

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

BAYLEY REPORTING, INC.
(727) 585-0600

APPEARANCES:On behalf of the Complainant:

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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?

1 A I have worked for FedEx for 26 years.

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

4 A Before coming to FedEx?

5 Q Yes.

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

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

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

17 Q You worked as a manager for FedEx?

18 A Yes. From 2000 to 2005, while I was in Subic Bay,
19 Philippines, I served as the regional chief pilot for the
20 Subic Bay and the Asia-Pacific Region. From 2007 to 2011, I
21 was a duty officer, and at the end of 2011, beginning of
22 2012 until 2014, I was a fleet captain for Airbus. And in
23 2014 to 2015 I was the assistant system chief pilot. And
24 then from 2014 to -- excuse me, 2015 to the present, I'm the
25 system chief pilot.

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

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

5 Q What were your job duties as a fleet captain?

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

10 Q You said how many pilots worked for you?

11 A Nine hundred fifty at the time.

12 Q While you were --

13 A Approximately.

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

16 A Yes.

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

20 A Yes.

21 Q What happened on that occasion?

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

1 Q Was there weather issues on that night?

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

5 Q Was there weather over Laredo?

6 A I don't recall.

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

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

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

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

25 Q While at the airport, are there pilots or the

1 flight crew, communicating with Memphis GOC?

2 A Yes.

3 Q Okay.

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

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

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

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

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

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

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

7 Q What do you mean by schedulers?

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

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

18 A Yes, I did.

19 Q Tell me about that meeting.

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

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

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

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

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

19 Q Was the meeting adversarial?

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

25 And Captain Estabrook was eating lunch with us, so

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

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

8 A He did make mention of that, yes.

9 Q Did you ever speak with the duty officer?

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

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

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

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

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

25 Q Did you schedule this meeting with the intent to

1 discipline Captain Estabrook?

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

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

10 A Okay.

11 Q Take your time to review it.

12 A Okay.

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

15 A Yes.

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

18 A Yes.

19 Q Which was? What was the purpose?

20 A The purpose was to investigate the circumstances
21 involved with why he was late reporting to work for flight
22 1317 on 11 April 2013.

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

25 A That is correct.

1 Q Do you know offhand what 19D-1 says?

2 A You know, it says it's an investigation, it's not
3 discipline, to paraphrase it. But it's part of the
4 investigation and discipline section of the CBA, and it is
5 the investigation part of that section.

6 Q Can you look at respondent's exhibit RX-1? It's
7 also in the same folder, but it's not the first number 1
8 tab, it's the second number 1 tab.

9 A Oh, got you. There are two number 1 tabs, all
10 right. Yes?

11 Q That exhibit contains excerpts of the collective
12 bargaining agreement, is that correct?

13 A Correct.

14 Q Can you find section 19?

15 JUDGE MORRIS: You said section 19?

16 MR. RIEDERER: Section 19. Should be page R-31
17 down the bottom.

18 THE WITNESS: Okay, yes.

19 BY MR. RIEDERER:

20 Q Is that section 19 of the collective bargaining
21 agreement?

22 A That is.

23 Q And so, when you cite to section 19D-1, what are
24 you referring to?

25 A 19D-1, I'm referring to the collective bargaining

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

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

12 Q All right.

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

16 Q Did you discipline Captain Estabrook for his
17 conduct?

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

1 Q Who is Bill McDonald?

2 A At that time in 2013, Bill McDonald was my boss,
3 and he was the system chief pilot.

4 Q Did you speak to Bill McDonald about this Laredo
5 incident?

6 A Yes. Captain Bill McDonald did -- I don't know if
7 he called me or we talked verbally, it was a long time ago,
8 but he did say, hey, we need to look into this and find out
9 why he didn't show up for work.

10 Q Did Captain McDonald instruct you to discipline
11 Captain Estabrook?

12 A No, he did not.

13 Q Did you follow up with Captain McDonald after the
14 meeting?

15 A I did. I believe I may have given him a phone
16 call just saying it's over, and I told him I'd follow up
17 with an e-mail, and I sent him an e-mail --

18 Q Can you look at --

19 A -- talking about what we did.

20 Q Can you look at respondent's exhibit RX-9?

21 JUDGE MORRIS: It's in the next volume.

22 MR. RIEDERER: And take your time to read that.

23 THE WITNESS: Okay.

24 BY MR. RIEDERER:

25 Q Is that the e-mail you sent to Captain McDonald

1 following your meeting?

2 A Yes, it is.

3 Q Can you explain in summary form what happened?

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

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

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

18 A No.

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

21 A No. It was -- no.

22 Q Do you know who Fred Smith is?

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

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

4 A Yes.

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

6 A Captain McDonald told me.

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

10 A Okay.

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

13 A Yes.

14 Q What was your impression of the e-mail?

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

21 Q Were you copied on this e-mail?

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

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

25 A No.

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

4 A No.

5 Q And did you eventually meet with Captain
6 Estabrook?

7 A Yes, we did.

8 Q Do you recall the date?

9 A Excuse me?

10 Q Do you recall the date?

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

12 Q Who was present in the meeting?

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

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

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

21 Q Who made that decision?

22 A Captain McDonald.

23 Q Explain what NOQ means.

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

1 this case, arrange a meeting.

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

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

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

12 A Yes.

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

15 A Yes.

16 Q How long did the meeting last?

17 A It was less than an hour.

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

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

22 Q As an overview, can you give us --

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

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

1 other times you've placed someone on NOQ?

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

9 Q How long did the meeting last?

10 A It was less than an hour.

11 Q What do you recall about the meeting?

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

17 Q What were your impressions of the tracking data
18 comments?

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

24 Q What were your impressions about the Auburn
25 Calloway comments?

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

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

9 A I don't recall.

10 Q Did he ever say anything about chasing Russians?

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

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

14 A I don't recall.

15 Q Is it possible?

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

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

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

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

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

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

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

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

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

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

22 A He did not indicate that, as I recall.

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

25 A No.

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

3 A No.

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

7 A No.

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

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

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

24 A No.

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

1 that. What happened at the end of the meeting?

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

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

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

11 Q What happened next?

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

15 Q Did Rob Tice explain to you why?

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

18 Q Did Rob Tice explain Todd Ondra's position?

19 A He did not.

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

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

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

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

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

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

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

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

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

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

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

4 Q And you called Captain Estabrook next?

5 A Yes.

6 Q What was his reaction?

7 A Well, he was very upset.

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

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

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

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

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

23 A Would you repeat that? I'm sorry.

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

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

5 Q Yeah.

6 A -- in the interest of safety.

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

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

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

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

23 A No, I did not.

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

1 A Absolutely.

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

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

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

14 A We have a flight safety duty officer that's on
15 24/7 that we can call. I'm not sure what you're referring
16 to.

17 Q A flight operations threat awareness program.

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

1 Q What are ASR's?

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

10 Q Do you know who Chuck Yannizzi is?

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

13 Q And do you know what his job duties are?

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

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

24 A No.

25 Q When was the decision made to refer Captain

1 Estabrook for a 15D exam?

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

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

9 A Okay.

10 Q What's the date of that letter?

11 A August 16th.

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

14 A Correct.

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

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

19 Q Did you prepare the letter?

20 A I did, with Rob Tice.

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

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

24 Q Tell me about that 15D process.

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

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

4 Q And is the aeromedical advisor an employee of
5 FedEx?

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

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

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

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

17 A I'm not involved in that process.

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

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

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

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

1 a statement why we were recommending Captain Estabrook to a
2 15D, and I did. With Rob Tice, we wrote a letter to them.

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

5 A Okay.

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

8 A Yes.

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

12 A No, I did not.

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

15 A I'm sorry? Say that again.

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

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

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

22 A I do know that he returned to flying.

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

24 JUDGE MORRIS: Counsel?

25 \\

CROSS EXAMINATION OF**ROB FISHER**1
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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

1 the airplane.

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

5 A Correct.

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

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

14 Q Uh-huh.

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

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

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

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

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

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

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

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

9 Q Okay.

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

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

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

17 Q That's not the question I asked.

18 A I don't understand your question, then.

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

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

25 Q So he can make that decision unilaterally?

1 A That is a true statement.

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

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

8 Q And so quite often, when --

9 A Sorry.

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

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

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

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

20 Q Uh-huh.

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

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

1 it related to Laredo, correct?

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

4 Q And 19D's always have the potential to turn into
5 19E's on the spot, isn't that correct?

6 A Certainly there is a potential, yes.

7 Q And 19E is a disciplinary process?

8 A That's correct.

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

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

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

16 A That's correct.

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

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

21 MR. SEHAM: Yes.

22 JUDGE MORRIS: Oh, sorry.

23 BY MR. SEHAM:

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

1 true?

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

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

8 A Vaguely I do recall, yes.

9 Q And you refused that request, correct?

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

14 Q Was not needed. Was not permitted?

15 A Correct.

16 Q Is that the better term, permitted?

17 A Sure. It is not permitted.

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

21 A Yes, correct.

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

23 MR. RIEDERER: The white notebook.

24 THE WITNESS: You said CX-8?

25 MR. SEHAM: Uh-huh.

1 BY MR. SEHAM:

2 Q Are you at the exhibit?

3 A Yes.

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

7 A Correct.

8 Q And you are copying Alan Armstrong?

9 A Correct.

10 Q And that would be a response to the attached
11 letter that begins at C-37, this letter dated April 29,
12 2013?

13 A Yes.

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

17 A That is correct.

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

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

4 A Yes.

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

7 MR. RIEDERER: Objection.

8 THE WITNESS: He knows section 19.

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

11 JUDGE MORRIS: Overruled.

12 MR. SEHAM: And what was your answer?

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

15 BY MR. SEHAM:

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

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

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

25 A Yes, I do.

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

4 A That is correct.

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

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

11 Q Uh-huh.

12 A -- which is the investigation portion of that.

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

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

18 Q Oh, okay.

19 A -- which is what we were performing.

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

22 A I did not.

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

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

1 MR. RIEDERER: Hold on.

2 THE WITNESS: Yes, sir.

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

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

12 BY MR. SEHAM:

13 Q Now if you could turn to respondent's exhibit RX-
14 8, please?

15 A Okay.

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

18 A Yes.

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

21 A Yes.

22 Q And did you read it on April 10th?

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

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

1 A I don't recall.

2 Q You never got any subsequent e-mail communications
3 from Mr. Crook, correct?

4 A I don't know. It was a long time ago.

5 Q Did anyone at FedEx ever ask you to look for any
6 correspondence you might have had with Mark Crook other than
7 respondent's exhibit RX-8?

8 A No.

9 Q Now, there were three conversations attached to
10 this e-mail, correct?

11 A I don't know.

12 Q If you could read -- let's see if -- the second
13 paragraph up, the second full paragraph up from the bottom.
14 Do you see where it says, I have attached Sherrie's first
15 conversation with Captain Estabrook, my conversation, and
16 then Sherrie's second conversation?

17 A Oh, yes, okay.

18 Q Okay.

19 A Yes, I agree, there were three conversations.

20 Q And you listened to these recorded conversations
21 before you had your scheduled interview with Captain
22 Estabrook, correct?

23 A That is correct.

24 Q You actually received these three e-mailed
25 conversations, these three recorded conversations, three

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

3 A I don't recall.

4 Q You don't recall?

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

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

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

10 Q Okay.

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

13 Q So several weeks?

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

18 Q Okay.

19 A So I probably heard them a week after this.

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

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

25 Q Okay, let's --

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

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

6 A Yes.

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

10 A Joint exhibit JX-2?

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

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

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

18 A That's correct.

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

22 A Yes.

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

1 A Yes.

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

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

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

10 A That is correct.

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

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

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

24 A I agree with that.

25 Q And you based that conclusion on the tapes,

1 correct?

2 A Correct.

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

5 A Respondent's?

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

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

8 THE WITNESS: Okay, yes.

9 BY MR. SEHAM:

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

13 A Yes.

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

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

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

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

10 Q Uh-huh.

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

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

23 A Well, once --

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

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

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

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

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

15 A That's correct.

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

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

1 departure time.

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

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

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

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

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

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

24 BY MR. SEHAM:

25 Q Now, if you based your determination that Captain

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

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

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

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

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

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

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

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

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

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

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

5 JUDGE MORRIS: Sustained.

6 BY MR. SEHAM:

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

10 A I recall Captain Estabrook saying that, yes.

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

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

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

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

22 Q Uh-huh.

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

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

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

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

9 A No.

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

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

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

16 MR. RIEDERER: In the white notebook.

17 BY MR. SEHAM:

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

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

22 Q Yes.

23 A And where is that?

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

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

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

5 A Yes.

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

8 A In the upper half, yes.

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

11 A Correct.

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

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

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

21 A Yes.

22 Q And then at the meeting that you had on May 1,
23 2013, you advised Captain Estabrook that no disciplinary
24 action would be taken against him, correct?

25 A At the end of the meeting, yes.

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

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

8 Q Uh-huh.

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

11 Q Uh-huh.

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

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

20 A To him? No.

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

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

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

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

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

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

9 A That is not correct.

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

12 A Yes.

13 Q On March 24th, 2016?

14 A I remember being deposed, yes.

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

17 A Yes.

18 Q You recall that?

19 A Yes.

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

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

1 Captain Estabrook.

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

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

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

10 A I don't have any specific recollection.

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

15 A The package tracking system, yes.

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

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

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

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

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

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

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

10 A Okay.

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

19 "Did Captain Estabrook express during the August
20 9th, 2013 meeting that Federal Express was not 00 in terms
21 of its dissemination of tracking information, was not doing
22 enough to deter terrorists from utilizing FedEx aircraft as
23 a potential weapon?" Answer, "I recall, you know, basically
24 that was the conversation." Now, was that your testimony on
25 March 16th?

1 A That is my testimony.

2 Q Oh, excuse me, March 24th. And does that refresh
3 your recollection that Captain Estabrook was communicating
4 to you on August 9th that, in terms of FedEx's dissemination
5 of tracking information, the company was not doing enough to
6 deter terrorists from utilizing FedEx aircraft as a
7 potential weapon?

8 A Well, let me just say this --

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

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

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

16 A Yes.

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

19 THE WITNESS: Yes, sir.

20 BY MR. SEHAM:

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

23 A Yes.

24 Q And does that stand for removed from management?

25 A Yes.

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

4 A Yes, we have used it for that.

5 Q Okay.

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

9 Q Uh-huh.

10 A It's a specific time frame.

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

13 A It can be, yes.

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

16 A I would say it can be used that way.

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

25 A That's my testimony, yes.

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

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

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

10 A I can make an assumption, but --

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

12 A I do not know.

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

16 A That is correct.

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

19 A I believe the NOQ designation was used --

20 Q I'm asking you if you know.

21 A I think I know, yes.

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

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

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

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

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

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

13 A It can be used for that, yes.

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

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

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

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

25 Q Okay.

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

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

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

10 JUDGE MORRIS: Thank you.

11 MR. RIEDERER: On a FedEx plane?

12 THE WITNESS: On a FedEx plane.

13 BY MR. SEHAM:

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

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

1 the deposition on March 24th, 2016?

2 A That is my testimony.

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

5 A Yes.

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

8 A That is correct.

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

12 A That is correct.

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

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

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

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

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

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

1 Q Uh-huh.

2 A And that's what I know, yes.

3 Q So, in fact, he never did ask for a meeting?

4 A I think Captain McDonald offered the meeting
5 instead of contacting Mr. Smith, and I'm assuming that he
6 accepted to have the meeting.

7 Q So there was no intent on the part of the company
8 representatives at this time -- or, it would your position
9 that there was no intent on the part of the company
10 representatives at this time to investigate Captain
11 Estabrook, correct?

12 A No, there was -- no, we were not investigating
13 Captain Estabrook.

14 Q And, with respect to Captain Estabrook at this
15 time, during this time frame of August 4th, August 5th, you
16 had no fitness for duty concerns, correct?

17 A That is correct.

18 Q You had no fitness for duty concerns at any time
19 prior to the August 9th meeting, correct?

20 A That is correct.

21 Q And there was no discussion between you and other
22 company representatives prior to August 9 concerning
23 Estabrook's fitness for duty, correct?

24 A That is correct.

25 Q And you had no concerns prior to August 9 that

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

3 A That is correct.

4 Q You had no contact with Mr. Ondra after the August
5 9th meeting concerning Captain Estabrook, correct?

6 A That is correct.

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

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

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

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

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

21 A I did determine that.

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

24 A That is correct.

25 Q And then subsequently Mr. Tice told you that you

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

2 A That is correct.

3 Q And that made you uncomfortable, correct?

4 A That is correct.

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

7 A Yes. Yes, I did.

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

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

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

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

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

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

9 A I did.

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

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

17 Q Uh-huh.

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

25 So I wanted to make sure that my boss knew about

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

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

8 A No, I don't --

9 Q You're elaborating when recounting --

10 A I'm elaborating the fact that --

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

13 A -- in the interests of safety --

14 Q Uh-huh.

15 A In the interests of safety, yes.

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

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

23 MR. SEHAM: Captain Estabrook?

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

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

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

4 JUDGE MORRIS: The deposition?

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

7 JUDGE MORRIS: Yeah.

8 MR. SEHAM: I did not understand.

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

10 MR. TADLOCK: Would you like a tab?

11 JUDGE MORRIS: Yeah.

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

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

17 MR. SEHAM: Oh, son of a gun.

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

20 MR. RIEDERER: I like that.

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

23 JUDGE MORRIS: So this will be CX-48.

24 \\

25 \\

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

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

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

7 MR. SEHAM: Yes, sir.

8 BY MR. SEHAM:

9 Q Okay, so we're at joint exhibit JX-6, and I'm
10 asking you to move to -- let's see, I think it's four pages
11 into that, coming to a page that's marked at the bottom 15-
12 3, and starting with the paragraph D, company-mandated
13 medical examinations. Could you let me know when you get
14 there?

15 A Okay, I'm there.

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

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

19 JUDGE MORRIS: Okay.

20 BY MR. SEHAM:

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

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

4 A Yes.

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

8 A It was at that time, yes.

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

13 A That is correct.

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

16 A That is correct.

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

19 A That is correct.

20 Q And, because you never had any conversation with
21 Todd Ondra concerning that might have been his rationales,
22 you developed your own rationales independently as to why a
23 15D was a reasonable process to follow, correct?

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

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

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

7 A That is correct.

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

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

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

16 A Yes.

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

19 A That is correct.

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

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

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

1 correct?

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

4 Q Okay.

5 A And my belief is that he did not.

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

9 A I don't recall.

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

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

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

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

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

19 JUDGE MORRIS: For identification.

20 MR. SEHAM: For identification.

21 BY MR. SEHAM:

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

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

3 A Yes.

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

7 A Yes.

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

10 A Yes.

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

14 A I don't recall that.

15 Q Uh-huh.

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

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

21 A Okay.

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

1 A [No audible response.]

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

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

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

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

9 THE WITNESS: It's not.

10 JUDGE MORRIS: I don't have it.

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

13 MR. SEHAM: I have a copy.

14 MR. RIEDERER: It's on the table.

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

16 JUDGE MORRIS: Oh, okay.

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

19 JUDGE MORRIS: Joint exhibit JX-3?

20 MR. SEHAM: Uh-huh.

21 BY MR. SEHAM:

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

24 A I don't --

25 Q This doesn't refresh your --

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

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

9 A Oh, it does.

10 Q It does refresh your recollection?

11 A It refreshes -- no, no, no.

12 Q I'm sorry.

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

15 Q Okay.

16 A -- at the deposition.

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

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

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

24 THE WITNESS: No, sir.

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

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

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

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

6 [WHEREUPON, there was a brief recess.]

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

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

15 JUDGE MORRIS: Go ahead, counsel.

16 MR. SEHAM: Okay.

17 BY MR. SEHAM:

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

20 A The meeting was August 9th.

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

24 A Yes.

25 Q And why did you consider it important?

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

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

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

9 Q Okay.

10 A I mean -- okay, yeah.

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

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

17 MR. SEHAM: Okay.

18 BY MR. SEHAM:

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

22 A Correct.

23 Q And it's addressed to Robert Tice and James
24 Ferguson. And, going to the final page of the letter, page
25 4, you see it's copied to Rob Fisher, Todd Ondra, and

1 Captain William McDonald, you see that?

2 A Yes.

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

5 A Correct.

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

7 A Yes.

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

10 A Correct.

11 MR. RIEDERER: To the extent that --

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

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

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

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

24 MR. RIEDERER: No.

25 JUDGE MORRIS: You may answer.

1 MR. SEHAM: I think he did.

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

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

6 THE WITNESS: Yes.

7 BY MR. SEHAM:

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

12 A Yes.

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

16 A We did.

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

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

3 Q Yeah, go ahead.

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

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

10 A Yes.

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

13 A That is correct.

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

16 A Correct.

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

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

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

24 A That's not verbatim.

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

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

3 A That is correct.

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

8 A That is true.

9 Q It didn't --

10 A That is correct.

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

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

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

18 A Correct.

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

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

25 Q So it became one of the contributing factors for

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

4 A Yes.

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

9 A Correct.

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

12 A Yes.

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

17 A That's correct.

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

21 A I would say that's correct.

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

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

3 A You read that correctly.

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

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

9 Q Okay.

10 A But, yes.

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

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

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

22 A [No audible response.]

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

25 A [No audible response.]

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

3 A Yeah. I would agree.

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

8 A Correct.

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

11 A As I recall.

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

14 A As I understand it, that is correct.

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

18 A I don't recall.

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

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

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

1 referring Captain Estabrook to a 15D evaluation?

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

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

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

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

21 Q Uh-huh.

22 A Twenty-two years.

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

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

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

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

7 A He may have said that.

8 Q Okay.

9 A I don't recall.

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

20 A That is correct.

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

1 Qaeda and the realtime tracking of FedEx packages, correct?

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

6 Q Isn't it true that it was the combination of the
7 references to Fred in the August 4th, 2013 e-mail, the
8 references to Mr. Calloway, and the references to Al Qaeda
9 and the live tracking issues that, together as a whole,
10 constituted your basis for referring Captain Estabrook to a
11 15D evaluation?

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

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

16 JUDGE MORRIS: Of CX-48?

17 MR. SEHAM: CX-48.

18 JUDGE MORRIS: For identification.

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

20 JUDGE MORRIS: Please.

21 MR. SEHAM: Okay.

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

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

25 \\

1 BY MR. SEHAM:

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

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

16 A That is my testimony.

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

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

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

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

1 2013 e-mail, the references to Mr. Calloway, and the
2 references to Al Qaeda and the live tracking issues that,
3 together as a whole, constituted your basis for referring
4 Captain Estabrook to a 15 evaluation, is that correct?
5 Correct?" "Correct." Is that your testimony?

6 A That is my testimony.

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

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

13 Q Okay.

14 A But is it possible? Anything is possible.

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

22 A That's my testimony.

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

25 A No.

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

5 A Correct.

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

10 A That was my testimony, yes.

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

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

15 Q So you had no idea?

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

19 Q Why was it regrettable?

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

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

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

3 A I remember that part of the meeting, yes.

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

6 A Yes.

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

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

11 Q Uh-huh.

12 A That's not what my intent was.

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

15 A No.

16 Q You didn't?

17 A [No audible response.]

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

20 A I do remember that, yes.

21 Q And what do you recall, specifically?

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

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

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

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

8 A I don't recall any medical questions.

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

13 A Yes.

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

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

17 Q Okay.

18 A I vaguely remember that meeting.

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

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

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

25 A David Knox.

1 Q And if you could turn to complainant's exhibit CX-
2 23?

3 A Okay.

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

5 A Yes.

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

7 A Yes.

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

10 A Yes, I do, April 30th.

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

13 A Yes.

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

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

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

21 A Uh-huh.

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

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

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

4 A NOQ is invoked --

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

7 A Right.

8 Q -- for psychological purposes --

9 A Sure.

10 Q -- in the past?

11 A We don't make --

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

16 A No.

17 Q You have no experience with that?

18 A No.

19 Q Now, at the bottom of this first page it says, "In
20 hindsight, we probably should have kept him off flight
21 status and conferred with Todd Ondra rather than make the
22 decision on our own." Is it your feeling that on August
23 9th, when you reinstated Captain Estabrook to flight status,
24 that you should have conferred with Todd Ondra rather than
25 make the decision on your own?

1 A That is our feeling, yes.

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

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

10 JUDGE MORRIS: Okay.

11 THE WITNESS: Yeah, that would be --

12 JUDGE MORRIS: I just wanted to understand the
13 context.

14 THE WITNESS: Yes.

15 JUDGE MORRIS: Thank you.

16 BY MR. SEHAM:

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

22 A Yes.

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

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

2 A Yes. I did call.

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

6 A Yes, I was not convinced.

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

10 A I did that.

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

14 A Yes.

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

19 A Yeah.

20 Q -- I want to refer --

21 A Please.

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

1 told me."

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

8 A I can only say that --

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

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

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

15 A It's certainly possible, yes.

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

18 A Correct.

19 MR. SEHAM: No further questions.

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

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

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

25 JUDGE MORRIS: No, do you know?

1 THE WITNESS: No, sir, I do not.

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

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

6 JUDGE MORRIS: Okay.

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

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

12 **REDIRECT EXAMINATION OF**

13 **ROB FISHER**

14 BY MR. RIEDERER:

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

17 A No.

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

20 A 19E?

21 Q Yes.

22 A Yes.

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

25 A No.

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

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

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

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

18 A It can be, yes.

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

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

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

1 15D. When was that decision made?

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

4 Q Meaning the same day, or the day after?

5 A The same day.

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

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

14 Q And you --

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

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

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

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

1 A It did not.

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

5 A It did not.

6 MR. RIEDERER: I have no additional questions.

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

9 **RECROSS EXAMINATION OF**

10 **ROB FISHER**

11 BY MR. SEHAM:

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

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

18 Q Okay.

19 A But they weren't recently.

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

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

25 JUDGE MORRIS: Overruled.

1 MR. SEHAM: You can answer.

2 JUDGE MORRIS: You may answer.

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

5 BY MR. SEHAM:

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

8 A Yes.

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

10 A That is true.

11 Q What additional junctures of information are
12 there?

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

15 Q Uh-huh.

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

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

20 A I believe so.

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

1 delivery?

2 A I don't recall specifically.

3 Q Uh-huh.

4 A I don't recall that specifically.

5 Q Well, if you could turn to joint exhibit JX-4?

6 And you see at the top it says -- oh, tell me when you're
7 there.

8 A Okay, I'm there.

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

14 A I still don't recall this.

15 Q Uh-huh.

16 A And I don't recall those specifics.

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

19 A I do remember him taking notes.

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

22 A I don't remember.

23 Q And you said Todd Ondra played a big role in the
24 15D decision, is that your testimony?

25 A He played a big role in the recommendation.

1 Q Okay.

2 A Yes.

3 Q But, with respect to the letter of August 16th
4 that you sent to Harvey Watt, to the company's aeromedical
5 advisor, there was no consultation with Todd Ondra as to
6 what would be the content of that letter, correct?

7 A That is correct.

8 MR. SEHAM: No further questions.

9 JUDGE MORRIS: And I've got several questions. As
10 I'm hearing your testimony, Mr. Ondra -- is that how you
11 pronounce his name -- didn't play a big role, he played a
12 decisive role in that letter going out on August 16th, is
13 that correct?

14 THE WITNESS: Yes, sir.

15 JUDGE MORRIS: Does FedEx have a tool in its
16 contract or its policies where security in and of itself can
17 suspend or ground a pilot pending an investigation?

18 THE WITNESS: I would say yes. If we have a
19 security issue with a crew member, which happens, which
20 happens, we will take him off of flying status immediately.

21 JUDGE MORRIS: Do you have any knowledge as to why
22 that wasn't done in this case since it was security in this
23 matter that appears to have had the concern?

24 THE WITNESS: The concern was made after the
25 meeting, is that what -- so after the meeting we did put him

1 on NOQ after the meeting.

2 JUDGE MORRIS: At the request of security?

3 THE WITNESS: At the request of security, yes.

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

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

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

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

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

24 THE WITNESS: Yes, sir?

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

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

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

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

13 THE WITNESS: No, sir.

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

18 THE WITNESS: He did not tell me that.

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

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

25 JUDGE MORRIS: Yeah.

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

3 JUDGE MORRIS: Okay.

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

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

9 THE WITNESS: Yes, sir.

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

13 THE WITNESS: How I wish I could.

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

16 THE WITNESS: Yes, sir.

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

20 THE WITNESS: For the April --

21 JUDGE MORRIS: April 2013 Laredo incident.

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

25 JUDGE MORRIS: Okay.

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

4 JUDGE MORRIS: Okay.

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

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

10 THE WITNESS: Yes.

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

13 THE WITNESS: Okay.

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

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

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

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

1 JUDGE MORRIS: You did not?

2 THE WITNESS: -- in that specific incident.

3 MR. RIEDERER: It is RMG.

4 JUDGE MORRIS: RMG, okay. The Mayday Mark
5 discussion occurred during which meeting?

6 THE WITNESS: That happened at the end of the
7 August 9th meeting.

8 JUDGE MORRIS: And do we -- what's the exhibit
9 that refers to the notice that was provided for the August
10 9th meeting? What's the exhibit number? Do the parties
11 know?

12 MR. SEHAM: Your Honor, respondent's exhibit RX-14
13 includes e-mail correspondence related to that.

14 JUDGE MORRIS: Okay, looking at respondent's
15 exhibit RX-14 where you notified him of this meeting, was
16 there ever a formal letter that was submitted notifying him
17 that this meeting was to occur?

18 THE WITNESS: It's August?

19 JUDGE MORRIS: In August.

20 THE WITNESS: I am -- no, sir, there was not a
21 formal letter.

22 JUDGE MORRIS: Unlike the April incident, the
23 Laredo incident, where there was a letter, you just did this
24 by e-mail?

25 THE WITNESS: Yes, sir.

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

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

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

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

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

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

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

23 THE WITNESS: Right.

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

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

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

6 THE WITNESS: Correct.

7 JUDGE MORRIS: Questions based on mine?

8 MR. SEHAM: Yes.

9 **RECROSS EXAMINATION OF**

10 **ROB FISHER**

11 **(resumed)**

12 BY MR. SEHAM:

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

16 A I don't recall that.

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

21 A That is correct.

22 Q All right.

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

25 Q Yes. And then at that meeting Captain Estabrook

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

3 A He did say that.

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

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

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

9 A I don't recall.

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

14 A His recommendation did play a big role --

15 Q Okay.

16 A -- yes.

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

19 A That is correct.

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

23 A Correct.

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

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

2 A Okay.

3 Q Okay?

4 A Yes.

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

8 A Correct.

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

10 A Yes.

11 Q So you received this e-mail thread?

12 A On August 7, 2013, yes, correct.

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

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

21 Q Standard procedure?

22 A But obviously it happened.

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

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

4 Q Uh-huh.

5 A Yes.

6 MR. SEHAM: No further questions.

7 MR. RIEDERER: No questions.

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

15 THE WITNESS: Yes, it is.

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

19 THE WITNESS: Correct.

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

22 THE WITNESS: That is a true statement.

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

1 himself and the company?

2 THE WITNESS: Correct.

3 JUDGE MORRIS: Okay, thank you. Counsel? No?

4 All right, thank you.

5 THE WITNESS: Thank you, sir.

6 JUDGE MORRIS: You are excused.

7 [WHEREUPON, witness Rob Fisher was
8 excused.]

9 JUDGE MORRIS: Lunch?

10 MR. RIEDERER: Your choice.

11 JUDGE MORRIS: Do we have a witness here?

12 MR. RIEDERER: Yeah.

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

17 MR. SEHAM: That's plenty.

18 MR. RIEDERER: That works.

19 JUDGE MORRIS: 12:30, it is.

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

22 MR. RIEDERER: Rob Tice.

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

25 JUDGE MORRIS: We're off the record.

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

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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?

1 A Yes.

2 Q And what is your current position?

3 A Lead counsel.

4 Q And how long have you held that position?

5 A Since about 2010.

6 Q And as lead counsel what are your job duties?

7 A I am involved in the pilot collective bargaining
8 agreement administration at FedEx Express.

9 Q Which, which -- can you tell the Court what group
10 you fall under or you fall within?

11 A In the labor relations law department.

12 Q And what's the function of a labor relations law
13 department?

14 A That department is involved in the collective
15 bargaining process and in the administration of the pilot
16 agreement that results from that collective bargaining
17 process.

18 Q And can you tell the Court about your background
19 prior to arriving at FedEx?

20 A I had a similar position at Northwest Airlines
21 from 1989 to 2006.

22 Q In your position at FedEx, are you familiar with
23 the process of referring pilots to a medical evaluation
24 pursuant to 15D of the parties' collective bargaining
25 agreement?

1 A Yes.

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

4 A In one of these books?

5 Q Yes, joint exhibit JX-6.

6 A I'm sorry? Yeah.

7 Q Can you please explain to the Court the section
8 15D process?

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

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

25 Q And so what purpose does section 15D serve at

1 FedEx?

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

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

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

14 Q Uh-huh.

15 A No.

16 Q So would that have to be done through a section
17 15D?

18 A Yes.

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

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

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

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

5 A Yes.

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

8 A Well, I think there's probably two main occasions
9 for that. One would be a 19E disciplinary hearing, and
10 another might be a 19D investigation process. And sometimes
11 19D doesn't really involve a concern about potential
12 discipline as much as it involves a concern that a pilot
13 might have some issues going on inside that need to be
14 attended to. And so occasionally I have attended those
15 kinds of meetings.

16 Q When did you first learn the name Mark Estabrook?

17 A I believe it was in April of 2013.

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

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

25 Q Were you aware of Captain Estabrook's background

1 during the time of this issue?

2 A Back in April of --

3 Q 2013.

4 A -- 2013? No.

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

7 A That was not until August of 2013.

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

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

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

14 JUDGE MORRIS: You mean complainant's exhibit?

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

18 THE WITNESS: Complainant's?

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

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

23 JUDGE MORRIS: It's a red one.

24 MR. TADLOCK: Yeah.

25 THE WITNESS: Is this my copy?

1 JUDGE MORRIS: No, that's mine.

2 BY MR. TADLOCK:

3 Q Is that a copy of the e-mail that you received?

4 A Yes.

5 Q And you reviewed that e-mail?

6 A Yes.

7 Q What was your impression of it?

8 A Well, it was weird, strange that a line pilot
9 would ask to speak to the top guy at the parent company of
10 FedEx Express.

11 Q Did you ultimately attend a meeting with Captain
12 Estabrook?

13 A Yes.

14 Q And were you involved in the -- or, did you make
15 the decision to place him into NOQ status prior to that
16 meeting?

17 A I didn't make that decision. I was involved in
18 the process of that result.

19 Q And that meeting occurred on August 9th?

20 A Correct.

21 Q Who else was in attendance in that meeting?

22 A Captain Estabrook, Todd Ondra, Rob Fisher, and
23 myself.

24 Q Mr. Tice, why were you invited to attend that
25 meeting?

1 A I was instructed to attend by my boss.

2 Q Do you understand why he instructed you to attend
3 it?

4 A I don't think there were any particular
5 instructions given. It was just attend to be the legal
6 representative, along with the other two members of
7 management.

8 Q Was ALPA representation invited to attend that
9 meeting?

10 A I tried to work with them to set up a schedule,
11 because frequently we'll have scheduling conflicts that need
12 to be resolved at the front end. So I thought I was being
13 proactive in trying to give Captain Estabrook the
14 opportunity to have union representation present, yes.

15 Q So why would you want union representation in a
16 meeting like this?

17 A I would not want the meeting to be interrupted
18 because somebody said I want to have a union rep present,
19 and then we would have to reschedule the meeting.

20 Q At FedEx Express, is it common to invite a union
21 representative to be present at a meeting involving
22 management?

23 A Certainly.

24 Q And a pilot?

25 A Certainly.

1 Q And why is that generally the case?

2 A Well, it's in the nature of good labor relations
3 to have the union be present when one of their represented
4 members is meeting with management. And there are some
5 times a pilot will say he doesn't want to have a union rep
6 present, and then the meeting goes forward without a union
7 rep.

8 Q I'd direct your attention to complainant's exhibit
9 CX-20.

10 A I missed that?

11 Q Complainant's exhibit CX-20. Please open that
12 document.

13 A This is the CX book?

14 Q You got it.

15 A I'm there.

16 Q Can you describe to the Court -- or, can you tell
17 the Court what that document is?

18 A This is an e-mail thread, started apparently by
19 me, to an ALPA attorney, Terry McTigue, and it continues
20 with a couple of back-and-forths. I guess it was all in the
21 same day.

22 Q Okay.

23 A All in the afternoon.

24 Q And would you direct your attention to the e-mail
25 at the top of that page where you e-mail Terry McTigue, who

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

3 A Yes.

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

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

11 MR. SEHAM: Objection to any further testimony.

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

14 MR. SEHAM: Okay.

15 BY MR. TADLOCK:

16 Q Can you tell me what was said at the August 9th
17 meeting or can you tell me what was discussed at the August
18 9th -- actually, let me strike that. Can you tell me what
19 Captain Estabrook told you at the August 9th meeting, told
20 the group?

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

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

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

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

18 A I don't recall.

19 Q Is it possible he did?

20 A Sure.

21 Q Is it something you think you would remember?

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

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

1 JUDGE MORRIS: He already did.

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

3 JUDGE MORRIS: Yes.

4 BY MR. TADLOCK:

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

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

14 Q Did everyone stay through the entire meeting?

15 A No.

16 Q Who left?

17 A Todd Ondra.

18 Q And was anything discussed after Todd Ondra left?

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

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

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

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

5 Q And who is Mayday Mark?

6 A I have no idea.

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

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

10 JUDGE MORRIS: It's a forum for --

11 THE WITNESS: -- about blogs.

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

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

15 MR. TADLOCK: Thank you, counsel.

16 BY MR. TADLOCK:

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

19 A Captain McDonald asked me to.

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

22 A I did.

23 Q Okay, would you --

24 A We printed them out.

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

1 A I'm there.

2 Q Are those the postings you printed out?

3 A I haven't gone through every page, but it looks
4 like a complete collection to me.

5 Q Did Captain McDonald seem agitated that Mark
6 Estabrook might be Mayday Mark?

7 A No.

8 Q Did Captain McDonald say to you that he was
9 interested in Mayday Mark because of some information
10 related to the Laredo incident?

11 A No.

12 Q Did Captain McDonald show you any posting by
13 Mayday Mark that caught his interest?

14 A I don't think so. I found one that was of
15 interest to me, though.

16 Q And did you ask Captain Estabrook whether he was
17 Mayday Mark at the August 9th meeting?

18 A Yes.

19 Q And what did he say?

20 A He said no. And I accepted his word for it. He
21 had given a lot of information about prior involvement in
22 the internet process and stuff. I thought he was being
23 accurate and truthful about that.

24 Q How did the meeting conclude?

25 A Captain Fisher informed Captain Estabrook that he

1 would be returning to flight status.

2 Q And what happened next?

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

7 Q And what did Todd Ondra state to you?

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

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

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

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

1 A I don't remember.

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

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

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

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

12 Q And what did you say to Rob Fisher?

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

19 Q Was the purpose of the August 9th meeting to
20 discipline Captain Estabrook?

21 A No.

22 Q Is there a disciplinary process within the
23 collective bargaining agreement?

24 A Yes.

25 Q And what part? Where does that fall under?

1 A It's all under section 19.

2 Q What section specifically?

3 A Well, if you were going to have a hearing under
4 section 19E, which is -- and you are required to issue a
5 preliminary hearing notice and certain documents that are
6 set forth in that section of the contract. That didn't take
7 place here.

8 If it was going to be a 19E meeting, there would
9 have been an invitation of that nature, and I understand
10 there was that kind of a letter sent out in connection with
11 the thing that happened with the no-show or the late show in
12 the spring.

13 And I don't believe there was a 19D letter that
14 went out in this case. In fact, the pilot was asking for an
15 opportunity to provide some what he regarded as security-
16 related information to the company, and he was accommodated
17 with a meeting, so that there's no way this was a section 19
18 meeting.

19 Q Are you aware who communicated the company's
20 decision to Captain Estabrook? To send him to a 15D, I
21 should say.

22 A I'm fairly certain it was Rob Fisher, but I didn't
23 participate in that call.

24 Q Do you have an understanding of when the decision
25 to refer Captain Estabrook to a section 15D medical

1 examination occurred?

2 A Well, I was involved in the front end of it, and
3 then it must have taken place in the flight management
4 office after I spoke with Captain Fisher. I don't know who
5 else he might have conferred with, but my impression from
6 speaking with him was that he was going to accede to the
7 request of Mr. Ondra to follow this up with an evaluation
8 under the CBA.

9 Q And do you understand that -- actually, I would
10 direct your attention to joint exhibit JX-5.

11 A I'm there.

12 Q Is that a copy of the 15D referral letter that was
13 sent by the company?

14 A Yes.

15 Q I would next like to direct your attention to --
16 actually, let me ask you another question. Prior to the
17 delivery of this letter, did you receive a letter from Alan
18 Armstrong on or around April 13th?

19 A August 13th?

20 Q August 13th, excuse me.

21 A Yes.

22 Q And is a copy of that letter found at joint
23 exhibit JX-7?

24 A Yes.

25 Q Do you understand a decision to refer Captain

1 Estabrook to a 15D to be already made at the time you
2 received that letter?

3 A Well, it certainly had been made, yes.

4 Q And what did that letter ask for?

5 A I believe the operative request is under numbered
6 paragraph 12 on page 3 of the letter. And he was asking
7 that there be a retraction of an accusation about Mayday
8 Mark. He was asking that FedEx withdraw any request that
9 Captain Estabrook undergo what this letter calls a
10 psychiatric evaluation. And then there was another request
11 having to do with this "If You See Something, Say Something"
12 issue.

13 Q Did you respond to that letter?

14 A Yes.

15 Q And is a copy of that response found at
16 complainant's exhibit CX-26?

17 A Yes.

18 Q What did you state in -- or, can you summarize
19 what you stated in that letter?

20 A Yes. We disagreed -- speaking on behalf of the
21 company -- we disagreed -- or, strike that. We quibbled
22 with the retraction of accusation request because that had
23 been taken care of, I thought, to both my satisfaction and
24 Captain Estabrook's at the meeting, at the tail end of the
25 meeting on August 9. I accepted what he had to say, and

1 that's what I put in the letter.

2 Then there was a request to cancel the medical
3 examination that had been requested. And, first of all,
4 this was not a direction to undergo a psychiatric
5 evaluation. I know that that's kind of been bandied about
6 in this case.

7 The contract does not permit FedEx flight
8 management to require that a pilot undergo that kind of
9 evaluation. Rather, it says that you use the provisions of
10 section 15D and ask the company's aeromedical advisor to
11 evaluate.

12 And so, in order to accomplish that, it has been
13 our standard practice in my office to send factual
14 information to the aeromedical advisor's office and then let
15 them decide what kind of evaluation, if any, is going to be
16 conducted.

17 And I guess that was the third point that I
18 raised, which is that we felt that as an air carrier we had
19 an obligation to provide the highest degree of safety in the
20 public interest, that we needed to make sure that what we
21 were dealing with was a pilot who is fit to fly.

22 And, as far as the concern that there had been a
23 violation of this federal statute, I wrote what I wrote at
24 the end of the paragraph at the bottom of the first page,
25 that we didn't feel that there had been a report of a

1 violation or an alleged violation.

2 Q Did you subsequently receive a letter from
3 complainant's counsel asking for the company's reasonable
4 basis for the 15D decision?

5 A Yes.

6 Q And could I direct your attention to complainant's
7 exhibit CX-27?

8 A Yes. I'm there.

9 Q Did the company provide its rationale to
10 complainant's counsel?

11 A No.

12 Q And can you explain why the company made the
13 decision not to provide the reasonable basis for its
14 decision to complainant's counsel?

15 A Yeah, that was made in the context of a
16 representation that there was a grievance being filed, and
17 we had a back-and-forth about the proper way to have a
18 grievance on file. And, in the course of that process,
19 there would have been an opportunity for discovery under the
20 applicable provisions of the contract. And I don't think
21 the grievance ever really got processed. We never got to
22 that point.

23 But I did not see any value in continuing a war of
24 words with Mr. Armstrong at that point. The company had
25 made the decision to have a 15D exam. We were going to

1 follow through with it, regardless of what the outside
2 attorney might think about it.

3 Q Does the company have a habit of -- or, does the
4 company have a practice of providing the basis for its 15D
5 referrals to the union that represents the pilots?

6 A When they ask.

7 Q And is that -- do they often ask?

8 A Oftentimes, it's pretty well understood what the
9 reasoning was, so it's not very common to ask. But
10 sometimes they'll ask, and I'll tell them.

11 Q And does the company have a practice of providing
12 the reasonable basis for its 15D decisions to outside
13 counsel?

14 A No.

15 Q As far as you're aware, is there a contractual
16 requirement in section 15D to provide either the
17 association, ALPA, or outside counsel with the company's
18 basis for a 15D referral?

19 A Not that I know of.

20 Q Are you aware whether the company corresponded
21 with Harvey Watt regarding the 15D referral?

22 A Yes.

23 Q And why did the company correspond with Harvey
24 Watt about this?

25 A Because we needed to provide information upon

1 which the discussion and evaluation could proceed, and
2 that's why I worked on the draft that was sent by Captain
3 Fisher.

4 Q Did you correspond further with Harvey Watt about
5 this matter?

6 A Never.

7 Q Did you correspond further with Dr. Bettes about
8 this matter?

9 A No.

10 Q Did you or anyone at FedEx, to the best of your
11 knowledge, try to interfere or influence Harvey Watt's
12 fitness for duty determination?

13 A Certainly not.

14 MR. TADLOCK: No further questions.

15 MR. SEHAM: Actually, may I have a two-minute
16 hand-washing break?

17 JUDGE MORRIS: Yes. We will take a recess in
18 place.

19 [WHEREUPON, there was a brief recess.]

20 JUDGE MORRIS: All parties present when the
21 hearing last recessed are again present.

22 **CROSS EXAMINATION OF**

23 **ROB TICE**

24 BY MR. SEHAM:

25 Q Referring to complainant's exhibit CX-8 --

1 A Yes?

2 Q -- you received this letter -- or, this e-mail
3 dated April 29th, 2013 from Rob Fisher, correct?

4 A That's what it indicates.

5 Q Uh-huh. And attached thereto is a letter from
6 Alan Armstrong dated April 29th, which you listed as a copy
7 on the last page, C-38. So you received this -- the
8 attached letter -- as well, from Mr. Armstrong on or about
9 April 29th, correct?

10 A I assume so.

11 Q And you discussed this letter with Captain
12 McDonald and Captain Fisher, the Armstrong letter, correct?

13 A I don't remember.

14 Q And could you turn to -- well, and you -- well, if
15 you could turn to CX-10, at page C-45, item 5, dated April
16 29th, e-mails between Director W. McDonald and Attorney R.
17 Tice regarding Manager R. Fisher letter to Attorney
18 Armstrong.

19 JUDGE MORRIS: What exhibit are you on?

20 MR. SEHAM: Complainant's exhibit CX-10.

21 JUDGE MORRIS: CX-10?

22 MR. SEHAM: C-45.

23 BY MR. SEHAM:

24 Q You see that reference that I've made, correct, at
25 item 5?

1 A I see that reference.

2 Q No, no, does this refresh your recollection that
3 you had consulted with McDonald and Fisher concerning how to
4 respond to Armstrong's April 29th letter?

5 A Doesn't refresh my recollection.

6 Q Do you dispute the representation of this document
7 that you consulted with Fisher and McDonald at this time in
8 terms of --

9 A No.

10 Q -- how to respond to the --

11 A It's consistent with my direct testimony, that I
12 was involved early on in the process. So it's consistent
13 with that.

14 Q And you received -- looking back at complainant's
15 exhibit CX-8 -- the e-mail at the top from Rob Fisher, you
16 participated in the drafting of that response to Alan
17 Armstrong, isn't that correct?

18 A I don't know.

19 Q You don't know?

20 A [No audible response.]

21 Q Would it be standard practice for someone in
22 FedEx's legal department to review a letter from a chief
23 pilot before it went out to an attorney?

24 A A letter like this -- or, an e-mail like this,
25 yes.

1 Q Now, you note that in Fisher's letter or e-mail at
2 the top it refers to the investigation of Captain Estabrook
3 as part of a disciplinary process?

4 A Yes.

5 Q And would you agree with me that it was your
6 recollection of this event that there was a 19E
7 investigation that was converted to a 19D investigation
8 contemporaneously with the Armstrong letter of April 29th?

9 A I don't remember the details and the sequence of
10 events.

11 MR. SEHAM: I'm going to ask you to turn to --
12 this would be?

13 JUDGE MORRIS: CX-49.

14 MR. SEHAM: For identification.

15 [WHEREUPON, the document identified
16 as COMPLAINANT'S EXHIBIT CX-49 was
17 marked for identification.]

18 BY MR. SEHAM:

19 Q Okay, I handed you, sir, a copy of your deposition
20 transcript. This is going to be referred to as
21 complainant's exhibit CX-49 for identification purposes
22 only. And do you recall that you were deposed in this
23 matter on March 24th, 2016?

24 A I'll accept your representation of the date. I
25 remember being deposed.

1 Q Do you recall that you took an oath to tell the
2 truth?

3 A Yes.

4 Q And did you during that deposition, to the best of
5 your recollection, tell the truth as best you could?

6 A Yes, sir.

7 Q I'm going to turn your attention to the top of --
8 well, to the bottom of page 37, starting at line 19, which
9 starts with, question, "Did you -- or, do you recall that
10 there were -- do you recall the reasons for the initiation
11 of an examination of Captain Estabrook in 2013 by Rob
12 Fisher?"

13 Answer, "I have a sketchy recollection, yes."
14 "And what is the best of your -- could you share with us,
15 please, your best recollection?" "My best recollection is
16 that I was involved in some other pending matter and was
17 only tangentially involved in this matter.

18 And so early on I was aware that there was a
19 failure to report to an airport issue, and I didn't get
20 involved further. And what started out to perhaps be a 19E
21 hearing under the CBA at some point I think, contemporaneous
22 with the Alan Armstrong letter, that changed to just a
23 meeting under what we call 19D, an interview. And I don't
24 know what happened there because I didn't participate."
25 Now, having -- did you give this testimony during your

1 deposition?

2 A I think you read it accurately.

3 Q And did you give -- you gave that testimony,
4 therefore?

5 A Yes.

6 Q And would you agree today that this portion that I
7 read, that that would constitute your best recollection?

8 A I think so.

9 Q Now, you said you received the letter August 13th
10 from Mr. Armstrong that has been identified as joint exhibit
11 JX-7.

12 A This one?

13 Q Yes.

14 A I'm there.

15 Q You received this letter, correct?

16 A Yes.

17 Q And as you'll note at the last page it was copied
18 to Rob Fisher, Todd Ondra, and Captain William McDonald, do
19 you see that on the final page?

20 A I do.

21 Q And you received this letter and you discussed it
22 with Messrs. Ondra, Fisher and Tice, correct?

23 A I'm Mr. Tice.

24 Q Excuse me. With Ondra, Fisher and McDonald?

25 A I don't remember having done so, but I may have

1 and probably did.

2 Q I want to direct your attention to page 30 -- or,
3 excuse me, page 40 of your transcript.

4 JUDGE MORRIS: CX-49?

5 MR. SEHAM: Yes, CX 49 for identification purposes
6 only.

7 BY MR. SEHAM:

8 Q And starting at line 11, "Does that -- in view of
9 that entry, would you agree that you not only received Mr.
10 Armstrong's August 13th letter on August 13th but that you
11 also discussed it with Mr. Ondra and Captain Fisher and
12 Captain McDonald, or at least communicated with them via e-
13 mail on August 13th?" And the answer is, "Yes." Would you
14 agree with me that you at least discussed this via e-mail,
15 this August 13th letter from Mr. Armstrong marked joint
16 exhibit JX-7?

17 A Yes, and I think it was because you had showed me
18 the privilege log that indicated something along those
19 lines.

20 Q Now, I believe you testified on direct that Bill
21 McDonald brought to your attention his concern that Captain
22 Estabrook was posting on the Airline Pilot Central forum
23 under the name of Mayday Mark, correct?

24 A Yes.

25 Q And you discussed the Mayday Mark identity issue

1 in the context of setting up a meeting with Captain Mark
2 Estabrook after the August 4th e-mail was received, correct?

3 A You might want to have question repeated?

4 Q Yeah, sure.

5 A There was a noise that I think distracted me.

6 Q No, no, no problem. And you and Captain McDonald
7 discussed the Mayday Mark identity issue in the context of
8 setting up a meeting with Captain Estabrook on August 4th,
9 2013 -- and now I've bolluxed it up. You discussed the
10 Mayday Mark identity issue in the context of setting up a
11 meeting with Captain Estabrook after the company had
12 received the August 4th, 2013 e-mail, correct?

13 A I think I could say yes to that.

14 Q Okay.

15 A Yes.

16 Q And so it was at the request of Captain McDonald
17 that you asked Captain Estabrook if he was Mayday Mark?

18 A Yes.

19 Q And you didn't know -- it's your testimony that
20 you didn't know why Captain McDonald had this interest?

21 A Right. I highlighted something that drew my
22 attention.

23 Q That drew your own attention?

24 A Yes.

25 Q But he didn't -- those are copies of -- what you

1 were referring to before, those were copies of postings that
2 you obtained for yourself, correct?

3 A Yes.

4 Q So Captain McDonald never provided you with copies
5 of postings?

6 A He did not.

7 Q Okay.

8 A To the best of my recollection, he did not.

9 Q And I think those are in CX-21. Yes, CX-21. If
10 you could turn to CX-21, I think you referred to them on
11 direct.

12 MR. TADLOCK: You're in the wrong book.

13 THE WITNESS: I'm there.

14 BY MR. SEHAM:

15 Q Would you agree with me that you don't know for
16 certain whether these were the pages of the -- well, let me
17 back up. You brought to the meeting on August 9th, 2013,
18 you brought copies of postings on the Airline Pilot Central
19 forum that reference Mayday Mark, correct?

20 A Yes.

21 Q Okay.

22 A They contained postings by Mayday Mark.

23 Q Fair enough. And would you agree with me that
24 you're not certain whether these pages under CX-21 are
25 precisely those pages that you took to the meeting?

1 A That's true, because I gave my originals to the
2 paralegal, and I presume these are those.

3 Q Uh-huh.

4 A I certainly didn't memorize every posting that's
5 on --

6 Q Okay.

7 A -- all of these pages.

8 Q And there could have been more or less in terms of
9 quantity with respect to what we see in CX-21?

10 A I don't think so. I don't know how it would be
11 less. It's a lot of pages.

12 Q Yeah. There could have been more?

13 A I don't think so, but maybe.

14 Q If you'll turn to your deposition, please, CX-49
15 for identification purposes only? Now, you see at the
16 bottom starting at line 24 it says --

17 A What page?

18 Q Seventeen.

19 A Okay.

20 Q The question reads, starting at line 24, "Okay,
21 does this -- in terms of volume, there are 24 pages -- that
22 approximate the volume as you recall that you brought to the
23 meeting that day? Could it have been more?" Answer, "Sure,
24 it could have been more or less. They weren't -- they
25 certainly didn't have this marking, the numbering on them,

1 so I'm not sure how many pages I had." Do you recall giving
2 that testimony?

3 A You read that accurately.

4 Q But, beyond that, you recall giving that
5 testimony, correct?

6 A This is a better source than my memory. I'm sure
7 it's accurate.

8 Q Okay, thank you. And would you agree with me
9 that, as you sit here today, would you concede that there
10 could have been more pages that you brought to that meeting
11 on August 9th?

12 A Yeah. I think I said that already.

13 Q So the answer to that is yes?

14 A Yes.

15 Q Okay. Now, the purpose of an NOQ is to ensure
16 that a pilot will not be utilized to operate airplanes,
17 correct?

18 A In part, that's correct.

19 Q Okay.

20 A It also involves non-flying activities.

21 Q I'm sorry, what was the last part of your answer?

22 A It can also involve non-flying work activities,
23 such as training.

24 Q But will you agree with me that it's a way of
25 removing someone from various FedEx pilot systems so that

1 they are not going to be utilized to operate airplanes?

2 A That is one of the purposes and effects, yes.

3 Q And the effect of an NOQ designation is -- among
4 other things, is to suspend an individual's jumpseat access,
5 correct?

6 A I guess I don't know all of the possibilities that
7 exist there. I know that in the case of -- I guess I just
8 don't know the systems that well.

9 Q Okay.

10 A I think I'm familiar enough to say that a
11 consequence of NOQ is -- there's a jumpseat consequence,
12 yes.

13 Q Well, would you agree with me that in your
14 experience the standard reason for a jumpseat suspension is
15 that the person under investigation -- is that the person is
16 under investigation for a significant matter?

17 A I think so, yes.

18 Q Now, you understood at the time -- is it your
19 testimony --

20 A It depends on the -- I guess I would want to add
21 to that. It depends upon the reason for the NOQ, and
22 there's -- as I understand it, there's different kinds of
23 NOQ's and different reasons for NOQ's. In the case of
24 someone who is under investigation for a serious potential
25 disability matter, because of the Auburn Calloway case, we

1 limit their access to jumpseats. And, in order to have the
2 meetings that are associated, they are purchased airline
3 tickets. But there are other kind of NOQ's that don't
4 involve disciplinary matters.

5 Q You understood -- your understanding at the time
6 of this August 9th meeting was that the purpose of the
7 meeting was to provide an opportunity for Captain Estabrook
8 to explain to the company security expert what his -- what
9 Captain Estabrook's concerns were?

10 A It was a meeting that he had requested, that he
11 wanted it to be with Fred Smith.

12 Q Uh-huh.

13 A But we substituted for Fred Smith, I guess. And
14 there were some concerns about whether he should be on the
15 jumpseat.

16 Q What were the concerns?

17 MR. TADLOCK: Objection, to the extent that it
18 calls for attorney-client privileged information.

19 JUDGE MORRIS: Overruled.

20 MR. TADLOCK: Okay.

21 THE WITNESS: There was a communication from the
22 VP of flight ops, as I recall, questioning is this an
23 appropriate person to be on a jumpseat.

24 BY MR. SEHAM:

25 Q And who was the VP of flight ops?

1 A James Bowman.

2 Q Did you get involved in the discovery responses
3 with respect to this case?

4 A I recall looking at some. I don't know how much
5 involvement I had.

6 Q Okay.

7 A But I probably had some input.

8 Q So there was a contact from James Bowman.

9 A I think it's in the privilege log.

10 Q And what did he express as his concern?

11 A I think I testified to that, should this
12 individual be on the jumpseats.

13 Q But did he identify why, other than just a generic
14 reference to the August 4th e-mail?

15 A I think that contextually it was in light of
16 having read the e-mail asking Fred Smith to give him a call
17 when he wasn't sleeping.

18 Q So it's your understanding that the NOQ
19 designation on August 5th was motivated by safety
20 consideration?

21 A In part, I think. In part, yes. But also in an
22 effort to make sure we had a meeting that didn't get
23 interrupted by scheduling issues.

24 MR. SEHAM: Could I have the first set of
25 interrogatories, please?

1 BY MR. SEHAM:

2 Q I'd like you to turn to complainant's exhibit CX-
3 22, and look at the interrogatory number 6 at the bottom of
4 that page. And that interrogatory reads, "Identify any
5 persons involved in the decision to place the complainant on
6 not qualified NOQ status on August 5th, 2013."

7 The answer is, "Respondent identifies the
8 following individuals who may be contacted through
9 undersigned counsel." And it lists Robert Fisher, William
10 McDonald, Todd Ondra, and Rob Tice. Now, that answer should
11 have also included James Bowman, correct?

12 A To the extent that he wrote an e-mail asking that
13 question, I think that's probably true.

14 Q And, in fact, Todd Ondra did not participate in
15 the decision to place Captain Estabrook on NOQ status on
16 August 5th, 2013?

17 A Yeah. I think that -- wasn't there a supplemental
18 interrogatory answer here?

19 Q I'm asking you that question right now as you sit
20 here. Isn't it true that Todd Ondra did not participate in
21 that decision on August 5th, 2013?

22 A I don't know for sure, but I don't think he did.

23 Q Okay.

24 A And I think you would have to look at the
25 supplemental interrogatory answer for an explanation --

1 Q Right.

2 A -- of the confusion.

3 MR. SEHAM: Let's try to find that now.

4 BY MR. SEHAM:

5 Q It is your belief -- if you would turn to
6 complainant's exhibit CX-19 -- so you were aware that there
7 was a supplemental response in terms of the interrogatories?

8 A I'm aware that there was to -- I think there was
9 to that question, to that interrogatory.

10 MR. SEHAM: Just for the record, complainant's
11 exhibit CX-19 is paginated from C-91 to C-94, so that's four
12 pages, the latter two of which are just a certification and
13 a verification by -- verification from Maryanne Miller.

14 JUDGE MORRIS: It does not address interrogatory
15 number 6.

16 MR. SEHAM: No, it doesn't, does it?

17 THE WITNESS: Well, let me catch up with -- if I
18 might, what was the other exhibit number we were looking at
19 before?

20 JUDGE MORRIS: CX-22.

21 THE WITNESS: I stand corrected. The supplement
22 was having to do with the reasons, interrogatory 7.

23 BY MR. SEHAM:

24 Q And let's focus on that, now that we're here, is
25 that the interrogatory question reads -- and this is for

1 number 7, "State the reasons why the complainant was placed
2 on NOQ status on or about August 5th, 2013." And you see
3 that the first answer was that, "Complainant was placed on
4 NOQ status on or about August 5th, 2013 because he had been
5 referred for examination under 15D of the collective
6 bargaining agreement between respondent and the Air Line
7 Pilots Association." And, in fact, that answer was
8 incorrect, Mr. Tice, wasn't it, because there was no 15D
9 determination anytime earlier than August 9th?

10 A That is correct.

11 Q Correct?

12 A [No audible response.]

13 Q And then it goes on that the company in effect
14 withdrew this and below provided a supplementary response,
15 "That this supplement responses [sic] supersedes
16 respondent's original response. Complainant was placed on
17 administrative NOQ status on or about August 5th, 2013 to
18 facilitate the scheduling of a meeting he requested. The
19 effect of the placement on NOQ status was to clear his
20 schedule and prevent the scheduling of conflicting
21 activities." This was an incomplete response, correct?

22 A At the time, I was unaware, failed to recall that
23 there was a Jim Bowman e-mail.

24 Q Okay.

25 A I just saw that this past week.

1 JUDGE MORRIS: We're referring to CX-22 and CX-19
2 and dealing with interrogatories number 7?

3 MR. SEHAM: Yes.

4 JUDGE MORRIS: You just said something, you just
5 saw what this week?

6 THE WITNESS: The e-mail by James Bowman asking
7 the question that I testified to earlier, is this a person
8 who should be on jumpseats. And at the time this
9 interrogatory was supplemented I had not reviewed or been
10 aware -- didn't have a recollection that I had participated
11 in that e-mail exchange.

12 BY MR. SEHAM:

13 Q So you prepared this interrogatory response?

14 A No.

15 Q Oh, sorry, I must have misunderstood your
16 testimony. I thought you said that you weren't aware of Mr.
17 Bowman's --

18 A I did not prepare this. I remember reading it.
19 And, if I had remembered that the James Bowman e-mail had
20 been sent, this would have read differently.

21 U.S. MARSHAL: Judge, if you're busy -- I'm with
22 the marshal's service. I just want to give you a card in
23 the event you need anything while you're here.

24 JUDGE MORRIS: Yeah.

25 U.S. MARSHAL: I apologize.

1 BY MR. SEHAM:

2 Q And you said you just recently reviewed this
3 Bowman e-mail?

4 A Yes.

5 Q You said that just a week ago?

6 A Within the past week, yes.

7 Q And who else was a recipient of this e-mail?

8 A I'd have to look at it. A lot of the attorneys.
9 I'm pretty sure my boss and other members of flight
10 management.

11 MR. SEHAM: I would ask for the immediate
12 production of that e-mail.

13 MR. TADLOCK: I will restate my privilege
14 objection.

15 JUDGE MORRIS: Your privilege objection is noted,
16 but you will produce it for me for *in camera* inspection.

17 MR. SEHAM: Well, listen, I want to be very open
18 about this, and if there's a preference to go -- well, maybe
19 I shouldn't be off-record.

20 JUDGE MORRIS: No, we're not off record.

21 MR. SEHAM: This was -- what?

22 JUDGE MORRIS: No, we're not off record.

23 MR. SEHAM: Okay, fine. I think it's only fair to
24 say that our demands at all time were for the disclosure of
25 all e-mail correspondence related to the decision-making

1 process, that FedEx said it was not obligated to disclose
2 any e-mails in which Mr. Tice was participating because of
3 attorney-client privilege.

4 And our response to that was, well, he was one of
5 the decision-makers, he's listed as an August 5th NOQ
6 decision-maker, and that, when an attorney acts as a
7 corporate decision-maker, his decisions are relevant. Now,
8 this tribunal sided with FedEx and said that that document
9 did not have to be -- and I'm assuming this was -- yeah, you
10 said it was in the privilege log, Mr. Tadlock?

11 MR. TADLOCK: I am not aware. I don't know what
12 document he is specifically referring to. My best guess is
13 that it's probably a document that's contained within our
14 privilege log.

15 MR. SEHAM: Well, here's my concern, I don't know
16 the tribunal has -- or it might have been your predecessor,
17 and that's why --

18 JUDGE MORRIS: It was?

19 MR. SEHAM: -- this is a difficult situation. And
20 maybe --

21 JUDGE MORRIS: Well, I have a separate concern in
22 that, why wouldn't privilege be waived since we now have an
23 attorney testifying at these proceedings?

24 MR. SEHAM: Well, that, as well.

25 THE WITNESS: Your Honor, I think you handled the

1 privilege consistently.

2 MR. TADLOCK: We have an interesting situation
3 here because he's a fact witness because he participated in
4 the August 9th meeting. But, before and after the August
5 9th meeting, he served in his role as a lawyer for the
6 company, advising flight management and other members of
7 management in the legal department.

8 So there has been -- I mean, we've got a little
9 bit of both. We have him as a fact witness and as a lawyer,
10 and we have addressed some of his communications in this
11 case through briefing, and it was determined that some of
12 his communications were, in fact, privileged. Some of his
13 communications were not.

14 And here he has testified, and we have raised some
15 privilege objections that have been overruled. But I don't
16 think that we have waived any privilege with respect to Mr.
17 Tice's communications as a lawyer representing the company
18 with advice of counsel.

19 MR. SEHAM: Well, I don't mean to be -- well, I
20 guess I am being the respondent's advocate to some point,
21 but I don't -- I would like everything to be on the table.
22 Referring to complainant's exhibit CX-10, block 11, I
23 imagine that this might be -- and I'm really being an
24 accomplice, again, of my adversary -- but it says here, "E-
25 mails with advice of counsel between Attorney Tice, VP, and

1 Attorney J. Maxwell, VP, J. Bowman, Director W. McDonald,
2 Director T. Ondra, and managers R. Fisher and T. Arnett and
3 cc to VP T. Harris regarding Estabrook 08/04/13 e-mail."

4 I imagine -- and perhaps counsel will be able to
5 say whether that's the e-mail that this witness is referring
6 to -- I have a dual problem, even having assisted them to
7 this point, is that, number one, the lawyers are obviously
8 key decision-makers in this process.

9 Number two, a waiver in our view has occurred.
10 Number three, this is arising in the context of, to our
11 view, very stark misrepresentations in two interrogatory
12 responses. We have now gone through a two-and-a-half-year
13 process and over two years of discovery. And all this time
14 it has been represented to us that it was those four
15 individuals. In fact, it wasn't those four individuals. It
16 was only perhaps three of them.

17 And we've got James Bowman and the representation
18 that was made that this was to facilitate a meeting, and now
19 we're hearing this person who wasn't identified in
20 interrogatory 6 instigated this NOQ for reasons that are in
21 conflict, direct conflict, with interrogatory response
22 number 7.

23 And, frankly, I'm at a loss of where to go from
24 here because we should have had a right to depose Bowman.
25 We should have had these documents provided to us. And I

1 don't know how to say -- I'm on the verge of stammering a
2 lot. But I think that that misrepresentation is obvious,
3 that prejudice is obvious, that credibility impact is
4 obvious. And I'm not sure where we go from here, because I
5 have never, ever had this situation before.

6 JUDGE MORRIS: Counsel?

7 MR. TADLOCK: The testimony from Mr. Tice was only
8 that Mr. Bowman questioned whether he should be on a
9 jumpseat. It doesn't indicate that he was a decision-maker,
10 so there's no indication that there's any testimony from Mr.
11 Tice that we did anything nefarious in our discovery. You
12 know, if he wanted to take Mr. Bowman's deposition, he
13 could. The guy was identified. He's not an attorney, he's
14 in management, flight management.

15 JUDGE MORRIS: All I'm understanding, he really
16 had no reason to until now.

17 MR. TADLOCK: Right. But, I mean, he could have
18 asked additional questions in discovery to determine that.
19 I mean, I don't know how to answer why he didn't take this
20 guy's deposition.

21 JUDGE MORRIS: Right.

22 MR. RIEDERER: I would also note that I believe --
23 and I don't want to double-team you with two attorneys
24 coming at you. I want this proceeding to be fair. I would
25 also note, I think we can elicit testimony -- and I think

1 Mr. Tice has testified to this -- that I don't believe that
2 the NOQ decision process itself is necessarily tied to the
3 removal of jumpseat status. And so there could have been --
4 and so, if that's the -- if he's testifying to the jumpseat
5 issue, there could be two separate decisions that are being
6 made.

7 MR. SEHAM: I would respectfully submit that, at a
8 minimum, we might need another *in camera* review of this
9 item. I'm trying to figure out how we go forward at this
10 point, and I'm really --

11 JUDGE MORRIS: This is what we're going to do.

12 MR. SEHAM: -- trying to buy this.

13 JUDGE MORRIS: The document that was referred to
14 shall be produced *in camera*. If it's not that, you will
15 also produce *in camera* item 11. I will reserve -- that's in
16 CX-10 -- I will reserve ruling on whether or not the
17 complainant will be given -- until I review this and I hear
18 all the evidence -- reserve whether or not I will give
19 complainant an opportunity to conduct deposition and
20 potentially continue this hearing for purposes of eliciting
21 additional testimony on this issue. But I'm not going to
22 stop in the middle of this.

23 And I'm going to allow the parties -- and remind
24 me when we close tomorrow about this -- an opportunity to
25 brief this issue again. My predecessor Judge, if I recall

1 correctly, had made some rulings on this. I don't have that
2 with me. I want the opportunity to go back and look at the
3 ruling that was made, as well. But, in the interim, I don't
4 have access to these documents, and I'm going to want to see
5 them, okay? Counsel?

6 MR. SEHAM: Yeah, I'm going to request a 10-minute
7 break.

8 JUDGE MORRIS: All right, we're in recess until 10
9 minutes of 2:00.

10 [WHEREUPON, there was a brief recess.]

11 JUDGE MORRIS: All parties present when the
12 hearing last recessed are again present. Go ahead, counsel.

13 **CROSS EXAMINATION OF**

14 **ROB TICE**

15 **(resumed)**

16 BY MR. SEHAM:

17 Q Mr. Tice, I just want to clarify this. It was
18 your understanding that, effective August 5th, Captain
19 Estabrook's jumpseat privileges were suspended, correct?

20 A I believe so, yes.

21 Q And then I'm going to ask you to turn to page 65
22 of complainant's exhibit CX-49.

23 A That's my deposition?

24 JUDGE MORRIS: Yes.

25 MR. SEHAM: Correct.

1 THE WITNESS: What was the page?

2 MR. SEHAM: For identification purposes only, page
3 65, starting at line 20. Are you there, sir?

4 THE WITNESS: Yes.

5 BY MR. SEHAM:

6 Q Read along with me, if you would. "Under what
7 circumstances would a pilot be deprived of his jumpseat
8 authority?" Their answer, "There are -- I guess there are
9 several circumstances." "What circumstances are you
10 familiar with?"

11 Answer, "I don't know that I know them all, but I
12 can give you off the top of my head a list." "Okay."
13 "There are some sick leave issues. If you -- and I don't
14 know the details of when you are able to use the jumpseat
15 privilege.

16 "But my understanding roughly is that if you call
17 in sick you shouldn't be traveling around on a jumpseat. If
18 you are under investigation for a significant matter, then
19 the jumpseat privilege is withheld and we bring you to the
20 place of the investigation or hearing with commercial
21 airline travel at the company's expense.

22 "Now, if you fail to follow some of the rules
23 associated with jumpseat reservations and cancellations, et
24 cetera, you can, I guess, have some loss of jumpseat
25 privileges for the -- for some period of time. That's all I

1 can think of off the top of my head." And was that your
2 testimony at your deposition?

3 A You read that correctly.

4 Q And Captain Estabrook, on August 4th he didn't
5 have any sick leave issues, did he?

6 A No.

7 Q Okay.

8 A Not that I know of.

9 Q Okay.

10 A He was planning to fly a trip.

11 Q And there were no issues related to his abuse of
12 jumpseat protocols, correct?

13 A Correct.

14 Q But he was, in fact, at this point under
15 investigation as to whether he had a mental health issue or
16 a fitness for duty issue, isn't that correct?

17 A Not really. I mean, there was an e-mail.

18 Q Uh-huh.

19 A There were concerns expressed about the author of
20 the e-mail.

21 Q Uh-huh.

22 A He wanted to talk security issues, and a meeting
23 was held and should he be jumpseating, and the decision was
24 made that he shouldn't be jumpseating.

25 Q Okay.

1 A So he was purchased an airline ticket --

2 Q Okay.

3 A -- to the meeting.

4 Q He shouldn't be jumpseating because?

5 A There were concerns about the e-mail that he had
6 written.

7 Q Concerns that raised a question as to whether he
8 was fit for duty?

9 MR. TADLOCK: I trust that, to the extent -- I
10 have a standing objection at this point with respect to
11 privilege, to the extent that Mr. Tice learned about those
12 concerns in the course of giving legal advice.

13 JUDGE MORRIS: Overruled.

14 THE WITNESS: Now I don't remember the question.

15 MR. SEHAM: And I meant to ask, we don't have the
16 capacity to have questions read back?

17 COURT REPORTER: Can we go off the record for a
18 second?

19 JUDGE MORRIS: We'll go off the record.

20 [WHEREUPON, there was a brief recess.]

21 JUDGE MORRIS: All parties present when the
22 hearing last recessed are again present. Go ahead.

23 MR. SEHAM: Okay.

24 JUDGE MORRIS: Counsel, you were asking questions
25 about the --

1 BY MR. SEHAM:

2 Q At least part of the reason behind the NOQ
3 designation and the suspension of jumpseat privileges at
4 this time was because there was a concern within Federal
5 Express as to whether Captain Estabrook had a fitness for
6 duty issue, correct?

7 A All I can recall is that the VP of flight ops
8 asked that question in an e-mail, and the tie-in the context
9 was the e-mail that was being discussed and is this somebody
10 that should be on a jumpseat. That's the best I can do for
11 you as far as my memory --

12 Q Well, how do you --

13 A -- having been served by the e-mail that I
14 described that I had read within the last week.

15 Q That question was raised -- just to confirm what
16 you just said -- the question was raised, is this a person
17 that should be on the jumpseat, correct?

18 A Or words to that effect, in an e-mail, yeah.

19 Q That was a question that was discussed among --

20 A It was a question posed by Captain Bowman in an e-
21 mail.

22 Q Uh-huh.

23 A I'm sorry, I can't be any more specific than that.

24 Q And what did you understand the reasoning to be
25 behind that question?

1 MR. TADLOCK: To the extent --

2 JUDGE MORRIS: Overruled.

3 THE WITNESS: I think I gave --

4 JUDGE MORRIS: Go ahead.

5 THE WITNESS: My turn?

6 JUDGE MORRIS: Yes.

7 THE WITNESS: I think I gave the context of it.

8 BY MR. SEHAM:

9 Q Whether -- the context being whether this person
10 based on the August 4th e-mail, had a fitness for duty
11 issue?

12 A Yes.

13 Q Now, as of August 5th, 2013, did you have any
14 concern about Captain Estabrook's mental health?

15 A I don't believe that I did. But I believe I
16 acceded to the VP's concerns, and he made that decision or
17 provided that input. I didn't know enough about Captain
18 Estabrook to form any judgments about that.

19 Q In your discussions with -- did you have
20 discussions with Mr. Ondra, McDonald and Fisher at this time
21 concerning the NOQ designation?

22 A I don't remember. All I remember is that e-mail
23 that I described to you.

24 Q Do you have any recollection of Ondra, McDonald or
25 Fisher expressing any concerns with respect to Captain

1 Estabrook's mental health prior to the August 9th meeting?

2 MR. TADLOCK: I'm going to object. I don't think
3 that the privilege has been waived with respect to anything
4 relating to those individuals.

5 JUDGE MORRIS: Who are those individuals?

6 MR. SEHAM: Ondra, McDonald and Fisher? They are
7 the persons identified in the company's interrogatories as
8 the NOQ decision-makers. And this question and answer has
9 already been posed and answered.

10 JUDGE MORRIS: Overruled.

11 THE WITNESS: Well, let me be as complete as I
12 can, because that's my obligation here. Those individuals
13 were on the e-mail, all right? My recollection is that
14 their names were among the persons who received Jim Bowman's
15 e-mail.

16 JUDGE MORRIS: While he's doing that, since it's
17 going to be *in camera*, can I get those e-mails tomorrow?

18 MR. RIEDERER: Yes.

19 JUDGE MORRIS: Okay.

20 MR. TADLOCK: Anything else?

21 BY MR. SEHAM:

22 Q I'm going to ask you to turn to your deposition,
23 CX-49 for identification purposes only, and can I ask you to
24 the bottom of page 26? Now, line 25 on page 26, the last
25 line, question, "Well, I just want to be clear, as of August

1 5th, there was no concern about Captain Estabrook's physical
2 health?" "No." "And as of August 5th, 2013, did you have
3 any concerns about Captain Estabrook's mental health?" And
4 the answer is, "No." Now, those were -- was that your
5 testimony during your deposition?

6 A You read that accurately.

7 Q And those were pretty definitive responses.

8 A That was my recollection at the time.

9 Q But has your recollection changed over the last
10 few weeks?

11 A Well, yeah. I just told you about the e-mail that
12 I just read last week.

13 Q Oh, okay. That wasn't --

14 A I guess that was more in response to the next
15 question.

16 Q All right. Well, if I recall your testimony --
17 I'm not going to ask the court reporter to read it back --
18 does this deposition testimony refresh your recollection
19 that you personally had no question about his fitness for
20 duty at the -- as of August 5th, 2013?

21 A When I testified in March --

22 Q Uh-huh.

23 A -- of this year, I had no recollection of having
24 received an e-mail from Jim Bowman where he said, should
25 this guy be on a jumpseat.

1 Q Uh-huh.

2 A So I testified truthfully that I didn't have those
3 concerns. Now, thinking back today, I look at that e-mail
4 and I realize, well, Jim Bowman had a concern.

5 Q Uh-huh.

6 A I didn't really have enough information to know
7 whether or not he had a mental health issue that should be
8 followed up or not. I hope that's --

9 Q Sir, didn't you participate in the compilation of
10 the defendant's -- or, FedEx's log of privileged documents
11 at CX-10?

12 A No.

13 Q You didn't?

14 A I provided an Outlook file.

15 Q Uh-huh.

16 A And that was handled by other people.

17 Q The next question is, "Did you know of anyone --
18 you were consulting with other participants in the NOQ
19 decision, Mr. Ondra, Captain McDonald, Captain Fisher,
20 correct? You were having communications with them
21 concerning his placement under NOQ status?"

22 Answer, "In the context, yes, of setting up the
23 meeting that was eventually set up." "Did any of them
24 express a concern in the run-up to the placement on NOQ
25 status that Captain Estabrook had a physical health

1 problem?" "No, sir, not from a fitness for duty as a pilot
2 standpoint at all."

3 "Did any of those three individuals, Mr. Tice --
4 Captain McDonald, Captain Fisher, and Mr. Ondra -- did any
5 of them express a concern about the mental health of Captain
6 Estabrook in the run-up to the placement on August 5th on
7 NOQ status?"

8 "No, sir, not from a fitness for duty as a pilot
9 standpoint, only a discussion of this is an odd situation
10 that we find ourselves in." So is that -- does that
11 continue to be your testimony today, that none of those
12 individuals had any concerns with respect to his mental
13 health, physical health, or general fitness for duty?

14 A I do not recall those three individuals expressing
15 concerns on August 5. I only recall now -- having had my
16 memory refreshed by an e-mail -- that Jim Bowman had that
17 concern.

18 Q Uh-huh.

19 A But it's possible they did, but I don't remember.

20 Q And nobody responded to Mr. Bowman?

21 A I didn't say that.

22 Q Well, who responded to Mr. Bowman?

23 A I did.

24 Q You did?

25 A I don't know if anybody else did or not.

1 Q And his title again is what?

2 A Back then, it was vice president of flight
3 operations.

4 Q So he would have been -- everyone else in the
5 meeting would have been -- certainly McDonald and Fisher
6 were subordinate to him?

7 A They reported up through him, yes.

8 Q Now, you're an attorney, correct?

9 A Yes.

10 Q And you're in the labor relations department,
11 correct?

12 A Yes.

13 Q And you would say a core element of your job is
14 participating in pilot-related investigations and
15 disciplinary proceedings, correct?

16 A Among the primary duties that I have, yes.

17 Q And usually your presence at a pilot meeting is
18 related to disciplinary matters, correct?

19 A When it involves an individual pilot, yes. When
20 it involves the Air Line Pilots Association in the
21 administrative grievance arena, I'll be meeting with ALPA
22 officials, and sometimes there's a grievance chairman there
23 and not an individual pilot. So I hope that's responsive.

24 MR. SEHAM: Yes, it is. The August 4th -- and
25 maybe I could get some help from counsel -- the August 4th

1 e-mail?

2 MR. TADLOCK: Oh, I'm sorry.

3 MR. SEHAM: No, that's all right.

4 MR. TADLOCK: CX-13? I believe that's us, as far
5 as --

6 MR. SEHAM: I have it here at CX-11, so why don't
7 I just go with what I have in front of me?

8 BY MR. SEHAM:

9 Q If you could turn to complainant's exhibit CX-11
10 at C-52?

11 A Can I see it, please?

12 Q And the August 4th, 2013 e-mail from Captain
13 Estabrook disclosed that he had served as the chairman of a
14 pilot union security committee, correct?

15 A That's what it says.

16 Q Did you have any basis for doubting that?

17 A No.

18 Q And the August 4th e-mail disclosed that Captain
19 Estabrook, in his capacity as chairman of the pilot security
20 meeting [sic], had dealings with Bill Henrikson, you see
21 that reference?

22 A I see that name. I don't know who that was.

23 Q Do you know today, as you sit here, that that is
24 the former vice president of corporate security --

25 A No.

1 Q -- for FedEx?

2 A No.

3 Q You don't know that?

4 A I don't know that.

5 Q Prior to the August 5th NOQ designation, did you
6 make any effort to confirm Captain Estabrook's service as
7 the pilot union security committee chairman?

8 A No.

9 Q And did you make any effort to investigate the
10 nature and scope of his transactions with Bill Henrikson?

11 A No.

12 Q And you made no effort to confirm his service or
13 the scope of his service as the pilot union security
14 committee chairman at any time prior to the issuance of the
15 August 16th, 2013 15D letter, correct?

16 A That was kind of a long question.

17 Q It's just the same question, that you didn't make
18 those inquiries as of August 5th and up through and
19 including August 16th, you didn't make those inquiries
20 either with respect to the scope of his service as a pilot
21 union security committee chairman? Is that true?

22 A I'm trying to search my memory as much as I can.
23 It may have been a matter of idle chatter within labor
24 relations, but I don't think anybody informed me that he had
25 held any title at ALPA of that kind. If that's what you

1 mean by investigation --

2 Q Uh-huh.

3 A -- I didn't talk to anybody who said, I remember
4 Captain Estabrook serving in that capacity.

5 Q Sometime after the August 9th meeting, you
6 asserted that your reason for asking questions to Captain
7 Estabrook about whether or not he was Mayday Mark was
8 because Mayday Mark was a FedEx pilot who had admitted to
9 having suffered a stroke, correct?

10 A There was a posting that I think used the word
11 seizure.

12 Q Yeah.

13 A And I don't know if I misused the word stroke, if
14 they are different. But that's the reason for what I
15 highlighted, because it came to my attention when I was
16 looking at the website.

17 Q But Captain McDonald never identified his concern
18 as relating to an individual --

19 A Not that I can recall.

20 Q -- having a stroke?

21 A Not that I can recall.

22 Q If I complete the question, it doesn't change the
23 answer?

24 A [No audible response.]

25 Q But you were -- at that meeting, you were of the

1 belief that the individual posting as Mayday Mark was a
2 Federal Express pilot, correct?

3 A Well, as I explained at my deposition, or tried to
4 explain, you don't know who is really posting. You don't
5 know if they are pretending to be something they're not.
6 But, based on the number of postings, it looked like he
7 might have been a FedEx pilot.

8 Q To your reading, he appeared to be a FedEx pilot,
9 correct?

10 A I think I explained my answer, and I stand by it.

11 Q Is the answer to my question yes?

12 A No.

13 Q The question I asked?

14 A You can't tell, but I thought maybe, based on the
15 context.

16 Q So my question that to you the poster appeared to
17 be a FedEx pilot, the answer is no?

18 A I'll say it again. I had no way of knowing for
19 sure, but it could have been.

20 Q I don't mean to split hairs with you, but from our
21 perspective it's an important distinction, so I'm going to
22 ask you to turn to page 29 of complainant's exhibit 49 for
23 identification purposes only. And if you could turn to 29
24 at line 9?

25 A All right.

1 Q Which reads, question, "There is reason to believe
2 that whoever Mayday Mark was was a Federal Express pilot,
3 correct?" Answer, "Based on the content of a lot of the
4 information, it looked like he was, but maybe he was on LTD
5 or something. I mean, it's hard to tell if they're telling
6 the truth or not when they write what they write." But my
7 question to you is, is your testimony today that at that
8 time you drew the conclusion that it looked like this Mayday
9 Mark poster was a FedEx pilot?

10 A I think that the deposition answer that you gave
11 is the same as the testimony I just gave a minute ago.

12 Q Well, I'd like an answer to my question, please.

13 A I think I have answered it three times.

14 JUDGE MORRIS: Answer the question.

15 THE WITNESS: I couldn't tell. He could have
16 been.

17 BY MR. SEHAM:

18 Q So you're rejecting this testimony as untrue?

19 A I think it's the same testimony I just gave.

20 JUDGE MORRIS: Move on, counsel.

21 MR. SEHAM: Yeah, I am moving on.

22 BY MR. SEHAM:

23 Q Once you determined to your satisfaction that
24 Captain Estabrook was not Mayday Mark, did you make any
25 further effort to determine who this FedEx pilot stroke

1 victim was?

2 A I wouldn't know how to do that, and I did not.

3 Q Did you ask anyone to investigate whether there
4 was another pilot out there who was a FedEx pilot who
5 suffered a stroke?

6 A No. It was a dead issue by then.

7 Q It's not a concern of yours that there's a FedEx
8 pilot out there who has an undisclosed stroke?

9 A If I believed everything I read on the internet, I
10 probably would not be able to sleep. I couldn't do anything
11 with the information that Captain McDonald asked me to ask.
12 It was done, it was closed. I dropped it a long time ago.

13 Q And why did you conclude in the first place that
14 Captain Estabrook might have been Mayday Mark?

15 A Only because Captain McDonald said, I think he
16 might be Mayday Mark. He asked me to ask, and I asked.

17 Q Now, Todd Ondra was not present for the entirety
18 of the meeting, correct?

19 A That is correct.

20 JUDGE MORRIS: Hold on, counsel, I have a
21 question. Did you relay the response that your conclusion
22 that he was not Mayday Mark back to the person that asked
23 you about that?

24 THE WITNESS: I'm sure I did.

25 JUDGE MORRIS: Okay. Thanks. Go ahead.

1 BY MR. SEHAM:

2 Q And Todd Ondra was not present for the discussion
3 regarding Mayday Mark?

4 A That's my recollection. It only happened at the
5 tail end of that meeting, although there was a pre-meeting
6 that the management folks had.

7 Q There was a pre-meeting?

8 A I think there was. We all came from different
9 places and assembled.

10 Q Well, did you have a sit-down discussion prior to
11 the meeting?

12 A It could have been a stand-up discussion. I just
13 don't remember the details. It's possible that the Mayday
14 Mark issue was --

15 MR. TADLOCK: Objection to the extent that --
16 let's be careful about the attorney-client privilege to the
17 extent that you involved giving advice to counsel.

18 MR. SEHAM: I'd like to --

19 JUDGE MORRIS: It's noted. Overruled. And don't
20 give narratives, counsel.

21 MR. TADLOCK: Okay.

22 JUDGE MORRIS: Continue.

23 BY MR. SEHAM:

24 Q It's your recollection that there was a meeting of
25 the company representatives prior -- immediately prior to

1 the meeting with Captain Estabrook on August 9th?

2 A The source of my information are the notes that
3 Mr. Ondra took, and he has Mayday Mark kind of high up on
4 the page. And I think maybe he wrote that before we
5 actually convened the meeting with Mr. Estabrook. That's
6 just me trying to put thoughts together. I don't remember
7 that for sure.

8 Q Well, but my question was -- totally aside from
9 Mayday Mark -- did the company representatives convene and
10 have some discussion prior to the meeting with Captain
11 Estabrook?

12 A I said I think there might have been a stand-up,
13 or maybe we sat down, but I don't remember the details of
14 it. The only thing that jogged my recollection process was
15 that there's a reference to Mayday Mark on the first page of
16 his notes.

17 And why would that have been there if it hadn't
18 taken place before the meeting actually started, because my
19 recollection is that that discussion with Captain Estabrook
20 happened at the end of that meeting and when Mr. Ondra
21 wasn't even there.

22 Q So you have no recollection of any content of the
23 discussion that preceded the August 9th meeting with Captain
24 Estabrook?

25 JUDGE MORRIS: He just said that. Move on.

1 BY MR. SEHAM:

2 Q I'm going to refer you to JX-7. And you received
3 this August 13th e-mail, this August 13th, 2013 e-mail from
4 Alan Armstrong, Captain Estabrook's attorney, correct?

5 A I'm sure I did.

6 Q Now, the directive, the written directive to
7 Captain Estabrook to submit to a 15D evaluation didn't issue
8 until three days after this letter, correct?

9 A That's correct.

10 Q And you were involved in the drafting and issuance
11 of that 15D directive of August 16th, 2013?

12 A I don't remember that. It's a fairly standard
13 form, and it might have taken place without my putting pen
14 to paper or anything like that.

15 Q Okay, is it -- now, there was a week delay between
16 the August 9th meeting and the issuance of the August 16th
17 directive, correct?

18 A August 9th to August 16th I think were the dates,
19 yes.

20 Q And is it possible that the Armstrong August 13th
21 letter was taken into consideration during that intervening
22 period?

23 A Yes.

24 Q And there is this reference to -- I think it was
25 brought up during direct -- on the third page of the letter

1 under 12-B, there's a demand that Federal Express withdraw
2 any request made by and through chief pilot Rob Fisher that
3 Captain Estabrook undergo a psychiatric evaluation. You
4 recall reading that on August 13th?

5 A [No audible response.]

6 Q Or you see that it's part of this letter, correct?

7 A It's certainly in paragraph 12-B.

8 Q And that would have been -- I'll move to -- if you
9 can go to joint exhibit JX-6? And go to the sixth page. It
10 says 15-6 at the lower left. And I'm looking at G-1 -- or,
11 G, titled limitation of medical procedures. Under 1, it
12 says, "Flight management shall not require a pilot to submit
13 to psychological or psychiatric examination." So this
14 contract language was in effect in August of 2013, correct?

15 A Yes. Plus the succeeding sentence. It was also
16 in effect.

17 Q We'll say the whole paragraph, correct?

18 A I don't think there is -- I think all of 15D was
19 in effect. What's printed, this 2011 version of the
20 contract.

21 Q All of section 15. Well, this is not 15D, this is
22 15G.

23 A You're right.

24 Q Okay.

25 A All of 15, as printed in this document, appears to

1 have been all from the 2011 printing.

2 Q So what Mr. Armstrong was asserting in this letter
3 was that there was a violation of a black-and-white
4 prohibition in the collective bargaining agreement, correct?

5 A I don't know what his intention was.

6 Q Well, he communicated facts that would constitute
7 a violation of --

8 A He wrote words that we disagreed with, yes.

9 Q But you never expressed disagreement.

10 A He was never ordered by flight management --

11 Q You're not responding to the questions.

12 A -- to submit to a psychological --

13 Q You're not --

14 A -- or psychiatric examination.

15 Q Answer the question. Were you on the phone call
16 between Captain Fisher and Captain Estabrook?

17 A No.

18 Q No, you weren't. So you don't know the answer to
19 that? You're saying that out of ideological conviction --
20 withdrawn. Let's proceed with this. You were -- you
21 received a demand that the company withdraw a directive that
22 Captain Estabrook submit to a psychiatric examination. And
23 isn't it true, sir, that you never denied that allegation
24 from Mr. Armstrong?

25 A What is true is that I did not regard Mr.

1 Armstrong as having correct information.

2 Q You didn't answer my question. I'm asking you,
3 did you ever communicate with Mr. Armstrong that it was --
4 that your position that he hadn't been directed to submit to
5 a psychiatric examination?

6 A I'll have to look at my -- did I respond to that
7 letter? I think I wrote an August 16 letter. What did I
8 say in it?

9 JUDGE MORRIS: Counsel, can you help him with
10 finding his letter?

11 MR. TADLOCK: Sure.

12 JUDGE MORRIS: I seem to recall there's a
13 reference.

14 MR. TADLOCK: Yeah. I would ask to direct your
15 attention to -- let's look at tab 26 of complainant's
16 documents.

17 THE WITNESS: I wrote, next you expressed concern
18 that -- no, I'm reading from the wrong one. I wrote in the
19 final paragraph the position I took in this letter that was
20 intended as a response to that 12-B.

21 BY MR. SEHAM:

22 Q Are you aware of any document in which you told
23 Mr. Armstrong he has not been referred to a psychiatric
24 examination?

25 A No, I don't think so.

1 Q Now, this -- if you could move to exhibit CX-32?

2 JUDGE MORRIS: Complainant's exhibit CX-32?

3 MR. SEHAM: Yes.

4 JUDGE MORRIS: Same binder.

5 MR. SEHAM: And I'm going to refer you to page
6 175. Well, actually, let me start with the first page.

7 BY MR. SEHAM:

8 Q Do you recognize this as the company's FedEx's
9 position statement submitted to the United States Department
10 of Labor/OSHA Division?

11 A All I can do is read it and assume that it is.

12 Q So you had no -- no one ever came to consult with
13 you about the position that FedEx would take --

14 A Honestly, I just don't remember --

15 Q -- with OSHA on this matter?

16 A -- reading the letter and having those kind of
17 discussions. I could have.

18 Q But you don't remember being consulted?

19 A That's right.

20 Q Now if we can go back to JX-7?

21 JUDGE MORRIS: So are we done with --

22 MR. SEHAM: Yes. Yes, if he doesn't know about
23 the letter, about the position statement.

24 BY MR. SEHAM:

25 Q So I'm going to refer you to point 6 on page 2.

1 A Are you talking about a numbered paragraph?

2 Q Yeah. I'm looking at -- I'm sorry, I'm looking at
3 the second page, item 6. And this is a letter -- before I
4 ask you that question, in looking at the last page, this is
5 a letter that went both to you and to Captain Fisher and
6 Todd Ondra and Captain William McDonald, correct?

7 A According to the cc list, yes.

8 Q So you were all informed by this letter that
9 Captain Estabrook served his country on an AWACS aircraft
10 that flew missions in the North Atlantic?

11 A I don't know if they read this --

12 Q Okay.

13 A -- letter or not.

14 Q But you read it?

15 A I read it.

16 Q It is your understanding, sir, that Captain Rob
17 Fisher made the decision to issue the 15D letter of August
18 16th, correct?

19 A That was my understanding.

20 Q Okay.

21 A I think I testified that he may have had a
22 conversation with Captain McDonald after he spoke to me, but
23 I don't -- my impression was that he understood that there
24 was going to need to be a 15D exam based on my telephone
25 conversation with him on August 9.

1 Q And you came to the conclusion that Captain Fisher
2 made the decision on the 15D letter based on your
3 involvement in the process, correct?

4 A Based on what I communicated to be Todd Ondra's
5 concerns.

6 Q Now I'm going to refer you to page 50 of your
7 deposition, complainant's exhibit 49 for identification
8 purposes only. Starting at line 20, question, "Well, who
9 made the decision to issue the 15 letter to Captain
10 Estabrook?"

11 Answer, "My understanding is that would have been
12 his direct manager in the flight operations department was,
13 I think, the fleet captain at the time, and that was Captain
14 Fisher." Question, "When you say that is your
15 understanding, what do you base that understanding on?" "My
16 involvement in the process." That was your testimony at
17 your deposition?

18 A Yes. And I went on to explain later on the page
19 that Mr. Ondra had called me, and I'll read it. "I called
20 Rob Fisher."

21 Q No, no, that's non-responsive.

22 A Okay.

23 Q Thank you. After the August 9th meeting, you and
24 Captain Fisher concurred in reinstating Captain Estabrook to
25 flight duty, correct?

1 A I had no problem with it. It wasn't my call, but
2 I had no problem with it.

3 Q You expressed no objection?

4 A I expressed no objection.

5 Q Did you communicate any reservations to Captain
6 Fisher?

7 A No.

8 Q Now, subsequent to --

9 A I should say, not that I recall. To me, it was
10 very prompt and quick, put him back to flying.

11 Q Okay.

12 A That type of conversation.

13 Q And it's your understanding that subsequent to
14 Captain Fisher's decision Todd Ondra discussed the issue
15 with Bill McDonald, correct?

16 A I'm sorry if I didn't track it with you very well.
17 My involvement was, Todd Ondra called me, and I called Rob
18 Fisher. I don't know what happened after I talked to Rob
19 Fisher.

20 Q Todd Ondra called you?

21 A Yes.

22 Q All right. And Todd Ondra -- I'm sorry, I've got
23 to hear that again -- Todd Ondra called you, and then you
24 called McDonald?

25 A No.

1 Q No?

2 A Todd Ondra called me, expressed the concerns that
3 are on page 51 of my deposition transcript. And then I
4 communicated those concerns to Rob Fisher in a subsequent
5 telephone conversation.

6 JUDGE MORRIS: Counsel, if you want that in
7 evidence, you're going to have to read 51.

8 MR. SEHAM: Yeah. I might come back to that.

9 BY MR. SEHAM:

10 Q Okay, and you -- so you spoke directly to Todd
11 Ondra, correct?

12 A Yes.

13 Q Okay.

14 A On the phone.

15 Q And would you agree with me that you have no
16 recollection of his making any reference to Russia or
17 Russians?

18 A I have no recollection of that.

19 Q And his primary emphasis, based on your
20 recollection, was to comments Captain Estabrook made about
21 Auburn Calloway?

22 A Correct.

23 Q And you personally have no recollection of Captain
24 Estabrook having made any reference to Russians or Russia
25 during the August 9th meeting, correct?

1 A I just don't recall, sir.

2 Q And Mr. Ondra, did he make any reference in his
3 conversation with you in terms of his reasons for
4 recommending the 15D evaluation, did he make any reference
5 to Captain Estabrook's August 4th e-mail?

6 A I don't think in that conversation, but I'm not
7 sure. I know that -- as I stated before, he was involved on
8 August 4 with those e-mails that I just recently read, and
9 that e-mail was front-and-center -- that e-mail request was
10 front-and-center on that e-mail thread. And I don't
11 remember if he talked to me about it after the meeting on
12 August 9 or not.

13 Q You have no recollection of his referencing the
14 August 4th e-mail, correct, in his 15D recommendation
15 considerations?

16 A I have no recollection of him making that
17 reference in the August 9 telephone conversation I had with
18 Todd Ondra.

19 Q And do you have any recollection at any time of
20 Todd Ondra telling you that the August 4th e-mail was part
21 of -- was a consideration of his in making the 15D
22 recommendation?

23 A No. The context I think was that it was an odd e-
24 mail. I don't -- that's the best recollection I have about
25 any comments Todd Ondra made about the e-mail.

1 Q And when did he make those comments?

2 A Before the meeting. I'm not sure when. That's my
3 sense and my recollection. I can't give you a date, time
4 and place.

5 Q But you -- but it was sometime before the August
6 9th meeting?

7 A That's what I think.

8 Q And during this August 9th meeting Captain
9 Estabrook did raise the fact that he was engaged in service
10 for the United States Air Force in the North Atlantic during
11 the -- I'm sorry, bolluxed that up. During the August 9th
12 meeting, Captain Estabrook did raise the fact that he had
13 engaged in service for the United States Air Force in the
14 North Atlantic, correct?

15 A Now I don't know what I remember versus what I've
16 read.

17 Q Okay.

18 A I guess I would say it's possible that he did. I
19 just don't have a clear recollection that he did.

20 Q Well, why don't we turn to page 82.

21 A Page 82?

22 Q Yes, of your --

23 JUDGE MORRIS: CX-49, for identification.

24 MR. SEHAM: Thank you.

25 \\

1 BY MR. SEHAM:

2 Q So, very quickly, at line 6, question, "Okay, now,
3 isn't it true that Captain Estabrook referenced at the
4 August 9 meeting that his military service had included
5 service on the AWACS aircraft surveilling Russian bombers?"

6 Answer, "You know, I don't remember the details of what he
7 said his military service was. I know he -- I seem to have
8 some recollection of the North Atlantic being referenced,
9 but I don't know beyond that." So is your recollection that
10 he referenced the North Atlantic in terms of his military
11 service?

12 A I remember North Atlantic. I don't -- as I said,
13 I don't remember the details, if I read it or if I
14 remembered it.

15 Q Okay.

16 A I just don't remember.

17 Q Now, after your call with Todd Ondra, you then
18 communicated to Rob Fisher what Ondra's concerns were,
19 correct?

20 A Yes.

21 Q And, to the best of your recollection, what did
22 you say to Rob Fisher as to what Ondra's concerns were?

23 A Best of my recollection is that Todd Ondra was
24 concerned about the Auburn Calloway comments and how they
25 might affect his state of mind, Captain Estabrook's state of

1 mind. And he was wondering whether or not there was
2 something under the contract we could do to have him
3 evaluated.

4 Q Uh-huh.

5 A And that's the information that I learned from
6 Todd Ondra and imparted to Rob Fisher.

7 Q So, in terms of the substance of Ondra's concerns,
8 you can't recollect communicating to Fisher anything more
9 specifically than what you just testified to?

10 A I cannot.

11 Q And Captain Fisher then made a decision to place
12 Captain Estabrook on NOQ status again on August 9th, 2013,
13 correct?

14 A I assume that that took place, based on the
15 conversation that I had with him and subsequent events.

16 Q Now, in order to refer a pilot for a 15D
17 evaluation, the collective bargaining agreement requires
18 that flight management have a reasonable basis for
19 questioning whether the pilot is fit for duty, correct?

20 A [No audible response.]

21 Q Just so the record reflects, you don't know that
22 off the top of your head without referring to the contract?

23 A I like to refer directly to the document.

24 Q Well, that's --

25 A There are certain individuals specified in here

1 that may direct a pilot to contact or see the company's
2 aeromedical advisor if the company -- doesn't say flight
3 management -- if the company has a reasonable basis to
4 question whether a pilot has developed or recovered from an
5 impairment to his ability to perform his duties as a pilot.

6 Q Uh-huh.

7 A That's what the contract says.

8 Q And, when a pilot is referred for a 15D
9 evaluation, the normal practice is for FedEx to disclose the
10 alleged reasonable basis to the pilot's union, correct?

11 A When the union is involved, that's the normal
12 practice if the question is asked.

13 Q And you declined to respond to Captain Estabrook's
14 Alan Armstrong's request that you provide a reasonable
15 basis, correct?

16 A Yes.

17 Q And then you subsequently declined to respond to a
18 request from Seham, Seham, Meltz and Petersen on behalf of
19 Captain Estabrook requesting that you state the reasonable
20 basis, correct?

21 A I don't remember the dates of that, but I think
22 your letter came after his.

23 Q But there was a second written request seeking the
24 reasonable basis, and you, on behalf of Federal Express,
25 declined to respond to that request?

1 A I did.

2 Q And do you recall during your deposition
3 testifying that you could think of no reason for withholding
4 the company's alleged reasonable basis for the 15 referral
5 from Captain Estabrook's counsel?

6 A You can direct me to that, if I'd like.

7 Q I'm asking you first a question, sir, whether you
8 recall giving that testimony.

9 A I don't recall.

10 Q Do you recall a reason suddenly occurring to you
11 over the last few weeks?

12 A I'm sorry, you garbled the word.

13 Q Did I?

14 A Can you repeat it? You say suddenly occurred for
15 some reason?

16 Q Yeah. Did you -- did a reason occur to you in
17 just the last few weeks as to why it was legitimate for you
18 to withhold the reasonable basis for Captain Estabrook's
19 referral?

20 MR. TADLOCK: Objection, objection. I think the
21 question is argumentative, and I think it lacks foundation
22 with respect to the --

23 MR. SEHAM: Well, we can build it by just
24 referring him. I guess rather than force you to rule, I can
25 withdraw the question --

1 JUDGE MORRIS: Withdraw the question, then.

2 MR. SEHAM: -- and then proceed in a different
3 way.

4 BY MR. SEHAM:

5 Q I'm going to refer you to page 62.

6 JUDGE MORRIS: CX-49, for identification?

7 MR. SEHAM: Yes, for identification.

8 BY MR. SEHAM:

9 Q At line 4, the question is, "As you sit here --

10 A I'm sorry, what page? I missed it.

11 Q Page 62.

12 A Okay.

13 Q Line 4.

14 A Let me find the page.

15 Q "As you sit here, is it fair to say that, as you
16 sit here today, a reason for withholding that information as
17 to the reasonable basis does not occur to you?" Answer,
18 "State it again." Question, "As you sit here today in your
19 witness seat, no reason occurs to you for the withholding of
20 the information requested in this letter concerning what the
21 reasonable basis was?" Answer, "That's right." Do you
22 recall giving that testimony?

23 A You read that accurately.

24 Q And was that truthful testimony, that as you were
25 being deposed on that day you had nothing occur to you as a

1 reason for withholding the two written requests from Captain
2 Estabrook's legal counsel as to the reasonable basis for the
3 15D referral?

4 A Truthful testimony.

5 Q Now, in your conversation with Mr. Ondra, the only
6 reason he raised for the recommendation he made to Captain
7 McDonald for a 15D evaluation were the comments of Captain
8 Estabrook, that Captain Estabrook made regarding Auburn
9 Calloway's conversion to Islam and Calloway's ability to
10 assist Al Qaeda, correct?

11 MR. TADLOCK: Objection to foundation, I think.

12 JUDGE MORRIS: Overruled.

13 THE WITNESS: I thought I had already testified to
14 this, but perhaps I am mistaken.

15 JUDGE MORRIS: Counsel, he has testified like
16 three or four times now about that.

17 BY MR. SEHAM:

18 Q Now, Captain Estabrook's comments regarding
19 Calloway came fairly late in his presentation, isn't that
20 correct?

21 A To the best of my recollection, that's true.

22 Q And his comments --

23 A It was kind of an add-on.

24 Q And his comments lasted less than a minute,
25 correct?

1 A I didn't time them.

2 Q Okay, and your understanding was that Captain
3 Estabrook, with respect to the issue of Calloway's
4 conversion, was simply reporting a rumor that he had heard,
5 correct?

6 A I believe that that's my best recollection is that
7 he had heard a rumor or rumors.

8 Q And that your best recollection of what he said
9 with respect to Al Qaeda was that it was possible that
10 Calloway may be communicating in some fashion with Al Qaeda?

11 A That sounds like a fair description.

12 Q Okay.

13 A That wasn't all I said, but it was accurate.

14 Q No one at FedEx engaged in any research regarding
15 Captain Estabrook's past working relationship with Calloway,
16 correct?

17 A I can only tell you what I know. I don't know
18 what other people did.

19 Q Okay.

20 A I did not.

21 Q You did not. And you don't know of anybody else
22 who did?

23 A I do not.

24 Q And is it fair to say that the Calloway incident
25 has had an enduring impact on FedEx operations?

1 A Sure.

2 Q Is it true that the Calloway incident still comes
3 up in response to questions about policies that are in
4 effect as a result of that hijacking?

5 A Yes.

6 Q And the Calloway incident has had a continuing
7 effect with respect to how much security there is around
8 FedEx as an enterprise, correct?

9 A Well, that's my impression. I wasn't here until
10 2006, so I don't really have a before-and-after perspective.
11 But that's my impression.

12 Q Now, at the August 9th meeting, Captain Estabrook
13 expressed his concern about the ability of terrorists to
14 know when a package leaves and when it arrives at an
15 airport, correct?

16 A I don't recall the details. I know he was
17 concerned about flight times. Subsequently, I have been
18 reminded that he was concerned about package tracking data.
19 I don't remember being able to understand the difference at
20 this meeting between what his concerns were and what those
21 two different kinds of information on the internet might be.
22 I was leaving that up to Todd Ondra to parse through and
23 understand.

24 Q You can turn to -- and this may be close to what
25 you said, but I do want to nail this down. On page 71 of

1 complainant's exhibit CX-49 for identification purposes
2 only, page 71 towards the top at line 3 states, "He talked
3 about the ability of terrorists to know when a package
4 leaves and when it arrives, and that's what I recall." So
5 did Captain Estabrook make comments to that effect on August
6 9th?

7 A I think that's basically what I said before.

8 Q Well, whether it was or not, I'm asking you, did
9 he make comments to that effect?

10 A Well, you read my testimony correctly from back
11 then.

12 Q All I'm asking --

13 A But the question was a little different than that.
14 I didn't --

15 Q All I'm asking you, is that truthful testimony
16 that you gave there?

17 A Oh, yes.

18 Q Okay, that's all. Under what circumstances would
19 you expect a pilot to bring union representation to a
20 meeting with management representatives?

21 A Certainly in the context of a disciplinary
22 investigation, but anytime the pilot felt that he would want
23 to have the advice and support of a union representative in
24 a meeting.

25 Q I'm going to refer you to page 74 of your

1 deposition transcript, March 24th, 2016. Starting at line
2 18, "What are the circumstances under which you would expect
3 a pilot to bring union representatives to a meeting with
4 management representatives?"

5 Answer, "If it was a disciplinary meeting, I would
6 expect that there would be a union representative present."

7 Question, "Okay, thank you. Any other circumstances that
8 occur to you?" "You're kind of asking me to free-associate.
9 I can't think of anything." Was that your testimony during
10 your deposition?

11 A You read that accurately.

12 Q And were you testifying truthfully to the best of
13 your ability at that time?

14 A Certainly.

15 Q And at that time you truly could not think of any
16 other reason for a pilot to bring a union representative to
17 a meeting?

18 A If I could have, I would have.

19 MR. SEHAM: I have no further questions.

20 JUDGE MORRIS: Counsel?

21 **REDIRECT EXAMINATION OF**

22 **ROB TICE**

23 BY MR. TADLOCK:

24 Q Was this a disciplinary meeting?

25 A No.

1 Q Did you ask whether Captain Estabrook wanted
2 counsel to be -- or, union representation to be present at
3 the meeting?

4 A I had discussions with the Air Line Pilots
5 Association legal staff about trying to schedule the
6 meeting, which I assumed that they would be attending, and
7 it wasn't until later on I learned that Captain Estabrook
8 said he didn't want union representation. So that's the way
9 it happened.

10 Q So is it the case you understand that there may be
11 non-disciplinary meetings where union representation --

12 MR. SEHAM: Objection, mind-reading.

13 JUDGE MORRIS: Overruled.

14 THE WITNESS: This was a meeting asked for by
15 Captain Estabrook. It was not a disciplinary meeting. As a
16 matter of courtesy to the union, I didn't want to have a
17 scheduling issue in case he expected there would be a union
18 rep present.

19 So I took the initiative to try to work with
20 ALPA's scheduling folks, because they aren't always as
21 available as I would like them to be, and I'm sure I'm not
22 as available as they would like me to be. And I was
23 mistaken, that he didn't want union representation present,
24 and I let ALPA know. And there was an e-mail to that
25 effect.

1 MR. TADLOCK: I have no further questions.

2 JUDGE MORRIS: Anything further?

3 **RECROSS EXAMINATION OF**

4 **ROB TICE**

5 BY MR. SEHAM:

6 Q Mr. Tice, Captain Estabrook never asked for a
7 meeting, did he?

8 A That's true. I felt like -- or, my impression was
9 he wanted to talk to someone in the company and he wasn't
10 going to talk to Fred Smith, according to the decisions made
11 by people above my pay grade. So we accommodated him, and
12 he agreed to come to a meeting.

13 MR. SEHAM: No further questions.

14 JUDGE MORRIS: Sir, concerning the 15D process,
15 what are the options for an employee if they determine or
16 believe -- correctly or incorrectly -- that the basis for
17 the evaluation is not a reasonable basis? What are their
18 options?

19 THE WITNESS: Well, I would think under the
20 Railway Labor Act they would be in an obey-now-grieve-later
21 status. And, as a practical matter, this is the first one
22 that's ever happened, so I don't know what options there
23 might be other than obey-now-grieve-later.

24 JUDGE MORRIS: Okay.

25 THE WITNESS: We certainly engage in lots of

1 conversations with the certified bargaining rep about 15D
2 exams and evaluations. So that process, in the ordinary
3 course, usually resolves the issue, and we usually go right
4 to a 15D and deal with the medical issue, not a legal issue
5 out of it.

6 JUDGE MORRIS: So, if an employee refuses, then,
7 to take a medical evaluation because it does not believe
8 that the company has a reasonable basis, is that a separate
9 basis for disciplinary action and/or termination?

10 THE WITNESS: I think the form letter actually has
11 a tag line at the end that there can be disciplinary
12 consequences for not following through on the direction.

13 JUDGE MORRIS: If the company never states what
14 the reasonable basis is, how is a pilot able to know so he
15 can make a determination on whether or not the company's
16 action is reasonable in the first place?

17 THE WITNESS: The contract doesn't address that
18 issue, I don't think.

19 JUDGE MORRIS: Does Mr. Smith have an open-door
20 policy?

21 THE WITNESS: I have no idea. I have seen him,
22 never spoken to him, never talked to him.

23 JUDGE MORRIS: Does Mr. Smith prefer to be called
24 Mr. Smith, Fred, you know, Mr. FedEx? What does he --

25 THE WITNESS: I have only been here since 2006,

1 and I have not heard any of the lore over that repeated
2 while I'm here. So I don't know.

3 JUDGE MORRIS: Those are the questions I have.
4 Questions based on mine?

5 MR. TADLOCK: No further questions.

6 MR. SEHAM: No further questions.

7 JUDGE MORRIS: All right. Thank you, sir.

8 THE WITNESS: Thank you.

9 JUDGE MORRIS: You're dismissed.

10 [WHEREUPON, witness Rob Tice was
11 excused.]

12 JUDGE MORRIS: And then I have some procedural
13 matters to talk with counsel. All right, so we're clear,
14 it's my understanding that respondent's counsel is going to
15 produce for my *in camera* inspection tomorrow the e-mails
16 that we have addressed previously, is that correct?

17 MR. RIEDERER: Correct.

18 JUDGE MORRIS: I intend -- go ahead.

19 MR. TADLOCK: Just so we're totally clear, can you
20 once identify on the privilege log? I'm not sure that we --

21 MR. SEHAM: Tab 11.

22 MR. TADLOCK: Just tab 11?

23 JUDGE MORRIS: Tab 11 only.

24 MR. TADLOCK: Okay.

25 JUDGE MORRIS: As well as, if it's not the same e-

1 mail, the e-mail he was addressing with the VP.

2 MR. RIEDERER: Right. I understand.

3 JUDGE MORRIS: I will tell you right now, I will
4 look at it. If I conclude that it's privileged, I am going
5 to return it and not include it in the record, okay? If I
6 have a question, I am going to retain it in an envelope so I
7 can do some further research.

8 So, if it's clear to me it's coming right back to
9 you. If I have some questions or concerns I'm going to
10 retain it for further deliberation, and then, if I
11 subsequently decide that it's not, I will return it to the
12 company, all right? That's my course of action. Counsel?

13 MR. SEHAM: Yes. With all due respect, I'd like
14 to inquire on behalf of the complainant the basis for
15 overruling -- the tribunal overruling the respondent's
16 objections with respect to the testimony concerning his
17 exchange with Captain Bowman.

18 And the reason I make that request is, it has been
19 our position all along that any correspondence in which Mr.
20 Tice was involved in this process should have been produced
21 to us because he was a decision-maker. And we cited case
22 law, and I can reproduce those briefs for you if you have
23 any interest.

24 But it was always a source of great frustration to
25 us that he was identified as one of the NOQ decision-makers

1 of August 5th, and yet -- and there's all this
2 correspondence during this period flying around, and,
3 frankly, we could find no -- we didn't receive any documents
4 in discovery that discussed the decision process during that
5 time of August 5th -- August 4th, August 5th -- up through
6 the 9th. So that's why I am deferentially requesting if we
7 could get a nicer understanding of the tribunal's decision
8 and whether that might impact some of the other privilege
9 documents.

10 JUDGE MORRIS: Yeah. I can envision -- or, I see
11 thus far where Mr. Tice could be both. At one point, in one
12 moment in time, he could be acting as a lawyer, and at
13 another moment in time he could be acting as a decision-
14 maker. It may not be the best situation for the respondent,
15 but I can envision how that's possible.

16 And so I am seeing a challenge that the
17 respondents -- and, frankly, the complainants -- have in
18 parceling out what would be considered privileged and what
19 would not be considered privileged information. I don't
20 have enough fidelity or visibility right now on exactly the
21 extent of his role in the decision-making process to
22 conclude a waiver of the attorney-client privilege. That
23 privilege is one of the most sacred privileges in our
24 judicial system. I will guard it zealously. But if in fact
25 it's waived, it's waived.

1 So that's kind of where we are. I have some great
2 trepidations about the attorney-client privilege and waiver.
3 That doesn't mean it hasn't occurred. And that also
4 doesn't mean that he wasn't acting in that role as an
5 advisor at one point in time and the decision-maker at
6 another point in time.

7 I don't know where that point is, from what I've
8 heard so far. Now, in fairness, I was not involved. The
9 prior Judge was involved in the discovery process and the
10 discovery disputes associated with that. I have asked my
11 law clerk to try and e-mail me tonight Judge Sellers' prior
12 order to get a better feel for what's going on.

13 I am separately concerned about the fact that, as
14 I understand it, as I understand it thus far, it should have
15 been identified in interrogatory number 6 and was not. So,
16 separate and apart from that, I have some concerns about the
17 discovery process. I don't have any information this was
18 intentional.

19 But at least at this point -- now, complainant's
20 counsel, if you've got evidence of that, that raises a whole
21 separate can of worms as to what remedy would be available
22 to you by not being provided that information. That's why
23 I'm willing to talk about post-hearing deposition and maybe
24 even keeping the hearing record open for purposes of
25 eliciting additional testimony. The good thing is, it's a

1 little after 3:00, you've got some time to chew on this, to
2 tell me tomorrow your thoughts on that.

3 MR. SEHAM: I would only -- as you go into this --
4 I don't know if we're going to have any colloquy before you
5 make this review, but certainly it might be highly probative
6 of whether there was withholding of evidence and some
7 intentionality.

8 If Bowman's participation is reflected in these
9 documents, whether or not we get them, it seems like the
10 tribunal is going to have a lot of insight as to the
11 intentionality of withholding the information, because
12 obviously key attorneys prepared this privilege log. And it
13 would be the same attorneys who were preparing the
14 interrogatory responses.

15 JUDGE MORRIS: Well, be that as it may, I want to
16 see the evidence before I even think about the way ahead.

17 MR. SEHAM: Uh-huh.

18 JUDGE MORRIS: So, if you can produce that stuff
19 for me tomorrow, things that involve the privilege log,
20 privileged e-mails involving Mr. Bowman and the e-mail that
21 Mr. Tice was referring to, if it's any different from that,
22 okay? Are there any other matters we need to discuss on the
23 record?

24 MR. SEHAM: None that occur to me at the time.
25 Our start time is 9:00 tomorrow?

1 JUDGE MORRIS: Yes, and we're going to be in the
2 ninth floor courtroom, Judge Fowlkes's courtroom. I will
3 secure this room, so you may leave all of your stuff here,
4 so all we have to do is do the group huddle in the elevator
5 in the way down.

6 MR. SEHAM: My client is whispering in my ear. I
7 presume that also, as they review correspondence, the
8 respondent's comes across any e-mails with Bowman and anyone
9 else concerning this matter, that those would also be
10 produced?

11 JUDGE MORRIS: They are under an affirmative
12 obligation. And I am sure at this point they would know the
13 consequences if they didn't.

14 MR. RIEDERER: Thank you.

15 JUDGE MORRIS: Anything else?

16 MR. SEHAM: No, Your Honor.

17 JUDGE MORRIS: This hearing is in recess until
18 tomorrow morning at 9:00.

19 [WHEREUPON, the proceedings were
20 concluded for the day at 3:05 p.m.]

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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

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