

Q But has your recollection changed over the last few weeks?

A Well, yeah. I just told you about the e-mail that I just read last week.

Q Oh, okay. That wasn't --

A I guess that was more in response to the next question.

Q All right. Well, if I recall your testimony -- I'm not going to ask the court reporter to read it back -- does this deposition testimony refresh your recollection that you personally had no question about his fitness for duty at the -- as of August 5th, 2013?

A When I testified in March --

Q Uh-huh.

A -- of this year, I had no recollection of having received an e-mail from Jim Bowman where he said, should this guy be on a jumpseat.

Q Uh-huh.

A So I testified truthfully that I didn't have those concerns. Now, thinking back today, I look at that e-mail and I realize, well, Jim Bowman had a concern.

Q Uh-huh.

A I didn't really have enough information to know whether or not he had a mental health issue that should be followed up or not. I hope that's --

Q Sir, didn't you participate in the compilation of the defendant's -- or, FedEx's log of privileged documents at CX-10?

A No.

Q You didn't?

A I provided an Outlook file.

Q Uh-huh.

A And that was handled by other people.

Q The next question is, "Did you know of anyone -- you were consulting with other participants in the NOQ decision, Mr. Ondra, Captain McDonald, Captain Fisher, correct? You were having communications with them concerning his placement under NOQ status?"

Answer, "In the context, yes, of setting up the meeting that was eventually set up." "Did any of them express a concern in the run-up to the placement on NOQ status that Captain Estabrook had a physical health

problem?" "No, sir, not from a fitness for duty as a pilot standpoint at all."

"Did any of those three individuals, Mr. Tice -- Captain McDonald, Captain Fisher, and Mr. Ondra -- did any of them express a concern about the mental health of Captain Estabrook in the run-up to the placement on August 5th on NOQ status?"

"No, sir, not from a fitness for duty as a pilot standpoint, only a discussion of this is an odd situation that we find ourselves in." So is that -- does that continue to be your testimony today, that none of those individuals had any concerns with respect to his mental health, physical health, or general fitness for duty?

A I do not recall those three individuals expressing concerns on August 5. I only recall now -- having had my memory refreshed by an e-mail -- that Jim Bowman had that concern.

Q Uh-huh.

A But it's possible they did, but I don't remember.

Q And nobody responded to Mr. Bowman?

A I didn't say that.

Q Well, who responded to Mr. Bowman?

A I did.

Q You did?

A I don't know if anybody else did or not.

Q And his title again is what?
A Back then, it was vice president of flight operations.
Q So he would have been -- everyone else in the meeting would have been -- certainly McDonald and Fisher were subordinate to him?
A They reported up through him, yes.
Q Now, you're an attorney, correct?
A Yes.
Q And you're in the labor relations department, correct?
A Yes.
Q And you would say a core element of your job is participating in pilot-related investigations and disciplinary proceedings, correct?
A Among the primary duties that I have, yes.
Q And usually your presence at a pilot meeting is related to disciplinary matters, correct?
A When it involves an individual pilot, yes. When it involves the Air Line Pilots Association in the administrative grievance arena, I'll be meeting with ALPA officials, and sometimes there's a grievance chairman there and not an individual pilot. So I hope that's responsive.
MR. SEHAM: Yes, it is. The August 4th -- and maybe I could get some help from counsel -- the August 4th

e-mail?

MR. TADLOCK: Oh, I'm sorry.

MR. SEHAM: No, that's all right.

MR. TADLOCK: CX-13? I believe that's us, as far as --

MR. SEHAM: I have it here at CX-11, so why don't I just go with what I have in front of me?

BY MR. SEHAM:

Q If you could turn to complainant's exhibit CX-11 at C-52?

A Can I see it, please?

Q And the August 4th, 2013 e-mail from Captain Estabrook disclosed that he had served as the chairman of a pilot union security committee, correct?

A That's what it says.

Q Did you have any basis for doubting that?

A No.

Q And the August 4th e-mail disclosed that Captain Estabrook, in his capacity as chairman of the pilot security meeting [*sic*], had dealings with Bill Henrikson, you see that reference?

A I see that name. I don't know who that was.

Q Do you know today, as you sit here, that that is the former vice president of corporate security --

A No.

Q -- for FedEx?
A No.
Q You don't know that?
A I don't know that.
Q Prior to the August 5th NOQ designation, did you make any effort to confirm Captain Estabrook's service as the pilot union security committee chairman?
A No.
Q And did you make any effort to investigate the nature and scope of his transactions with Bill Henrikson?
A No.
Q And you made no effort to confirm his service or the scope of his service as the pilot union security committee chairman at any time prior to the issuance of the August 16th, 2013 15D letter, correct?
A That was kind of a long question.
Q It's just the same question, that you didn't make those inquiries as of August 5th and up through and including August 16th, you didn't make those inquiries either with respect to the scope of his service as a pilot union security committee chairman? Is that true?
A I'm trying to search my memory as much as I can. It may have been a matter of idle chatter within labor relations, but I don't think anybody informed me that he had held any title at ALPA of that kind. If that's what you

mean by investigation --

Q Uh-huh.

A -- I didn't talk to anybody who said, I remember Captain Estabrook serving in that capacity.

Q Sometime after the August 9th meeting, you asserted that your reason for asking questions to Captain Estabrook about whether or not he was Mayday Mark was because Mayday Mark was a FedEx pilot who had admitted to having suffered a stroke, correct?

A There was a posting that I think used the word seizure.

Q Yeah.

A And I don't know if I misused the word stroke, if they are different. But that's the reason for what I highlighted, because it came to my attention when I was looking at the website.

Q But Captain McDonald never identified his concern as relating to an individual --

A Not that I can recall.

Q -- having a stroke?

A Not that I can recall.

Q If I complete the question, it doesn't change the answer?

A [No audible response.]

Q But you were -- at that meeting, you were of the

belief that the individual posting as Mayday Mark was a Federal Express pilot, correct?

A Well, as I explained at my deposition, or tried to explain, you don't know who is really posting. You don't know if they are pretending to be something they're not. But, based on the number of postings, it looked like he might have been a FedEx pilot.

Q To your reading, he appeared to be a FedEx pilot, correct?

A I think I explained my answer, and I stand by it.

Q Is the answer to my question yes?

A No.

Q The question I asked?

A You can't tell, but I thought maybe, based on the context.

Q So my question that to you the poster appeared to be a FedEx pilot, the answer is no?

A I'll say it again. I had no way of knowing for sure, but it could have been.

Q I don't mean to split hairs with you, but from our perspective it's an important distinction, so I'm going to ask you to turn to page 29 of complainant's exhibit 49 for identification purposes only. And if you could turn to 29 at line 9?

A All right.

Q Which reads, question, "There is reason to believe that whoever Mayday Mark was was a Federal Express pilot, correct?" Answer, "Based on the content of a lot of the information, it looked like he was, but maybe he was on LTD or something. I mean, it's hard to tell if they're telling the truth or not when they write what they write." But my question to you is, is your testimony today that at that time you drew the conclusion that it looked like this Mayday Mark poster was a FedEx pilot?

A I think that the deposition answer that you gave is the same as the testimony I just gave a minute ago.

Q Well, I'd like an answer to my question, please.

A I think I have answered it three times.

JUDGE MORRIS: Answer the question.

THE WITNESS: I couldn't tell. He could have been.

BY MR. SEHAM:

Q So you're rejecting this testimony as untrue?

A I think it's the same testimony I just gave.

JUDGE MORRIS: Move on, counsel.

MR. SEHAM: Yeah, I am moving on.

BY MR. SEHAM:

Q Once you determined to your satisfaction that Captain Estabrook was not Mayday Mark, did you make any further effort to determine who this FedEx pilot stroke

victim was?

A I wouldn't know how to do that, and I did not.

Q Did you ask anyone to investigate whether there was another pilot out there who was a FedEx pilot who suffered a stroke?

A No. It was a dead issue by then.

Q It's not a concern of yours that there's a FedEx pilot out there who has an undisclosed stroke?

A If I believed everything I read on the internet, I probably would not be able to sleep. I couldn't do anything with the information that Captain McDonald asked me to ask. It was done, it was closed. I dropped it a long time ago.

Q And why did you conclude in the first place that Captain Estabrook might have been Mayday Mark?

A Only because Captain McDonald said, I think he might be Mayday Mark. He asked me to ask, and I asked.

Q Now, Todd Ondra was not present for the entirety of the meeting, correct?

A That is correct.

JUDGE MORRIS: Hold on, counsel, I have a question. Did you relay the response that your conclusion that he was not Mayday Mark back to the person that asked you about that?

THE WITNESS: I'm sure I did.

JUDGE MORRIS: Okay. Thanks. Go ahead.

BY MR. SEHAM:

Q And Todd Ondra was not present for the discussion regarding Mayday Mark?

A That's my recollection. It only happened at the tail end of that meeting, although there was a pre-meeting that the management folks had.

Q There was a pre-meeting?

A I think there was. We all came from different places and assembled.

Q Well, did you have a sit-down discussion prior to the meeting?

A It could have been a stand-up discussion. I just don't remember the details. It's possible that the Mayday Mark issue was --

MR. TADLOCK: Objection to the extent that -- let's be careful about the attorney-client privilege to the extent that you involved giving advice to counsel.

MR. SEHAM: I'd like to --

JUDGE MORRIS: It's noted. Overruled. And don't give narratives, counsel.

MR. TADLOCK: Okay.

JUDGE MORRIS: Continue.

BY MR. SEHAM:

Q It's your recollection that there was a meeting of the company representatives prior -- immediately prior to

the meeting with Captain Estabrook on August 9th?

A The source of my information are the notes that Mr. Ondra took, and he has Mayday Mark kind of high up on the page. And I think maybe he wrote that before we actually convened the meeting with Mr. Estabrook. That's just me trying to put thoughts together. I don't remember that for sure.

Q Well, but my question was -- totally aside from Mayday Mark -- did the company representatives convene and have some discussion prior to the meeting with Captain Estabrook?

A I said I think there might have been a stand-up, or maybe we sat down, but I don't remember the details of it. The only thing that jogged my recollection process was that there's a reference to Mayday Mark on the first page of his notes.

And why would that have been there if it hadn't taken place before the meeting actually started, because my recollection is that that discussion with Captain Estabrook happened at the end of that meeting and when Mr. Ondra wasn't even there.

Q So you have no recollection of any content of the discussion that preceded the August 9th meeting with Captain Estabrook?

JUDGE MORRIS: He just said that. Move on.

BY MR. SEHAM:

Q I'm going to refer you to JX-7. And you received this August 13th e-mail, this August 13th, 2013 e-mail from Alan Armstrong, Captain Estabrook's attorney, correct?

A I'm sure I did.

Q Now, the directive, the written directive to Captain Estabrook to submit to a 15D evaluation didn't issue until three days after this letter, correct?

A That's correct.

Q And you were involved in the drafting and issuance of that 15D directive of August 16th, 2013?

A I don't remember that. It's a fairly standard form, and it might have taken place without my putting pen to paper or anything like that.

Q Okay, is it -- now, there was a week delay between the August 9th meeting and the issuance of the August 16th directive, correct?

A August 9th to August 16th I think were the dates, yes.

Q And is it possible that the Armstrong August 13th letter was taken into consideration during that intervening period?

A Yes.

Q And there is this reference to -- I think it was brought up during direct -- on the third page of the letter

under 12-B, there's a demand that Federal Express withdraw any request made by and through chief pilot Rob Fisher that Captain Estabrook undergo a psychiatric evaluation. You recall reading that on August 13th?

A [No audible response.]

Q Or you see that it's part of this letter, correct?

A It's certainly in paragraph 12-B.

Q And that would have been -- I'll move to -- if you can go to joint exhibit JX-6? And go to the sixth page. It says 15-6 at the lower left. And I'm looking at G-1 -- or, G, titled limitation of medical procedures. Under 1, it says, "Flight management shall not require a pilot to submit to psychological or psychiatric examination." So this contract language was in effect in August of 2013, correct?

A Yes. Plus the succeeding sentence. It was also in effect.

Q We'll say the whole paragraph, correct?

A I don't think there is -- I think all of 15D was in effect. What's printed, this 2011 version of the contract.

Q All of section 15. Well, this is not 15D, this is 15G.

A You're right.

Q Okay.

A All of 15, as printed in this document, appears to

have been all from the 2011 printing.

Q So what Mr. Armstrong was asserting in this letter was that there was a violation of a black-and-white prohibition in the collective bargaining agreement, correct?

A I don't know what his intention was.

Q Well, he communicated facts that would constitute a violation of --

A He wrote words that we disagreed with, yes.

Q But you never expressed disagreement.

A He was never ordered by flight management --

Q You're not responding to the questions.

A -- to submit to a psychological --

Q You're not --

A -- or psychiatric examination.

Q Answer the question. Were you on the phone call between Captain Fisher and Captain Estabrook?

A No.

Q No, you weren't. So you don't know the answer to that? You're saying that out of ideological conviction -- withdrawn. Let's proceed with this. You were -- you received a demand that the company withdraw a directive that Captain Estabrook submit to a psychiatric examination. And isn't it true, sir, that you never denied that allegation from Mr. Armstrong?

A What is true is that I did not regard Mr.

Armstrong as having correct information.

Q You didn't answer my question. I'm asking you, did you ever communicate with Mr. Armstrong that it was -- that your position that he hadn't been directed to submit to a psychiatric examination?

A I'll have to look at my -- did I respond to that letter? I think I wrote an August 16 letter. What did I say in it?

JUDGE MORRIS: Counsel, can you help him with finding his letter?

MR. TADLOCK: Sure.

JUDGE MORRIS: I seem to recall there's a reference.

MR. TADLOCK: Yeah. I would ask to direct your attention to -- let's look at tab 26 of complainant's documents.

THE WITNESS: I wrote, next you expressed concern that -- no, I'm reading from the wrong one. I wrote in the final paragraph the position I took in this letter that was intended as a response to that 12-B.

BY MR. SEHAM:

Q Are you aware of any document in which you told Mr. Armstrong he has not been referred to a psychiatric examination?

A No, I don't think so.

Q Now, this -- if you could move to exhibit CX-32?
JUDGE MORRIS: Complainant's exhibit CX-32?
MR. SEHAM: Yes.
JUDGE MORRIS: Same binder.
MR. SEHAM: And I'm going to refer you to page 175. Well, actually, let me start with the first page.
BY MR. SEHAM:
Q Do you recognize this as the company's FedEx's position statement submitted to the United States Department of Labor/OSHA Division?
A All I can do is read it and assume that it is.
Q So you had no -- no one ever came to consult with you about the position that FedEx would take --
A Honestly, I just don't remember --
Q -- with OSHA on this matter?
A -- reading the letter and having those kind of discussions. I could have.
Q But you don't remember being consulted?
A That's right.
Q Now if we can go back to JX-7?
JUDGE MORRIS: So are we done with --
MR. SEHAM: Yes. Yes, if he doesn't know about the letter, about the position statement.
BY MR. SEHAM:
Q So I'm going to refer you to point 6 on page 2.

A Are you talking about a numbered paragraph?

Q Yeah. I'm looking at -- I'm sorry, I'm looking at the second page, item 6. And this is a letter -- before I ask you that question, in looking at the last page, this is a letter that went both to you and to Captain Fisher and Todd Ondra and Captain William McDonald, correct?

A According to the cc list, yes.

Q So you were all informed by this letter that Captain Estabrook served his country on an AWACS aircraft that flew missions in the North Atlantic?

A I don't know if they read this --

Q Okay.

A -- letter or not.

Q But you read it?

A I read it.

Q It is your understanding, sir, that Captain Rob Fisher made the decision to issue the 15D letter of August 16th, correct?

A That was my understanding.

Q Okay.

A I think I testified that he may have had a conversation with Captain McDonald after he spoke to me, but I don't -- my impression was that he understood that there was going to need to be a 15D exam based on my telephone conversation with him on August 9.

Q And you came to the conclusion that Captain Fisher made the decision on the 15D letter based on your involvement in the process, correct?

A Based on what I communicated to be Todd Ondra's concerns.

Q Now I'm going to refer you to page 50 of your deposition, complainant's exhibit 49 for identification purposes only. Starting at line 20, question, "Well, who made the decision to issue the 15 letter to Captain Estabrook?"

Answer, "My understanding is that would have been his direct manager in the flight operations department was, I think, the fleet captain at the time, and that was Captain Fisher." Question, "When you say that is your understanding, what do you base that understanding on?" "My involvement in the process." That was your testimony at your deposition?

A Yes. And I went on to explain later on the page that Mr. Ondra had called me, and I'll read it. "I called Rob Fisher."

Q No, no, that's non-responsive.

A Okay.

Q Thank you. After the August 9th meeting, you and Captain Fisher concurred in reinstating Captain Estabrook to flight duty, correct?

A I had no problem with it. It wasn't my call, but I had no problem with it.

Q You expressed no objection?

A I expressed no objection.

Q Did you communicate any reservations to Captain Fisher?

A No.

Q Now, subsequent to --

A I should say, not that I recall. To me, it was very prompt and quick, put him back to flying.

Q Okay.

A That type of conversation.

Q And it's your understanding that subsequent to Captain Fisher's decision Todd Ondra discussed the issue with Bill McDonald, correct?

A I'm sorry if I didn't track it with you very well. My involvement was, Todd Ondra called me, and I called Rob Fisher. I don't know what happened after I talked to Rob Fisher.

Q Todd Ondra called you?

A Yes.

Q All right. And Todd Ondra -- I'm sorry, I've got to hear that again -- Todd Ondra called you, and then you called McDonald?

A No.

Q No?
A Todd Ondra called me, expressed the concerns that are on page 51 of my deposition transcript. And then I communicated those concerns to Rob Fisher in a subsequent telephone conversation.
JUDGE MORRIS: Counsel, if you want that in evidence, you're going to have to read 51.
MR. SEHAM: Yeah. I might come back to that.
BY MR. SEHAM:
Q Okay, and you -- so you spoke directly to Todd Ondra, correct?
A Yes.
Q Okay.
A On the phone.
Q And would you agree with me that you have no recollection of his making any reference to Russia or Russians?
A I have no recollection of that.
Q And his primary emphasis, based on your recollection, was to comments Captain Estabrook made about Auburn Calloway?
A Correct.
Q And you personally have no recollection of Captain Estabrook having made any reference to Russians or Russia during the August 9th meeting, correct?

A I just don't recall, sir.

Q And Mr. Ondra, did he make any reference in his conversation with you in terms of his reasons for recommending the 15D evaluation, did he make any reference to Captain Estabrook's August 4th e-mail?

A I don't think in that conversation, but I'm not sure. I know that -- as I stated before, he was involved on August 4 with those e-mails that I just recently read, and that e-mail was front-and-center -- that e-mail request was front-and-center on that e-mail thread. And I don't remember if he talked to me about it after the meeting on August 9 or not.

Q You have no recollection of his referencing the August 4th e-mail, correct, in his 15D recommendation considerations?

A I have no recollection of him making that reference in the August 9 telephone conversation I had with Todd Ondra.

Q And do you have any recollection at any time of Todd Ondra telling you that the August 4th e-mail was part of -- was a consideration of his in making the 15D recommendation?

A No. The context I think was that it was an odd e-mail. I don't -- that's the best recollection I have about any comments Todd Ondra made about the e-mail.

Q And when did he make those comments?
A Before the meeting. I'm not sure when. That's my sense and my recollection. I can't give you a date, time and place.
Q But you -- but it was sometime before the August 9th meeting?
A That's what I think.
Q And during this August 9th meeting Captain Estabrook did raise the fact that he was engaged in service for the United States Air Force in the North Atlantic during the -- I'm sorry, bolluxed that up. During the August 9th meeting, Captain Estabrook did raise the fact that he had engaged in service for the United States Air Force in the North Atlantic, correct?
A Now I don't know what I remember versus what I've read.
Q Okay.
A I guess I would say it's possible that he did. I just don't have a clear recollection that he did.
Q Well, why don't we turn to page 82.
A Page 82?
Q Yes, of your --
JUDGE MORRIS: CX-49, for identification.
MR. SEHAM: Thank you.
\\

BY MR. SEHAM:

Q So, very quickly, at line 6, question, "Okay, now, isn't it true that Captain Estabrook referenced at the August 9 meeting that his military service had included service on the AWACS aircraft surveilling Russian bombers?" Answer, "You know, I don't remember the details of what he said his military service was. I know he -- I seem to have some recollection of the North Atlantic being referenced, but I don't know beyond that." So is your recollection that he referenced the North Atlantic in terms of his military service?

A I remember North Atlantic. I don't -- as I said, I don't remember the details, if I read it or if I remembered it.

Q Okay.

A I just don't remember.

Q Now, after your call with Todd Ondra, you then communicated to Rob Fisher what Ondra's concerns were, correct?

A Yes.

Q And, to the best of your recollection, what did you say to Rob Fisher as to what Ondra's concerns were?

A Best of my recollection is that Todd Ondra was concerned about the Auburn Calloway comments and how they might affect his state of mind, Captain Estabrook's state of

mind. And he was wondering whether or not there was something under the contract we could do to have him evaluated.

Q Uh-huh.

A And that's the information that I learned from Todd Ondra and imparted to Rob Fisher.

Q So, in terms of the substance of Ondra's concerns, you can't recollect communicating to Fisher anything more specifically than what you just testified to?

A I cannot.

Q And Captain Fisher then made a decision to place Captain Estabrook on NOQ status again on August 9th, 2013, correct?

A I assume that that took place, based on the conversation that I had with him and subsequent events.

Q Now, in order to refer a pilot for a 15D evaluation, the collective bargaining agreement requires that flight management have a reasonable basis for questioning whether the pilot is fit for duty, correct?

A [No audible response.]

Q Just so the record reflects, you don't know that off the top of your head without referring to the contract?

A I like to refer directly to the document.

Q Well, that's --

A There are certain individuals specified in here

that may direct a pilot to contact or see the company's aeromedical advisor if the company -- doesn't say flight management -- if the company has a reasonable basis to question whether a pilot has developed or recovered from an impairment to his ability to perform his duties as a pilot.

Q Uh-huh.

A That's what the contract says.

Q And, when a pilot is referred for a 15D evaluation, the normal practice is for FedEx to disclose the alleged reasonable basis to the pilot's union, correct?

A When the union is involved, that's the normal practice if the question is asked.

Q And you declined to respond to Captain Estabrook's Alan Armstrong's request that you provide a reasonable basis, correct?

A Yes.

Q And then you subsequently declined to respond to a request from Seham, Seham, Meltz and Petersen on behalf of Captain Estabrook requesting that you state the reasonable basis, correct?

A I don't remember the dates of that, but I think your letter came after his.

Q But there was a second written request seeking the reasonable basis, and you, on behalf of Federal Express, declined to respond to that request?

A I did.

Q And do you recall during your deposition testifying that you could think of no reason for withholding the company's alleged reasonable basis for the 15 referral from Captain Estabrook's counsel?

A You can direct me to that, if I'd like.

Q I'm asking you first a question, sir, whether you recall giving that testimony.

A I don't recall.

Q Do you recall a reason suddenly occurring to you over the last few weeks?

A I'm sorry, you garbled the word.

Q Did I?

A Can you repeat it? You say suddenly occurred for some reason?

Q Yeah. Did you -- did a reason occur to you in just the last few weeks as to why it was legitimate for you to withhold the reasonable basis for Captain Estabrook's referral?

MR. TADLOCK: Objection, objection. I think the question is argumentative, and I think it lacks foundation with respect to the --

MR. SEHAM: Well, we can build it by just referring him. I guess rather than force you to rule, I can withdraw the question --

JUDGE MORRIS: Withdraw the question, then.

MR. SEHAM: -- and then proceed in a different way.

BY MR. SEHAM:

Q I'm going to refer you to page 62.

JUDGE MORRIS: CX-49, for identification?

MR. SEHAM: Yes, for identification.

BY MR. SEHAM:

Q At line 4, the question is, "As you sit here --

A I'm sorry, what page? I missed it.

Q Page 62.

A Okay.

Q Line 4.

A Let me find the page.

Q "As you sit here, is it fair to say that, as you sit here today, a reason for withholding that information as to the reasonable basis does not occur to you?" Answer, "State it again." Question, "As you sit here today in your witness seat, no reason occurs to you for the withholding of the information requested in this letter concerning what the reasonable basis was?" Answer, "That's right." Do you recall giving that testimony?

A You read that accurately.

Q And was that truthful testimony, that as you were being deposed on that day you had nothing occur to you as a

reason for withholding the two written requests from Captain Estabrook's legal counsel as to the reasonable basis for the 15D referral?

A Truthful testimony.

Q Now, in your conversation with Mr. Ondra, the only reason he raised for the recommendation he made to Captain McDonald for a 15D evaluation were the comments of Captain Estabrook, that Captain Estabrook made regarding Auburn Calloway's conversion to Islam and Calloway's ability to assist Al Qaeda, correct?

MR. TADLOCK: Objection to foundation, I think.

JUDGE MORRIS: Overruled.

THE WITNESS: I thought I had already testified to this, but perhaps I am mistaken.

JUDGE MORRIS: Counsel, he has testified like three or four times now about that.

BY MR. SEHAM:

Q Now, Captain Estabrook's comments regarding Calloway came fairly late in his presentation, isn't that correct?

A To the best of my recollection, that's true.

Q And his comments --

A It was kind of an add-on.

Q And his comments lasted less than a minute, correct?

A I didn't time them.
Q Okay, and your understanding was that Captain Estabrook, with respect to the issue of Calloway's conversion, was simply reporting a rumor that he had heard, correct?
A I believe that that's my best recollection is that he had heard a rumor or rumors.
Q And that your best recollection of what he said with respect to Al Qaeda was that it was possible that Calloway may be communicating in some fashion with Al Qaeda?
A That sounds like a fair description.
Q Okay.
A That wasn't all I said, but it was accurate.
Q No one at FedEx engaged in any research regarding Captain Estabrook's past working relationship with Calloway, correct?
A I can only tell you what I know. I don't know what other people did.
Q Okay.
A I did not.
Q You did not. And you don't know of anybody else who did?
A I do not.
Q And is it fair to say that the Calloway incident has had an enduring impact on FedEx operations?

A Sure.

Q Is it true that the Calloway incident still comes up in response to questions about policies that are in effect as a result of that hijacking?

A Yes.

Q And the Calloway incident has had a continuing effect with respect to how much security there is around FedEx as an enterprise, correct?

A Well, that's my impression. I wasn't here until 2006, so I don't really have a before-and-after perspective. But that's my impression.

Q Now, at the August 9th meeting, Captain Estabrook expressed his concern about the ability of terrorists to know when a package leaves and when it arrives at an airport, correct?

A I don't recall the details. I know he was concerned about flight times. Subsequently, I have been reminded that he was concerned about package tracking data. I don't remember being able to understand the difference at this meeting between what his concerns were and what those two different kinds of information on the internet might be. I was leaving that up to Todd Ondra to parse through and understand.

Q You can turn to -- and this may be close to what you said, but I do want to nail this down. On page 71 of

complainant's exhibit CX-49 for identification purposes only, page 71 towards the top at line 3 states, "He talked about the ability of terrorists to know when a package leaves and when it arrives, and that's what I recall." So did Captain Estabrook make comments to that effect on August 9th?

A I think that's basically what I said before.

Q Well, whether it was or not, I'm asking you, did he make comments to that effect?

A Well, you read my testimony correctly from back then.

Q All I'm asking --

A But the question was a little different than that. I didn't --

Q All I'm asking you, is that truthful testimony that you gave there?

A Oh, yes.

Q Okay, that's all. Under what circumstances would you expect a pilot to bring union representation to a meeting with management representatives?

A Certainly in the context of a disciplinary investigation, but anytime the pilot felt that he would want to have the advice and support of a union representative in a meeting.

Q I'm going to refer you to page 74 of your

deposition transcript, March 24th, 2016. Starting at line 18, "What are the circumstances under which you would expect a pilot to bring union representatives to a meeting with management representatives?"

Answer, "If it was a disciplinary meeting, I would expect that there would be a union representative present." Question, "Okay, thank you. Any other circumstances that occur to you?" "You're kind of asking me to free-associate. I can't think of anything." Was that your testimony during your deposition?

A You read that accurately.

Q And were you testifying truthfully to the best of your ability at that time?

A Certainly.

Q And at that time you truly could not think of any other reason for a pilot to bring a union representative to a meeting?

A If I could have, I would have.

MR. SEHAM: I have no further questions.

JUDGE MORRIS: Counsel?

REDIRECT EXAMINATION OF

ROB TICE

BY MR. TADLOCK:

Q Was this a disciplinary meeting?

A No.

Q Did you ask whether Captain Estabrook wanted counsel to be -- or, union representation to be present at the meeting?

A I had discussions with the Air Line Pilots Association legal staff about trying to schedule the meeting, which I assumed that they would be attending, and it wasn't until later on I learned that Captain Estabrook said he didn't want union representation. So that's the way it happened.

Q So is it the case you understand that there may be non-disciplinary meetings where union representation --

MR. SEHAM: Objection, mind-reading.

JUDGE MORRIS: Overruled.

THE WITNESS: This was a meeting asked for by Captain Estabrook. It was not a disciplinary meeting. As a matter of courtesy to the union, I didn't want to have a scheduling issue in case he expected there would be a union rep present.

So I took the initiative to try to work with ALPA's scheduling folks, because they aren't always as available as I would like them to be, and I'm sure I'm not as available as they would like me to be. And I was mistaken, that he didn't want union representation present, and I let ALPA know. And there was an e-mail to that effect.

MR. TADLOCK: I have no further questions.

JUDGE MORRIS: Anything further?

RECROSS EXAMINATION OF

ROB TICE

BY MR. SEHAM:

Q Mr. Tice, Captain Estabrook never asked for a meeting, did he?

A That's true. I felt like -- or, my impression was he wanted to talk to someone in the company and he wasn't going to talk to Fred Smith, according to the decisions made by people above my pay grade. So we accommodated him, and he agreed to come to a meeting.

MR. SEHAM: No further questions.

JUDGE MORRIS: Sir, concerning the 15D process, what are the options for an employee if they determine or believe -- correctly or incorrectly -- that the basis for the evaluation is not a reasonable basis? What are their options?

THE WITNESS: Well, I would think under the Railway Labor Act they would be in an obey-now-grieve-later status. And, as a practical matter, this is the first one that's ever happened, so I don't know what options there might be other than obey-now-grieve-later.

JUDGE MORRIS: Okay.

THE WITNESS: We certainly engage in lots of

conversations with the certified bargaining rep about 15D exams and evaluations. So that process, in the ordinary course, usually resolves the issue, and we usually go right to a 15D and deal with the medical issue, not a legal issue out of it.

JUDGE MORRIS: So, if an employee refuses, then, to take a medical evaluation because it does not believe that the company has a reasonable basis, is that a separate basis for disciplinary action and/or termination?

THE WITNESS: I think the form letter actually has a tag line at the end that there can be disciplinary consequences for not following through on the direction.

JUDGE MORRIS: If the company never states what the reasonable basis is, how is a pilot able to know so he can make a determination on whether or not the company's action is reasonable in the first place?

THE WITNESS: The contract doesn't address that issue, I don't think.

JUDGE MORRIS: Does Mr. Smith have an open-door policy?

THE WITNESS: I have no idea. I have seen him, never spoken to him, never talked to him.

JUDGE MORRIS: Does Mr. Smith prefer to be called Mr. Smith, Fred, you know, Mr. FedEx? What does he --

THE WITNESS: I have only been here since 2006,

and I have not heard any of the lore over that repeated while I'm here. So I don't know.

JUDGE MORRIS: Those are the questions I have. Questions based on mine?

MR. TADLOCK: No further questions.

MR. SEHAM: No further questions.

JUDGE MORRIS: All right. Thank you, sir.

THE WITNESS: Thank you.

JUDGE MORRIS: You're dismissed.

[WHEREUPON, witness Rob Tice was excused.]

JUDGE MORRIS: And then I have some procedural matters to talk with counsel. All right, so we're clear, it's my understanding that respondent's counsel is going to produce for my *in camera* inspection tomorrow the e-mails that we have addressed previously, is that correct?

MR. RIEDERER: Correct.

JUDGE MORRIS: I intend -- go ahead.

MR. TADLOCK: Just so we're totally clear, can you once identify on the privilege log? I'm not sure that we --

MR. SEHAM: Tab 11.

MR. TADLOCK: Just tab 11?

JUDGE MORRIS: Tab 11 only.

MR. TADLOCK: Okay.

JUDGE MORRIS: As well as, if it's not the same e-

mail, the e-mail he was addressing with the VP.

MR. RIEDERER: Right. I understand.

JUDGE MORRIS: I will tell you right now, I will look at it. If I conclude that it's privileged, I am going to return it and not include it in the record, okay? If I have a question, I am going to retain it in an envelope so I can do some further research.

So, if it's clear to me it's coming right back to you. If I have some questions or concerns I'm going to retain it for further deliberation, and then, if I subsequently decide that it's not, I will return it to the company, all right? That's my course of action. Counsel?

MR. SEHAM: Yes. With all due respect, I'd like to inquire on behalf of the complainant the basis for overruling -- the tribunal overruling the respondent's objections with respect to the testimony concerning his exchange with Captain Bowman.

And the reason I make that request is, it has been our position all along that any correspondence in which Mr. Tice was involved in this process should have been produced to us because he was a decision-maker. And we cited case law, and I can reproduce those briefs for you if you have any interest.

But it was always a source of great frustration to us that he was identified as one of the NOQ decision-makers

of August 5th, and yet -- and there's all this correspondence during this period flying around, and, frankly, we could find no -- we didn't receive any documents in discovery that discussed the decision process during that time of August 5th -- August 4th, August 5th -- up through the 9th. So that's why I am deferentially requesting if we could get a nicer understanding of the tribunal's decision and whether that might impact some of the other privilege documents.

JUDGE MORRIS: Yeah. I can envision -- or, I see thus far where Mr. Tice could be both. At one point, in one moment in time, he could be acting as a lawyer, and at another moment in time he could be acting as a decision-maker. It may not be the best situation for the respondent, but I can envision how that's possible.

And so I am seeing a challenge that the respondents -- and, frankly, the complainants -- have in parceling out what would be considered privileged and what would not be considered privileged information. I don't have enough fidelity or visibility right now on exactly the extent of his role in the decision-making process to conclude a waiver of the attorney-client privilege. That privilege is one of the most sacred privileges in our judicial system. I will guard it zealously. But if in fact it's waived, it's waived.

So that's kind of where we are. I have some great trepidations about the attorney-client privilege and waiver. That doesn't mean it hasn't occurred. And that also doesn't mean that he wasn't acting in that role as an advisor at one point in time and the decision-maker at another point in time.

I don't know where that point is, from what I've heard so far. Now, in fairness, I was not involved. The prior Judge was involved in the discovery process and the discovery disputes associated with that. I have asked my law clerk to try and e-mail me tonight Judge Sellers' prior order to get a better feel for what's going on.

I am separately concerned about the fact that, as I understand it, as I understand it thus far, it should have been identified in interrogatory number 6 and was not. So, separate and apart from that, I have some concerns about the discovery process. I don't have any information this was intentional.

But at least at this point -- now, complainant's counsel, if you've got evidence of that, that raises a whole separate can of worms as to what remedy would be available to you by not being provided that information. That's why I'm willing to talk about post-hearing deposition and maybe even keeping the hearing record open for purposes of eliciting additional testimony. The good thing is, it's a

little after 3:00, you've got some time to chew on this, to tell me tomorrow your thoughts on that.

MR. SEHAM: I would only -- as you go into this -- I don't know if we're going to have any colloquy before you make this review, but certainly it might be highly probative of whether there was withholding of evidence and some intentionality.

If Bowman's participation is reflected in these documents, whether or not we get them, it seems like the tribunal is going to have a lot of insight as to the intentionality of withholding the information, because obviously key attorneys prepared this privilege log. And it would be the same attorneys who were preparing the interrogatory responses.

JUDGE MORRIS: Well, be that as it may, I want to see the evidence before I even think about the way ahead.

MR. SEHAM: Uh-huh.

JUDGE MORRIS: So, if you can produce that stuff for me tomorrow, things that involve the privilege log, privileged e-mails involving Mr. Bowman and the e-mail that Mr. Tice was referring to, if it's any different from that, okay? Are there any other matters we need to discuss on the record?

MR. SEHAM: None that occur to me at the time. Our start time is 9:00 tomorrow?

JUDGE MORRIS: Yes, and we're going to be in the ninth floor courtroom, Judge Fowlkes's courtroom. I will secure this room, so you may leave all of your stuff here, so all we have to do is do the group huddle in the elevator in the way down.

MR. SEHAM: My client is whispering in my ear. I presume that also, as they review correspondence, the respondent's comes across any e-mails with Bowman and anyone else concerning this matter, that those would also be produced?

JUDGE MORRIS: They are under an affirmative obligation. And I am sure at this point they would know the consequences if they didn't.

MR. RIEDERER: Thank you.

JUDGE MORRIS: Anything else?

MR. SEHAM: No, Your Honor.

JUDGE MORRIS: This hearing is in recess until tomorrow morning at 9:00.

[WHEREUPON, the proceedings were concluded for the day at 3:05 p.m.]

\\

\\

\\

\\

\\

REPORTER'S CERTIFICATE

TITLE: Mark Estabrook v. Federal Express Corporation
CASE NO.: 2014-AIR-00022
DATE: June 7, 2016
LOCATION: Memphis, Tennessee

This is to certify that the attached proceedings before the United States Department of Labor, Office of Administrative Law Judges, were held according to the record, and that this is the original, complete, true and accurate recording accomplished at this hearing.

June 7, 2016

BAYLEY REPORTING, INC. **Date**