No. 19-60716

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK ESTABROOK,
Petitioner,
v.
ADMINISTRATIVE REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR
Respondent,
and
FEDERAL EXPRESS CORPORATION,
Intervenor.

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

On Petition for Review of the Final Decision and Order of
the United States Department of Labor's Administrative Review Board, before
Honorable William T. Barto, James A. Haynes, and Daniel T. Gresh,
Administrative Appeals Judges, ARB No. 2017-0047

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Mark Estabrook, Petitioner
2. Federal Express Corporation, Intervenor
3. Lee Seham, Counsel for Petitioner
4. Stanley Silverstone, Counsel for Petitioner
5. Seham, Seham, Meltz & Petersen, LLP, Counsel for Petitioner
6. Daniel Riederer, Counsel for Intervenor Federal Express Corporation

7. Phil Tadlock, Counsel for Intervenor Federal Express Corporation

8. Kate S. O'Scannlain, Jennifer S. Brand, Sarah K. Marcus, Megan E. Guenther, and Shelley E. Trautman, Counsel for Respondent

/s/ Shelley E. Trautman
SHELLEY E. TRAUTMAN

Attorney of Record for Respondent,
Secretary of Labor

STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary in this matter because the issues may be resolved based on the briefs submitted by the parties.

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RESPONSE BRIEF FOR THE SECRETARY OF LABOR

On behalf of Respondent Administrative Review Board, U.S. Department of Labor, the Secretary of Labor ("Secretary") submits this response to the brief of Petitioner Mark Estabrook ("Estabrook" or "Petitioner").

JURISDICTIONAL STATEMENT

The whistleblower provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act"), 49 U.S.C. 42121, conferred subject matter jurisdiction upon the Secretary of Labor ("Secretary")

over this case, which Petitioner Mark Estabrook initiated by filing a complaint against Federal Express Corporation ("Fed Ex") with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA").[1] This Court has jurisdiction to review the final order of the Secretary under AIR 21. *See* 49 U.S.C. 42121(b)(4)(A). The Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order on August 8, 2019.[2] Estabrook filed a timely petition for review with this Court on September 24, 2019. This Court has jurisdiction to review the ARB's Final Decision and Order because Petitioner Estabrook resided in this circuit on the dates of the alleged violations of AIR 21. *See* 49 U.S.C. 42121(b)(4)(A).

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the determination of the ALJ, as affirmed by the Board, that Estabrook did not establish that he engaged in protected activity under 49 U.S.C. 42121 when he expressed concerns regarding the publishing of certain flight and package tracking information because he did

[1] Congress has granted the Secretary the authority to administer AIR 21 through adjudication. The Secretary has delegated the authority and assigned the responsibility to investigate whistleblower complaints under AIR 21 to OSHA. *See* Secretary's Order No. 01-2012 (Jan. 25, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012); *see also* 29 C.F.R. 1979.103-.105.

[2] The Secretary has delegated the authority to issue final agency decisions in cases arising under AIR 21 to the ARB. *See* Secretary's Order No. 01-2019 (April 3, 2019), 84 Fed. Reg. 13,072 (April 3, 2019); *see also* 29 C.F.R. 1979.110(a).

not have an objectively reasonable belief that FedEx was violating a Federal Aviation Authority ("FAA") rule or any other federal law relating to air carrier safety.

2. Whether substantial evidence supports the determination of the Administrative Law Judge ("ALJ"), as affirmed by the Board, that Estabrook failed to establish that his AIR 21-protected activity was a contributing factor in FedEx's decision to ground him from flying ("Not Operationally Qualified" status) or to require him to undergo a "15D" medical evaluation.

3. Whether substantial evidence supports the determination of the ALJ, as affirmed by the Board, that FedEx did not waive its claim of attorney-client privilege to the contents of FedEx emails when a FedEx attorney testified as a fact witness at the administrative hearing and FedEx objected to any testimony that disclosed privileged attorney-client communications.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case arises under the employee protection provision ("whistleblower") provision of AIR 21, which protects employees who provide information to an employer or the federal government that they reasonably believe relates to a violation, or alleged violation, of any order, regulation or standard of the Federal Aviation Administration ("FAA"). *See* 49 U.S.C. 42121(a)(1). A covered

employer may not discriminate against an employee because he engages in protected activity. *See* 49 U.S.C. 42121(a)(1)-(2). An employee who believes that he has been retaliated against in violation of AIR 21 may file a complaint alleging such retaliation with the Secretary through OSHA. *See* 49 U.S.C. 42121(b)(1); 29 C.F.R. 1979.103. On April 29, 2013, Estabrook filed such a complaint with OSHA; however, the complaint was withdrawn on May 2, 2013. CX 9.[3]

Estabrook filed a second complaint with OSHA on October 3, 2013 alleging that he was retaliated against for raising air transportation safety concerns. CL 1 at 1-3. On July 15, 2014, OSHA found that it did not have reasonable cause to believe that an AIR 21 violation occurred and dismissed Estabrook's complaint. CL 2. Estabrook filed timely objections to OSHA's findings and requested a hearing before the Department's Office of Administrative Law Judges ("OALJ") on the merits of his claim. CL 3. On May 9, 2016 ALJ Scott R. Morris held that Estabrook was entitled to judgment as a matter of law that he engaged in protected

[3] References to the documents in the certified list of documents filed with this Court by the ARB are indicated by the abbreviation "CL" and the document number in the certified list. "JX" refers to the joint exhibits filed by Estabrook and FedEx with the ALJ. "CX" refers to the exhibits filed by Estabrook with the ALJ. "RX" refers to the exhibits filed by FedEx with the ALJ. "Tr." refers to the transcript of the proceedings before the ALJ. References to the ALJ's Decision and Order are indicated by "D&O" followed by the page number. References to the ARB's Final Decision and Order are indicated by "FDO" followed by the page number. References to Estabrook's brief filed with this Court are noted as "Pet. Br."

activity when (1) he refused to fly because of hazardous weather conditions on April 10, 2013 and (2) when he filed his April 29, 2013 OSHA complaint. CL 49. ALJ Morris also held that Estabrook was entitled to judgment as a matter of law that he was subjected to adverse actions when he was (1) placed on not operationally qualified ("NOQ") status on August 5, 2013, (2) when NOQ status was reinstated on August 9, 2013, and (3) when he was compelled to submit to a "15D" medical evaluation. *Id*. A hearing was held before ALJ Morris on June 6-8, 2016. CL 60-62.

On May 16, 2017, ALJ Morris issued a Decision and Order ("D&O") in which the ALJ concluded that while Estabrook engaged in protected activities and suffered adverse actions, he failed to show that his protected activity was a contributing factor in those adverse actions. D&O 52-62. Further, the ALJ held that Estabrook's August 9, 2013 concerns regarding the publishing of certain flight and package tracking information was not protected activity because Estabrook did not have an objectively reasonable belief that FedEx was violating an FAA rule or any other federal law relating to air carrier safety. D&O 49.

Estabrook filed a timely petition for review of the ALJ D&O with the ARB on May 26, 2017. CL 70. On August 8, 2019, the ARB issued a Final Decision and Order ("FDO") affirming the ALJ's decision. CL 75. Estabrook filed a timely Petition for Review with this Court on September 24, 2019.

B. Statement of Facts[4]

a. Estabrook's Employment History

Estabrook began working as a pilot for FedEx in 1989. CL 49. In approximately 2001 through 2002, Estabrook served as the head of the FedEx Pilots Association ("FPA") security committee, during which time he raised security concerns to FedEx senior executives, the FAA Administrator, and the Airline Pilots' Association ("ALPA") regarding the publication of certain package and flight tracking data. Tr. 41-42; JX 7; CL 1 at 3. During the relevant period, Estabrook reported to Fleet Captain Rob Fisher, who reported to System Chief Pilot William "Bill" McDonald. CL 49 at 3.

b. April 10, 2013 Laredo, Texas Flight

On April 10, 2013, Estabrook was scheduled to captain a flight from Laredo, Texas to Memphis, Tennessee. D&O 4. While still at the hotel, Estabrook learned of a line of thunderstorms between the two locations. D&O 4. From his hotel, Estabrook watched the weather and called the FedEx Global Operations Center dispatcher, who recommended another route around the storm. *Id*. According to Estabrook, after further discussion, the consensus reached between the two was that Estabrook was not going to fly according to the original flight time and was to

[4] Unless otherwise indicated, this statement of facts is based on the facts as determined by the ALJ.

wait out the storm. *Id*. Estabrook understood this to mean that he was authorized to stay at the hotel. Tr. 350.

The Dispatch Duty Officer, Mark Crook, received a call from personnel at the Laredo airport that a FedEx flight crew assigned to a flight scheduled to depart soon was not at the airport. Tr. 248-249. Crook called Estabrook, the pilot assigned to the flight, and discussed the weather and the flight. Tr. 69. During the evening, Estabrook spoke with Crook on the phone multiple times. Tr. 73. Some of their conversations were recorded and some were not. Tr. 277. According to Estabrook, he felt pressured, or "pilot pushed," to fly through the storm to Memphis. Tr. 73. Crook denied pressuring Estabrook to fly despite the weather, but he admitted to telling Estabrook that he needed to be at the Laredo airport and not at his hotel. Tr. 273. According to Crook's testimony, his concern was Estabrook's nonappearance at the airport, not his refusal to fly into bad weather. Tr. 257-258.

Following this incident, an investigation in accordance with the collective bargaining agreement was authorized by Bill McDonald, Estabrook's second line supervisor, in order to investigate the facts as to why Estabrook reported to the airport late. CX 6; JX 2. After learning about this investigation, Estabrook filed an AIR 21 complaint with OSHA on April 29, 2013. CX 8. Rob Fisher, Estabrook's immediate supervisor, conducted an investigative meeting with

Estabrook on May 1, 2013. JX 2. Concluding that the Laredo incident had occurred due to miscommunication, Fisher notified Estabrook at this meeting that FedEx would not take any disciplinary action against him. Tr. 137; 314. Estabrook subsequently withdrew the April 29, 2013 OSHA complaint on May 2, 2013. CX 9.

c. August 4, 2013 Email and Estabrook's NOQ Status

Approximately three months later, on August 4, 2013, Estabrook sent an email to McDonald requesting that McDonald set up a phone call between himself and FedEx Chairman and CEO, Fred Smith, to discuss "something related to 9-11." Tr. 34; CX 11. The email states:

> I need to talk to Fred. It has nothing to do with Flight Ops or you. It deals with something related to 9-11. I did my best to protect the company and reported as much as I could through Bill Henrickson when I was the Security Chairman at ALPA. Ask Fred to call me on my cell but realize I turn it off when I sleep. I am about to close my eyes and call it a day.

CX 11.

McDonald responded to Estabrook in an email, stating that he had "some concerns with the issue [Estabrook] raised" and requested that Estabrook meet with Fisher and Director of Corporate Security, Todd Ondra. CX 11. McDonald also told Estabrook in this email that Estabrook was removed from flight status with pay, otherwise known as Not Operationally Qualified ("NOQ") status, until that meeting could occur. *Id*. NOQ status takes pilots off of flight duty status for

various reasons, including to facilitate a meeting or to address the pilot's fitness for duty. D&O 8; Tr. 322-323; 368.

d. August 9, 2013 Meeting

A meeting between Estabrook, Ondra, Fisher, and FedEx Attorney Rob Tice occurred on August 9, 2013. D&O 9; CX 11. Before the meeting, McDonald became aware of online postings on a pilot group internet forum from a person who called himself "Mayday Mark." Tr. 699; CX 21. "Mayday Mark's" July 28-August 5, 2013 discussion thread discussed a sleep survey, pilot fatigue, and airline management. CX 21. Because some of the posts specifically mentioned FedEx management and because the facts resembled the Laredo incident, McDonald told Attorney Tice that he wanted to know whether Estabrook was actually "Mayday Mark." Tr. 700-703.

During the August 9, 2013 meeting, Estabrook discussed his concerns regarding the publication of package and flight tracking data and how FedEx was not deterring Al Qaeda and terrorists in general from using this data to place bombs on FedEx aircraft. Tr. 88; 433. Estabrook stated that he had read news articles leading up to his August 4, 2013 email that he believed validated his concerns. D&O 6-7. Estabrook told the meeting attendees that he wanted the publishing of tracking information stopped. *Id*. at 9.

Estabrook also stated during the meeting that he had heard a rumor that Auburn Calloway, a former FedEx pilot, had converted to Islam and might be communicating with Al Qaeda from prison. D&O 26; Tr. 153; 324; 433. Calloway had attempted to hijack a FedEx flight in 1994 and has been imprisoned ever since. D&O 4. Estabrook and Calloway were hired at FedEx in the same class and were study partners. Tr. 96. Because of Calloway's alleged conversion to Islam, Estabrook recommended during the meeting that FedEx approach federal authorities to set up listening devices in Calloway's jail cell. D&O 13 (citing Tr. at 153).

During the meeting, Attorney Tice asked Estabrook whether he was "Mayday Mark;" however, Estabrook denied that he was "Mayday Mark." Tr. 434; 436. Ondra left the meeting early before the discussion on "Mayday Mark." D&O 23; Tr. 434. After this discussion, Attorney Tice believed that Estabrook was telling the truth and that he was not "Mayday Mark." D&O 23.

e. NOQ Status Removal and Subsequent Reinstatement

At the end of the August 9, 2013 meeting, Fisher told Estabrook that he was removed from NOQ status. D&O 21; Tr. 328; 437. Later that day, Ondra contacted McDonald, who had not been at the meeting, to let McDonald know that he had concerns about Estabrook and his ability to operate an aircraft based on what he had heard at the meeting. Tr. 554. Because Ondra had left the meeting

before it was determined that Estabrook was not "Mayday Mark," Ondra was not aware of this fact and therefore could not relay it to McDonald. D&O 55. Ondra recommended that some kind of medical evaluation of Estabrook occur; McDonald deferred to Ondra's judgment due to Ondra's sensitive position at FedEx and his responsibility for the security and safety of FedEx's system. Tr. 555; 645.

Ondra called Attorney Tice and asked if there were a mechanism under the collective bargaining agreement to have Estabrook "checked out." Tr. 437. Attorney Tice then called Fisher and told him to place Estabrook back on NOQ status based on Ondra's recommendation. Tr. 328. Immediately after this, McDonald instructed Fisher to prepare a "15D" notification for Estabrook. Tr. 646. "15D" refers to a provision of the contract between FedEx and the pilot's union. JX 6; D&O 10. The provision allows the Vice President of Flight Operations, the System Chief Pilot, a Regional Chief Pilot, or a Chief Pilot to direct a pilot to contact or see FedEx's aeromedical advisor if FedEx has a reasonable basis to question whether a pilot has developed or recovered from an impairment to his ability to perform his duties as a pilot. JX 6; Tr. 635.

On August 9, 2013, after speaking with McDonald, Fisher notified Estabrook that he was placed back on NOQ status and that he must see an aeromedical advisor. Tr. 330-331. At the time of this call, Fisher was not completely convinced that reinstating NOQ status was an appropriate action to

take. D&O 21. Fisher also acknowledged that he told Estabrook during this phone call that the reason for this action was that "[Estabrook] knew too much." Tr. 330; D&O 58. However, he later described this statement as "a regrettable comment" made at "the end of a very long and exhausting day." *Id*.

On August 16, 2013, Fisher sent Estabrook a "15D" notification letter, which directed Estabrook to contact Dr. Thomas Bettes, FedEx's aeromedical advisor, for a medical evaluation. JX 5. The letter stated that FedEx had a reasonable basis to question whether Estabrook had developed an impairment to his ability to perform duties as a pilot. *Id*. The letter also stated that Estabrook was removed from any conflicting activities with pay until the advisor determined that he was fit for duty. *Id*. FedEx normally discloses the alleged reasonable basis to the pilot's union when a pilot is referred to a 15D evaluation. D&O 24. However, when asked in writing by Estabrook's attorneys for FedEx's reasonable basis for the 15D evaluation, FedEx did not respond because the requests came from Estabrook's attorneys and not from a union lawyer. D&O 56-57.

Upon receiving the referral, Dr. Bettes, the Aeromedical Advisor, asked FedEx for its basis for the referral. D&O 57. Fisher and Attorney Tice jointly prepared a response for Dr. Bettes. D&O 32. In the document, Fisher cited Estabrook's "strange" request to have FedEx's CEO call him about something to do with 9-11, Estabrook's reference to former FedEx pilot, Auburn Calloway, and

Estabrook's statements about security concerns relating to Al Qaeda as reasons for the evaluation request. RX-15. Fisher further stated that "[l]argely at Mr. Ondra's urging, FedEx Express Flight Management has determined that in the interest of flight safety, Captain Estabrook should be referred to the FedEx Express aeromedical advisor for an evaluation of his fitness for duty." *Id*.

Dr. Bettes conducted an initial evaluation of Estabrook and then referred him to a psychiatrist, Dr. Glass. RX 20; RX 21. Based on Dr. Glass' report, Dr. Bettes concluded that Estabrook was unfit to fly. RX 16. Estabrook disputed this finding and submitted a second opinion from a different physician who disagreed with Dr. Bettes' conclusion. RX 6. In accordance with the Collective Bargaining Agreement, Estabrook was then referred to a third "tie-breaking" evaluation. RX 4. The third physician concluded that Estabrook was capable to return to flight status from a psychological standpoint. *Id*. On October 30, 2013, Dr. Bettes reversed his decision and concluded that, based on the second and third physician reports, Estabrook was fit to fly. RX 23. FedEx returned Estabrook to flight duty the same day. RX 24.

C. Proceedings before the ALJ and Decision of the ALJ

Prior to hearing, on May 9, 2016, the ALJ granted in part a motion for Summary Decision filed by Estabrook holding as a matter of law that Estabrook engaged in protected activity when (1) he refused to fly from Laredo, Texas

because of hazardous weather conditions on April 10, 2013 and (2) when he filed his April 29, 2013 OSHA complaint. CL 49 at 16. The ALJ noted that it was well-established that a pilot's refusal to fly in bad weather and the filing of a retaliation complaint are protected activities. *Id*. The ALJ also held as a matter of law that Estabrook was subjected to adverse actions when he was (1) placed on NOQ status, (2) when NOQ status was reinstated, and (3) when he was compelled to submit to a 15D medical evaluation. *Id*. In reaching these conclusions, the ALJ reasoned that NOQ status affected the terms, conditions, or privileges of Estabrook's employment because he was removed from service as a pilot and lost jumpseat privileges and that this, coupled with the 15D medical evaluation, essentially amounted to employer warnings about performance issues. *Id*. at 22.

Incorporating this reasoning, after considering the testimony at the three day hearing and weighing the documentary evidence, the ALJ issued his D&O on May 16, 2017, concluding that Estabrook engaged in protected activity and was subject to adverse actions but failed to establish that the protected activity was a contributing factor to the adverse actions. D&O 62. The ALJ also concluded that Estabrook did not demonstrate by a preponderance of evidence that his August 4, 2013 email and August 9, 2013 communications concerning improving FedEx's security of its aircraft were protected activities. *Id*. at 50. The ALJ found that, while AIR 21 extends to aviation security matters, Estabrook did not reasonably

believe that the publishing of package and flight tracking data were violations of aviation security laws or any other federal law relating to air carrier safety; therefore, his communications were not protected by AIR 21. D&O 48-49.

The ALJ reasoned that Estabrook did not have a subjective belief that publishing tracking data was related to a violation of air carrier safety law because he was essentially raising an issue that could potentially *improve* air carrier safety, which is not the same as raising an issue about a *violation* of an aviation safety law or regulation. *Id*. at 49. In addition, the ALJ found that, despite the fact that Estabrook described his communications as an effort to force FedEx to fulfill its legal obligations to prevent and deter the introduction of explosive devices into cargo aircraft, Estabrook failed to articulate how FedEx failed to fulfill its obligations in the first place. *Id.*

The ALJ also noted that Estabrook clearly knew as far back as 2001 that FedEx had not removed public access of certain package tracking data and that the FAA, Transportation Security Administration ("TSA"), or some other federal agency had not alerted FedEx that such disclosure constituted a violation. D&O 49. Further, FedEx presented evidence that the FAA actually *requires* FedEx to transmit certain tracking data and that FedEx cannot control the distribution of that information thereafter. *Id.* (citing Tr. 142-44; 534-35; and CX-44).

In reaching this conclusion, the ALJ relied in part on Ondra's testimony regarding the tracking data available to the public. D&O at 49 (citing Tr. 142-44; 534-35; and CX-44). Ondra testified that FedEx does not publish flight tracking data. Tr. 535-36. Instead, the FAA collects real-time flight tracking data from all airlines operating within the United States and the FAA, not FedEx, releases the data to third parties and the public. D&O 25 (citing Tr. 535-36). In addition, Ondra testified that the package tracking information that FedEx disseminates does not disclose information about the flights or trucks that carry a given package. *Id*. (citing Tr. at 535).

In short, the ALJ found that Estabrook's concerns were not objectively reasonable because public availability of package and flight tracking is well known to the general public, and should be especially well known to a pilot of Estabrook's stature and experience. D&O 49-50. The ALJ also found that Estabrook's concerns were objectively unreasonable because if such practices represented a violation of FAA or TSA regulations, those agencies charged with aviation safety and security oversight would have addressed the matter. D&O at 50.

Because the ALJ held that Estabrook's August 4, 2013 and August 9, 2013 communications concerning improving FedEx's security were not protected activities, the ALJ evaluated whether Estabrook's actual protected activities—his April 10, 2013 refusal to fly and his April 29, 2013 OSHA complaint—were

contributing factors to the August 5, 2013 initial NOQ status designation, the August 9, 2013 subsequent NOQ status reinstatement, and the 15D evaluation process that began on August 16, 2013. D&O 52. The ALJ held that these protected activities were not contributing factors to the adverse actions. *Id*.

The ALJ considered Estabrook's argument that the temporal proximity between the April 10, 2013 refusal to fly and the August 2013 adverse actions created an inference that linked the events. D&O 52. However, the ALJ found that this contention ignored the intervening events that occurred on August 4, 2013 (Estabrook's email to McDonald) and August 9, 2013 (the meeting where Estabrook expressed his concerns about tracking data, Al Qaeda, and Auburn Calloway) that prompted the NOQs and the 15D evaluation process. D&O 52.

The ALJ found that the evidence showed that FedEx management did not have an issue with Estabrook's April 10, 2013 refusal to fly; instead, management's issue was Estabrook's failure to arrive at the airport at his scheduled time, which differs from Estabrook's protected activity of refusing to fly. D&O 53. The ALJ reasoned that there was little evidence, if any, that the August 2013 adverse actions related to Estabrook's refusal to fly and April 29, 2013 OSHA complaint. *Id*. The ALJ noted that Estabrook's argument that McDonald was angry at Estabrook for not being disciplined was tenuous at best because the evidence overwhelmingly showed that the NOQ status and 15D evaluation process

stemmed from Estabrook's August 4, 2013 email and the August 9, 2013 meeting. *Id*.

In reaching this conclusion, the ALJ determined that there was no evidence that FedEx's use of NOQ status represented an attempt to punish or harass Estabrook and that it was quite reasonable that FedEx's chain of command would want to evaluate Estabrook's concerns to determine whether they merited the attention of the CEO. D&O 53-54. Additionally, the ALJ determined that McDonald had non-retaliatory reasons to question Estabrook's fitness, despite the fact that the ALJ found it troubling that FedEx withheld its reasonable basis for the 15D evaluation, that McDonald made the 15D evaluation decision based on what the ALJ concluded was incomplete information, and that McDonald deferred to the recommendation of Ondra, who the ALJ believed was not entirely credible due to his contradicting testimony. D&O 55-56; 61. The ALJ reasoned that any responsible operator must err on the side of safety in the world of aviation and that McDonald's deference to the information provided by the Director of Security was not unreasonable. D&O 61. Describing FedEx's actions as more of an overreaction to Estabrook's comments in a hyper-vigilant atmosphere than any type of animus towards Estabrook, the ALJ concluded that Estabrook did not demonstrate any link between his April 2013 protected activity and the August 2013 adverse actions. D&O 61-62.

In reaching these conclusions, the ALJ conducted a detailed analysis of the credibility of each witness who testified at trial and the documentary and other evidence introduced at the hearing. The ALJ found that, in general, the witnesses were all equally credible. D&O 43. However, the ALJ gave Ondra's testimony regarding some of Estabrook's statements during the August 9, 2013 meeting very little weight, finding it inconceivable that Ondra would be the only meeting participant to remember certain topics that were discussed. *Id*. The ALJ also found McDonald's testimony on the issue of the purpose of the 15D evaluation not credible, reasoning that it was disingenuous to argue that FedEx made the referral for any other purpose than to seek a psychological evaluation. *Id*. at 44.

Finally, Attorney Tice, FedEx's lead labor relations lawyer, had testified as a fact witness during the ALJ hearing. Tr. 423-424. On cross-examination, Estabrook's attorney asked Tice the purpose of the August 9, 2013 meeting. Tr. 457. Tice answered partly by stating that "there were some concerns about whether [Estabrook] should be on the jumpseat."[5] *Id*. Estabrook's attorney then asked about these concerns, prompting FedEx's attorney to object to the extent that the testimony called for attorney-client privileged information. *Id*. The ALJ overruled FedEx's objections, leading to Tice's testimony that the Vice President

[5] "Jumpseat" refers to the seats FedEx pilots can use in the back of the plane where seats are available or seats in the cockpit. Tr. 367. NOQ status triggers the removal of jumpseat privileges as a cautionary action. D&O 21.

of Operations, James Bowman, had questioned in an email whether Estabrook should have jumpseat privileges. Tr. 457-458.

Because Tice admitted that he had forgotten about this email when answering interrogatories, Estabrook's attorney asked for the immediate production of Bowman's email. Tr. 461-463. FedEx's attorney again objected on the basis of attorney-client privilege. Tr. 463. The ALJ ordered that FedEx produce the documents for *in camera* inspection to determine whether they were covered by the attorney-client privilege and whether FedEx waived its privilege. Tr. 513-514; 523. After reviewing the documents, the ALJ held that the documents were either attorney-client privilege or work product information not subject to disclosure. Tr. 523.

D. The Board's Affirmance

In a *Per Curiam* decision, the Board affirmed the ALJ's D&O. The Board affirmed the ALJ's conclusions that Estabrook's April 10, 2013 refusal to fly was protected activity and that the NOQ designations and 15D evaluation directive were adverse actions, as FedEx did not challenge the ALJ's findings on those issues on appeal. FDO 7; 11.[6] The Board also affirmed the ALJ's conclusion that

[6] While the issue was not challenged by FedEx, the Board noted that an employer's directive to a pilot to undergo a psychological evaluation is not in and of itself an adverse action if it is not coupled with selective implementation or a retaliatory motive. FDO at 11.

Estabrook's April 2013 OSHA complaint was protected activity, noting that the filing of OSHA complaints claiming retaliation constitutes protected activity under 49 U.S.C. 42121(a)(4). *Id*. at 8.

The Board further affirmed the ALJ's conclusion that Estabrook's discussion of safety concerns regarding the publishing of tracking information during the August 9, 2013 meeting was not protected activity. *Id*. In reaching this conclusion, the Board agreed that Estabrook could not have had a reasonable belief that publishing low-level flight or tracking information constituted a violation of federal air carrier safety or security laws because it is an industry-wide practice and not prohibited. *Id*. at 10. The Board noted that, based on Board precedent, Estabrook's concerns became unreasonable when the FAA and other entities did not prohibit the publishing of tracking data when he raised the issues with them in 2001 and 2002. *Id*.

The Board also affirmed the ALJ's conclusion that Estabrook's OSHA complaint and refusal to fly were not contributing factors to his adverse actions, holding that the ALJ's findings were supported by substantial evidence. *Id*. at 12. The Board ruled that substantial evidence supported the ALJ's findings that there was no causal link between the April 2013 protected activities and the August 2013 adverse actions because of the intervening events of Estabrook's unusual behavior in August. *Id*.

The Board rejected Estabrook's argument that FedEx's treatment of the "Mayday Mark" postings provided a connection from his protected activity in April 2013 to the adverse actions in August 2013, finding that substantial evidence existed that there was no causal connection because FedEx accepted Estabrook's denial when he stated that he was not "Mayday Mark." *Id*. The Board then ruled that substantial evidence supported the ALJ's finding that the August 2013 NOQs and 15D examination stemmed from the August 4, 2013 email and August 9, 2013 meeting because the NOQs and 15D examination occurred immediately after the August 9, 2013 meeting and the strange behavior Estabrook exhibited. *Id*.

Finally, the Board held that the ALJ did not abuse his discretion in affirming FedEx's assertion of attorney-client privilege concerning emails connected with Attorney Tice's testimony. *Id*. at 13. Despite Estabrook's argument that FedEx had waived its privilege to the emails, the Board concluded that FedEx did not voluntarily waive its claim of privilege, as FedEx asserted privilege on two separate occasions during Attorney Tice's testimony. *Id*.

SUMMARY OF ARGUMENT

This Court should affirm the ALJ's decision, as affirmed by the Board. First, the Board correctly concluded that substantial evidence supports the ALJ's determination that Estabrook failed to establish that his statements regarding his concerns with the publishing of flight and package tracking data during the August

9, 2013 meeting were protected activity. This conclusion is supported by the ALJ's findings that Estabrook did not have a reasonable belief that the publishing of package and flight tracking data violated aviation security laws or any other federal law relating to air carrier safety. FedEx presented evidence that the FAA requires FedEx to transmit a certain level of tracking data. Moreover, Estabrook's stature and experience as a pilot were inconsistent with any reasonable belief that FedEx's actions violated air carrier safety law given that flight and package tracking is well known to the general public and that Estabrook had raised these same concerns with the FAA and FedEx management in 2001-2002 but the FAA had not prohibited the practice.

Second, the Board correctly concluded that substantial evidence supports the ALJ's determination that Estabrook failed to establish that his AIR 21-protected activity was a contributing factor in FedEx's decision to place him on NOQ status or to require him to undergo a 15D medical evaluation. Therefore, the Board properly concluded that Estabrook did not carry his burden of proving that FedEx retaliated against him in violation of AIR 21.

Specifically, Estabrook failed to prove by a preponderance of the evidence that his protected activity, i.e., his April 2013 refusal to fly and April 2013 OSHA complaint, contributed to FedEx's decision to place him on NOQ status or to require him to undergo a 15D medical evaluation. The ALJ's review of the

evidence showed that the NOQ status and 15D medical evaluation determinations were made solely because of Estabrook's "odd" email requesting a meeting with the FedEx CEO and the subsequent meeting where Estabrook made statements about terrorists using tracking data and about a former FedEx pilot who had attempted to hijack a FedEx plane. Notably, the NOQ status and 15D medical evaluation determinations occurred immediately after this email and meeting, demonstrating that these events triggered the NOQ statuses and 15D determinations and created reasonable and non-retaliatory reasons for FedEx to question Estabrook's fitness. Further, the ALJ reasonably found that any inference of causal connection created by the temporal proximity between Estabrook's April 2013 refusal to fly and corresponding OSHA complaint and the August 2013 NOQ status and 15D evaluation was overcome by the intervening events of Estabrook's email requesting a meeting with the CEO and the subsequent meeting where he made statements that management found concerning.

Finally, substantial evidence supports the ALJ's finding and the Board's affirmance that FedEx did not waive its claim of attorney-client privilege to the contents of FedEx emails when Attorney Tice testified as a fact witness at the administrative hearing because FedEx objected repeatedly to testimony that disclosed privileged attorney-client communications, and thus the disclosure was not voluntary.

STANDARD OF REVIEW

Judicial review of the ARB's FDO is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). *See* 49 U.S.C. 20109(d)(4); 49 U.S.C. 42121(b)(4)(A). Under the APA, this Court must affirm the Board's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or is "unsupported by substantial evidence." 5 U.S.C. 706(2)(A), (E). Under this standard, "[a]n agency's conclusions of law are reviewed de novo and its findings of fact are reviewed for substantial evidence." *Ameristar Airways, Inc. v. Admin. Review Bd.*, 771 F.3d 268, 272 (5th Cir. 2014) (citing 5 U.S.C. 706(2)(A)). The application of the attorney-client privilege is a question of fact. *United States v. Campbell*, 73 F.3d 44, 46 (5th Cir. 1996). Thus, an agency's application of the attorney-client privilege is reviewed for substantial evidence. *See Dickinson v. Zurko*, 527 U.S. 150, 154 (1999) (holding that a court must apply the APA's agency review standards when reviewing a factual finding from an agency subject to the APA, absent an exception).

A court's review under the "substantial evidence" standard is deferential. *See Allen v. Admin. Review Bd.*, 514 F.3d 468, 478 (5th Cir. 2008). "'Substantial evidence' means 'more than a mere scintilla but less than a preponderance.'" *Ameristar Airways*, 771 F.3d at 272 (quoting *Williams v. Admin. Rev. Bd.*, 376

F.3d 471, 476 (5th Cir.2004)). As this Court has held, "[i]n applying the substantial evidence standard, we scrutinize the record to determine whether such evidence is present; [w]e may not reweigh the evidence, try the issues de novo, or substitute our judgment for that of the [agency]." *Myers v. Apfel*, 238 F.3d 617, 619 (5th Cir. 2001) (internal citations omitted). Thus, the Court must examine the entire record, but "must affirm the Board's decision unless it would not be possible for a reasonable trier of fact to agree with its conclusions." *Ameristar Airways, Inc. v. Admin. Review Bd.*, 650 F.3d 562, 566 (5th Cir. 2011); *Allen,* 514 F.3d at 476 ("[u]nder the substantial evidence standard, the ARB's findings must be upheld if, considering all the evidence, a reasonable person could have reached the same conclusion as the ARB") (quoting *Williams*, 376 F.3d at 475-76).

Moreover, under substantial evidence review, "[i]t is fundamental that credibility determinations and the resolution of conflicting evidence are the prerogative of the fact finder, here the ALJ." *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981). Thus, the Court is "especially reluctant to disturb an agency determination where, as here, the Board upholds the findings of an administrative law judge who conducted live hearings." *Ameristar Airways, Inc.*, 650 F.3d at 566.

ARGUMENT

I. STATUTORY BACKGROUND

AIR 21 protects an employee of an air carrier against retaliation for providing information to the employer or the federal government regarding a violation, or alleged violation, of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States. *See* 49 U.S.C. 42121(a)(1), 29 C.F.R. 1979.102(a). Actions under the whistleblower protection provision of AIR 21 are governed by the legal burdens in 49 U.S.C. 42121(b)(2)(B) and the applicable regulations at 29 C.F.R. Part 1979. To prevail on an AIR 21 claim, a complainant must prove all the elements of his claim by a preponderance of the evidence, including: (1) that he engaged in protected activity; (2) that the employer was aware of such activity; (3) that he suffered an adverse action; and (4) that the protected activity was a contributing factor in the adverse action. *See* 49 U.S.C. 42121(b)(2)(B)(iii); 29 C.F.R. 1979.104(b)(1).

For the employee's concern to be protected under AIR 21, the employee need not be correct that the relevant conduct violates the law. *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, 2015 WL 1005044, *5 (ARB Feb. 13, 2015) ("[A]n employee engages in protected activity any time [ ]he provides or attempts to provide information related to a violation or alleged violation of an FAA

requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable."); *see also Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008) (discussing reasonable belief standard under analogous Sarbanes-Oxley whistleblower provision). However, the employee must subjectively believe that there is a violation and the circumstances must be such that a reasonable employee with similar training and experience to the complainant could believe that there is a violation. *Id.* at 477 ("The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.").

Furthermore, to succeed on a claim of retaliation, the complainant must demonstrate, " i.e., prove . . . by a preponderance of the evidence, that protected activity was a 'contributing factor' that motivated a respondent to take adverse action against him. . . . ." *Peck v. Safe Air Int'l, Inc*, ARB No. 02-028, 2004 WL 230770, at *7 (ARB Jan. 30, 2004) (quoting 49 U.S.C. 42121(b)(2)(B)(iii)). An employee fails to meet his burden to show that protected activity was a contributing factor in an adverse action if the ALJ concludes that the employer's claimed reason was in fact the only reason for the action. *See Powers v. Union Pacific R.R.*, ARB No. 13-034, 2017 WL 262014, at *15 (ARB Jan. 6, 2017), *aff'd Powers v. U.S. Dep't of Labor*, 723 F. App'x. 522 (9th Cir. 2018)

I. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DETERMINATION, AS AFFIRMED BY THE BOARD, THAT ESTABROOK FAILED TO ESTABLISH THAT HIS STATEMENTS REGARDING THE PUBLISHING OF FLIGHT AND PACKAGE TRACKING DATA WAS PROTECTED ACTIVITY.

Based on the standards described above and the evidence in the record, the ALJ found, and the Board affirmed, that Estabrook did not engage in protected activity when he stated that FedEx should stop publishing certain flight and package tracking data because it was incentivizing terrorists to place explosives on FedEx planes. This Court should affirm that determination as based on substantial evidence.

A. Substantial Evidence Supports the ALJ's Conclusions that Estabrook Did Not Subjectively Believe there was a Violation of the Law and that, at Any Rate, Such a Belief Would Have Been Objectively Unreasonable.

Substantial evidence supports the ALJ's finding and the Board's affirmance that Estabrook did not subjectively believe that there was a violation of law relating to air carrier safety and that such a belief would not have been objectively reasonable. With regard to Estabrook's subjective belief, the ALJ reasonably concluded that Estabrook was essentially raising an issue that could potentially *improve* air carrier safety, which was not the same as raising an issue about a *violation* of an aviation safety law or regulation. D&O 49. Although Estabrook characterizes his statements as a way to "make FedEx fulfill its legal obligations to prevent and deter the introduction of explosive devices into cargo aircraft," Pet. Br.

17, the ALJ found that Estabrook failed to articulate *how* FedEx failed to fulfill its obligations and that, even if security practices may be improved, this does not mean that a violation is taking place. D&O at 49. The ARB agreed with that conclusion noting "Estabrook was only suggesting a policy change for FedEx to voluntarily or proactively withdraw publishing data to make its safety or security procedures more effective." FDO at 10.

Substantial evidence also supports the ALJ's finding that Estabrook did not have an objectively reasonable belief that the publishing of package and flight tracking data violated aviation security laws or any other federal law related to air carrier safety. The ALJ properly looked to Estabrook's training and experience as a pilot and FedEx employee to determine that it was objectively unreasonable of him to believe that FedEx's tracking data practices were violations of air carrier safety laws considering that the availability of package and flight tracking information is well known to the general public. D&O 50. The ALJ also found it significant that the agencies charged with aviation safety and security had not stopped FedEx's tracking data practices in response to terrorist attacks. *Id*. As the ALJ and the Board noted, Estabrook had raised the same concerns with both the FAA and FedEx management in 2001-2002. D&O 40; FDO 9. Also, Estabrook knew that publishing some level of tracking data was an industry-wide practice and that the FAA did not prohibit FedEx from publishing tracking data in response to

these prior complaints. D&O 40; FDO 10. Under these circumstances, it was unreasonable for Estabrook to believe that there was a violation when the FAA had been informed of the practice, which was widespread and publicly known, and took no action to stop FedEx's tracking data practices. D&O 40; FDO 10 (citing *Hindsman v. Delta Airlines, Inc.*, ARB Case No. 09-023, slip op. at 5 (ARB June 30, 2010) (noting that *Hindsman* could not reasonably believe there was a violation of FAA rules once she learned that the FAA permitted the relevant practice).

Further, the ALJ considered the evidence that FedEx presented that the FAA actually *requires* it to transmit certain tracking data and that it is the FAA, not FedEx, that publishes the data to third parties. D&O 49. Estabrook even conceded that FedEx only disseminates certain data to the FAA and not to the public; thus, Estabrook could not have reasonably believed that FedEx, by transmitting data to the FAA, was violating an FAA rule or aviation safety law. Tr. 144.

Thus, in considering these facts, the ALJ appropriately considered the circumstances and made factual findings that support his determination that Estabrook did not have a reasonable belief that the publishing of package and flight tracking data were violations of aviation security laws or any other federal law relating to air carrier safety. The ARB properly affirmed those findings as based on substantial evidence, and this Court should do the same. *See Allen*, 514 F.3d at 477 (noting that generally "the objective reasonableness of an employee's belief

should not be decided as a matter of law, and the fact-finder's resolution of the issue is entitled to deference on appeal.").

B. The ALJ Properly Relied on Ondra's Testimony in Finding That Estabrook Did Not have a Reasonable Belief that a Violation Had Occurred or Was Occurring.

Estabrook argues that the FAA does not actually require FedEx to transmit some level of tracking data, that the ALJ "improperly abdicated" his obligation to interpret the law, and that the ALJ delegated his legal analysis, in part, to FedEx to determine whether FedEx was violating aviation safety rules in its tracking data practices. Specifically, Estabrook asserts that the ALJ erred in allowing Director of Corporate Security, Ondra, to testify that FedEx was not violating the law in its tracking data practices. Pet. Br. 50-51. However, the ALJ committed no error and Estabrook misapprehends the purpose of Ondra's testimony.

It is well-established that the Federal Rules of Evidence permit a witness to express an opinion as to an ultimate issue. *See United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984) (citing *United States v. Miller*, 600 F.2d 498, 500 (5th Cir.), *cert. denied*, 444 U.S. 955 (1979); Fed. R. Evid. 704 ("The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact."). In allowing Ondra's testimony, the ALJ properly limited the testimony to the issue of whether it was reasonable for Estabrook to believe that FedEx's data tracking practices were violating aviation safety laws. Tr. 539. Specifically, the

ALJ stated that the question of whether Ondra believed that FedEx was violating the law was allowed for the limited purpose of Ondra's understanding and that the ALJ was "going to give no weight to whether or not the law was actually violated." Tr. 539. Thus, Ondra's testimony was limited to Ondra's perception of FedEx's conformity with the law to determine whether Estabrook's belief was reasonable. Accordingly, this Court should find that Ondra's testimony was admissible.

Even if this Court were to determine that the ALJ erred in allowing the testimony, this Court should find that the testimony was harmless because it was consistent with other strong evidence in the record supporting the conclusion that Estabrook's belief that FedEx was violating aviation safety laws was unreasonable. This includes Estabrook's own testimony that FedEx only transmits certain flight tracking data to the FAA and not third parties, that he had already discussed his concerns about FedEx's tracking data practices with the FAA, but that the FAA did not take action on those concerns, and the well-known, industry-wide practice of package and flight tracking. Tr. 144-146; *See Faison v. Nationwide Mortg. Corp.*, 839 F.2d 680, 690 (D.C. Cir. 1987) (finding testimony harmless in that it "merely augmented other pattern evidence"); *Hygh v. Jacobs*, 961 F.2d 359, 365 (2d Cir. 1992) (finding testimony harmless because it was "expressed within a larger body of otherwise unobjectionable testimony… from which the jury could easily have drawn the same conclusions…").

Moreover, it is Estabrook's burden to demonstrate prejudice caused by the testimony, which he has not done. *Liner v. J. B. Talley & Co.*, 618 F.2d 327, 329 (5th Cir. 1980) (holding that the party asserting error has the burden of demonstrating that its substantial rights were affected); Fed. R. Civ. P. 61 ("Unless justice requires otherwise, no error in admitting or excluding evidence… is ground[s] for granting a new trial… or otherwise disturbing a judgment or order). Accordingly, this Court should affirm the ALJ's decision, as affirmed by the Board, that Estabrook failed to establish that his statements regarding the publishing of flight and package tracking data was protected activity.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DETERMINATION, AS AFFIRMED BY THE BOARD, THAT ESTABROOK'S PROTECTED ACTIVITY WAS NOT A CONTRIBUTING FACTOR IN THE NOQ STATUSES AND 15D MEDICAL EVALUATION REQUIREMENT

Having determined that Estabrook's August 4th and August 9th communications were not protected, the ALJ was left with determining whether Estabrook's prior protected activity—his April 2013 refusal to fly and first complaint to OSHA—contributed to the adverse actions taken against him. A "contributing factor" is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Ameristar*, 650 F.3d at 567. Complainants can prove that their protected activity was a contributing factor in the adverse action by direct or circumstantial evidence. *See*

Araujo v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 161 (3d Cir. 2013). While temporal proximity between the protected activity and the adverse action is a factor in establishing a causal connection, intervening events can break the causal link. *See Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014). Moreover, an AIR 21 complainant must convince the factfinder that "it is more likely than not that the employee's protected activity played some role in the adverse action." *Palmer v. Canadian Nat'l Ry,* ARB No. 16-035, 2016 WL 5868560, 32 (ARB Sept. 30, 2016) (en banc).

A. The ALJ's Factual Findings, Inferences, and Conclusions on Causation, as Affirmed by the Board, are Supported by Substantial Evidence

In concluding that Estabrook failed to establish that his protected activity contributed to the NOQ statuses and 15D medical evaluation requirement, the ALJ carefully considered and drew reasonable inferences from the evidence in the record as a whole, including the credibility of the witnesses and the circumstantial evidence presented by both sides. The ARB appropriately affirmed the ALJ's well-reasoned decision.

The ALJ found that Estabrook failed to establish that his April 2013 refusal to fly and April 2013 OSHA complaint were contributing factors to the August 5, 2013 initial NOQ status designation, the August 9, 2013 NOQ status reinstatement, and the 15D evaluation process that began on August 16, 2013. D&O 52. Instead,

the ALJ found that these actions all stemmed solely from Estabrook's August 4, 2013 email and the statements that he made during the August 9, 2013 meeting, and that temporal proximity alone was insufficient to demonstrate that his protected activity was a contributing factor to the adverse actions. D&O 52. In particular, the intervening events of Estabrook's email requesting a meeting with the CEO and the statements that he made in the August 9, 2013 meeting persuaded the ALJ that the Laredo-related protected activity was not a contributing factor to the NOQ statuses and 15D medical evaluation requirement. D&O 62.

This conclusion was supported by numerous findings of fact. First, the ALJ found that no member of FedEx management had any animus towards Estabrook's refusal to fly approximately three months prior. D&O 53. Rather, his unprotected failure to report to the airport on time was concerning to management. *Id.* The ALJ also found that there was no evidence that FedEx's use of NOQ status represented an attempt to punish or harass Estabrook. *Id.* Instead, the ALJ found that it was reasonable that Estabrook's chain of command would want to meet with him to determine if his concerns merited the attention of the CEO. *Id.* at 54. Additionally, the ALJ found that it was reasonable of McDonald to defer to the recommendation of a security specialist, especially in the aviation industry where "any responsible operator must err on the side of safety." D&O 53, 61. These findings are well-supported by substantial evidence in the record as a whole,

including the witnesses' testimony, the ALJ's credibility findings, and documentary evidence, including Estabrook's August 4, 2013 email to McDonald.

The ALJ reasonably found that FedEx's decision to initially place Estabrook on NOQ status was unrelated to Estabrook's refusal to fly and OSHA complaint. This conclusion was supported by, among other findings of fact, that Estabrook was placed on NOQ status as a direct result of Estabrook's August 4, 2013 email to ensure his presence at the later meeting. D&O 53. As the Board noted, McDonald's August 5, 2013 reply email to Estabrook, which placed Estabrook on initial NOQ status, came immediately after Estabrook's August 4, 2013 email. CX-11; FDO 12. This immediate temporal proximity demonstrates that it was Estabrook's August 4, 2013 email that caused FedEx to place Estabrook on initial NOQ status, not his protected activity from three months prior.

The ALJ also reasonably found that FedEx management acted reasonably when it reinstated NOQ status and required Estabrook to undergo a medical evaluation and that these actions were not related to the April 2013 refusal to fly and OSHA complaint. Specifically, FedEx's Director of Security, Ondra, told McDonald that Estabrook made strange statements about terrorists and had exhibited odd behavior; based off of these non-discriminatory reasons, McDonald deferred to Ondra's recommendation that Estabrook be evaluated and placed back on NOQ status. D&O 61. McDonald's deference to Ondra's recommendation was

not unreasonable, given Ondra's subject matter expertise, the context of Estabrook's statements about terrorism, and the safety concerns involved in aviation. D&O 61. Further, as the Board noted, the reinstatement of NOQ status and the 15D medical evaluation requirement occurred immediately after the August 9, 2013 meeting. FDO 12. This immediate temporal proximity demonstrates that it was Estabrook's statements at the August 9, 2013 meeting that caused FedEx to ultimately take these actions, not his refusal to fly and OSHA complaint from three months prior.

Further, any temporal proximity between Estabrook's refusal to fly and OSHA complaint was subsequently overwhelmed by the strange statements Estabrook made in the August 4, 2013 email and August 9, 2013 meeting. FDO 12. As the ALJ reasonably characterized it, FedEx's response to Estabrook's statements regarding Al Qaeda and Auburn Calloway was more of an over-reaction, given the hyper-vigilant atmosphere surrounding terrorism in FedEx's industry, and not a disciplinary matter rooted in protected activity. D&O 61. Moreover, there is little, if any, evidence that the NOQ statuses and 15D medical evaluation requirement related to Estabrook's April protected activity. D&O 53. The ALJ found that Estabrook's argument that McDonald was angry that Estabrook had not been disciplined for his refusal to fly was tenuous at best and that the issue of "Mayday Mark" was settled at the April 9, 2013 meeting. D&O

53, 56. Indeed, McDonald testified that he was satisfied with the results of the meeting between Fisher and Estabrook concerning Estabrook's refusal to fly and Fisher testified that McDonald did not instruct him to discipline Estabrook. D&O 53.

Based on the evidence in the administrative record as a whole, a factfinder could reasonably conclude, as the ALJ did, that Estabrook's April 2013 protected activity of refusing to fly and subsequent OSHA complaint did not contribute to FedEx's decision to place Estabrook on NOQ status and to require him to undergo a 15D medical evaluation. Further, a factfinder could reasonably conclude, as the ALJ did, that any inference of causation established by temporal proximity was overwhelmed by Estabrook's unusual behavior in the intervening events. D&O 62.

B. Estabrook's Arguments that the ALJ and ARB Erred Do Not Undermine the Substantial Evidence Supporting the ALJ's Factual Findings

Estabrook makes several arguments that the ALJ and ARB did not accord FedEx's "shifting, false, and perjurious" rationales for its decision to place Estabrook on NOQ status proper weight. Pet. Br. 36-38. He also argues that the ALJ and ARB failed to accord proper weight to the temporal proximity factor and the "Mayday Mark" postings. Id. at 32, 40. However, the ALJ and ARB considered all of the evidence and none of Estabrook's arguments undermine the conclusion that substantial evidence supports the ALJ's decision, as affirmed by

the Board. That a different factfinder could have weighed the evidence differently is not sufficient grounds to overturn the ALJ's well-reasoned decision, as affirmed by the Board. *See Lockheed Martin Corp. v. Admin. Review Bd*., 717 F.3d 1121, 1138 (10th Cir. 2013) (citing *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999)) ("The possibility of drawing different inferences from the administrative record . . . is a grossly insufficient basis to disturb an agency's findings on appeal").

1. The ALJ Carefully Considered All of the Evidence of Record

Estabrook argues that the ALJ and ARB failed to give proper weight to FedEx's "shifting rationales for the August 5 NOQ grounding," the "standard purpose of NOQ groundings, and "FedEx's serial mendacity." To the contrary, the ALJ carefully considered all of the circumstantial evidence of alleged retaliation offered by Estabrook in concluding that his protected activity did not contribute to the NOQ statuses and 15D medical evaluation requirement. The Board, in affirming the ALJ's conclusions, held that the ALJ's findings were supported by substantial evidence.

Regarding Estabrook's contention that the ALJ and ARB failed to give proper weight to FedEx's "serial mendacity," and "perjurious" rationales, Pet. Br. 36, the ALJ made credibility determinations of the witnesses, which are entitled to deference. Estabrook is correct that the ALJ found parts of Ondra's and

McDonald's testimony not credible; however the ALJ found that all of the witnesses were generally equally credible. D&O 43-44. As the finder of fact, the ALJ was free to credit or not credit each of the witnesses, and this court should grant great deference to his credibility findings. *See Atlantic Marine*, 661 F.2d at 900. Moreover, as this Court held in *Tellespen Pipeline Services v. NLRB*, "[b]ecause the ALJ is in a unique position to evaluate the credibility and demeanor of the witnesses, this court defers to plausible inferences he drew from the evidence, even where this court might reach a contrary result if it were to decide the case de novo." 320 F.3d 554, 563 (5th Cir. 2003).

The ALJ also considered the fact that FedEx failed to supply Estabrook with a "reasonable basis" for the 15D evaluation when his attorney asked for one. D&O 56-57. However, the ALJ weighed all of the evidence, including FedEx's argument that it was not required to provide Estabrook's counsel with a reason for its referral of Estabrook for the 15D evaluation, and found that it did not outweigh the record evidence as a whole. D&O 41, 62. The ARB concluded that even if a reasonable basis had been required for the 15D referral, "FedEx's omission did not undermine the substantial evidence supporting the ALJ's findings that the NOQs and the 15D examination stemmed from the behavior Estabrook exhibited in August and not from his refusal to fly in Laredo or his April OSHA complaint." FDO 13.

Estabrook further argues that FedEx offered shifting reasons in its interrogatory responses for placing him on NOQ status, indicating that his protected activity was a contributing factor in the NOQ determination. Pet. Br. 36-38. The ALJ implicitly rejected this argument by stating that he would not "second guess the ministerial mechanism used by [FedEx] to ensure [Estabrook's] presence at a meeting, especially when [Estabrook] has presented no evidence [FedEx] used this protocol for improper means." D&O at 53. The ALJ also found that there was no evidence that FedEx's use of NOQ status represented an attempt to punish or harass Estabrook. *Id*.

Further, it is clear from the record evidence that there were no "shifting reasons" in FedEx's interrogatory responses, as Estabrook argues, as there were *two different* instances of NOQ status usage: one on August 5, 2013 and the other on August 9, 2013 when NOQ was reinstated. CX 9. This Court has found that inconsistent explanations may not rise to an inference of pretext when an employer does not fundamentally change its reasons for its decisions during the course of litigation. *See Musser v. Paul Quinn Coll.*, 944 F.3d 557, 564 (5th Cir. 2019), as revised (Dec. 10, 2019), as revised (Dec. 23, 2019). Although FedEx was inconsistent in its explanation for placing Estabrook on NOQ status, FedEx has not fundamentally changed its reasons for placing Estabrook on NOQ status since the ALJ hearing; thus, pretext should not be inferred. Accordingly, the record

evidence does not support Estabrook's claim that FedEx's "shifting rationales" warranted an inference of pretext.

Finally, contrary to Estabrook's contention, the ALJ considered and rejected Estabrook's argument that the use of open-ended NOQ status that is typically used for disciplinary purposes, rather than a different kind of status, indicated pretext. D&O 53-54. The ALJ found that there was no evidence that FedEx utilized NOQ status for improper means and that it was reasonable that evaluating Estabrook's concerns might take an undetermined amount of time, thus warranting an open-ended NOQ status. *Id.* Accordingly, Estabrook's allegation that the ALJ failed to consider this circumstantial evidence is without merit.

2. The ALJ and ARB Reasonably Concluded that Intervening Events Between the Protected Activity and Adverse Actions Broke the Causal Connection and Defeated the Inference of Causation Created by Temporal Proximity

Estabrook also argues that the ALJ and ARB failed to accord proper weight to the temporal proximity factor. Pet. Br. 32. The ALJ considered Estabrook's argument that the temporal proximity between the April 10, 2013 refusal to fly and corresponding OSHA complaint and the August 2013 adverse actions created an inference that linked the events. D&O 52. However, the ALJ found that this contention ignored the intervening events that occurred on August 4, 2013 (Estabrook's email to McDonald) and August 9, 2013 (the meeting where

Estabrook expressed his concerns about tracking data, Al Qaeda, and Auburn Calloway) that prompted the NOQs and 15D evaluation process. D&O 52.

As noted by the ALJ, "though temporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of making a prima facie showing of knowledge and causation, and may support an inference of retaliation, the inference is not necessarily dispositive." D&O 52 (quoting *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-012, slip op. at 7 (Dec. 31, 2007)). In particular, intervening events can break the causal link that could otherwise be inferred from temporal proximity if the events provide an independent reason for the adverse action. *See, e.g., Sanders v. Sailormen, Inc.,* 506 F. Appx. 303, 304 (5th Cir. 2013); *Twigg v. Hawker Beechcraft Corp*., 659 F.3d 987, 1001-02 (10th Cir. 2011) ("evidence of temporal proximity has minimal probative value in a retaliation case where intervening events between the employee's protected conduct and the challenged employment action provide a legitimate basis for the employer's action.") (citations omitted); *Robinson v. Nw. Airlines, Inc*., ARB No. 04-041, 2005 WL 3263822, at *6 (ARB Nov. 30, 2005) (citations omitted).

Here, substantial evidence supports the ALJ's finding that the temporal proximity between Estabrook's protected activity and the adverse actions, by itself, was insufficient to support a finding of retaliation. D&O 62. The ALJ found that

Estabrook's August 4, 2013 email and the comments that he made during the August 9, 2013 meeting were intervening events that broke any causal connection between the April 2013 refusal to fly and OSHA complaint and the adverse actions. D&O 52-53. The ARB affirmed, holding that any causal link was "overwhelmed" by Estabrook's unusual behavior in August. FDO 12.

The ALJ reasoned that all of the adverse actions revolve around the August 4, 2013 email and the subsequent meeting and that the NOQ statuses and the 15D medical evaluation requirement were "prompted" by Estabrook's August 4, 2013 email. D&O 52. The ALJ found that Estabrook was placed on NOQ status on August 5, 2013 as a "direct result" of his August 4, 2013 email and that this email and Estabrook's odd behavior and strange statements during the August 9, 2013 meeting created non-retaliatory reasons to question Estabrook's fitness, thus warranting the NOQ statuses and 15D medical evaluation. D&O 53, 61. In addition, as the ARB found, the fact that the August 5, 2013 NOQ status occurred immediately after Estabrook's August 4, 2013 email and that the NOQ status reinstatement and 15D medical evaluation requirement occurred immediately after the August 9, 2013 meeting is strong temporal proximity evidence that it was actually the email and meeting that triggered the adverse actions, not the April protected activity. FDO at 12.

Therefore, the ALJ considered Estabrook's argument that temporal proximity created an inference of causal connection; however, based on the record as a whole, including witness testimony, the ALJ reached the different and reasonable conclusion that intervening events disrupted any inference of causal connection and created independent reasons for the adverse actions. Although Estabrook argues that "there is no basis for the ALJ's 'intervening event' theory," Pet. Br. 35, these findings are sufficient to meet the substantial evidence standard, which does not call for the ALJ's finding to be the only possible understanding of the evidence in the record. *See, e.g., Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1138 (10th Cir. 2013).

3. The ALJ and ARB Reasonably Concluded that the "Mayday Mark" Postings Did Not Create a Causal Connection Between Estabrook's Protected Activity and the Adverse Actions

Estabrook also argues that the ALJ and ARB failed to consider that the "Mayday Mark" postings provided a "Laredo-related" connection from Estabrook's April 2013 protected activity to the decisions to place Estabrook NOQ status and require him to undergo a 15D evaluation. Pet. Br. 41-42. However, the Board properly determined that substantial evidence supports the ALJ's finding that there was no causal connection between the "Mayday Mark" postings and the adverse actions.

The ALJ found that the issue of "Mayday Mark" was "settled" during the August 9, 2013 meeting and that the argument that McDonald was angry that Estabrook had not been disciplined for the Laredo incident was tenuous at best. D&O 53, 56. The ARB affirmed this finding, reasoning that although the "Mayday Mark" postings were brought up in the meeting, FedEx accepted Estabrook's denial when Estabrook stated and verified that he was not "Mayday Mark." FDO 12. The ARB found that although McDonald was involved in the Laredo event as a supervisor in the chain of command, any causal link between Laredo and the adverse actions was overwhelmed by Estabrook's unusual behavior at the August 9, 2013 meeting. FDO 12. Estabrook further contends that the primary objective of the August 9, 2013 meeting was to ascertain his responsibility for the "Mayday Mark" postings. Pet. Br. 41. However, the ALJ drew different reasonable inferences from the record, finding that although Estabrook did not ask for a meeting, it was quite reasonable that Estabrook's chain of command would want to meet to evaluate whether Estabrook's concerns from his August 4, 2013 email merited the attention of the CEO. D&O 54.

In addition, Estabrook argues that because McDonald did not know that Estabrook was not "Mayday Mark" at the time that he made the decisions to reinstate NOQ status and to require Estabrook to undergo a 15D evaluation, there is a causal connection between "the Laredo events" and the adverse actions. Pet.

Br. 41. However, as the Board noted in *Powers v. Union Pacific*, "it is well within the ALJ's purview to conclude … that an employee has failed to meet his burden to show that protected activity was a factor in his termination when the ALJ believes that the employer's claimed reason was in fact the only reason." ARB No. 13-034, 2017 WL 262014, at *15 (ARB Jan. 6, 2017), *aff'd Powers v. U.S. Dep't of Labor*, 723 F. App'x. 522 (9th Cir. 2018). The ALJ weighed all of the evidence and found that McDonald had non-retaliatory reasons to place Estabrook on NOQ status and to require him to undergo a 15D medical evaluation, namely the recommendation from the Director of Security, Ondra, that Estabrook should be evaluated. D&O 61. It was in the ALJ's purview to find that the events of August 4, 2013 and August 9, 2013 overwhelmed any causal connection between the Laredo events and the adverse actions.

Estabrook cites to *Douglas v. Skywest* for the proposition that the singling out of a complainant who has engaged in protected activity for investigation of an unrelated incident supports a finding of a causal link between the protected activity and an adverse action. Pet. Br. 41; *Douglas v. Skywest Airlines, Inc*., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ALJ Oct. 3, 2007; ARB Sept. 30, 2009). However, *Douglas* is inapposite. In *Douglas*, the complainant was accused of "bad mouthing" and writing graffiti after engaging in protected activity. *Douglas,* ALJ No. 2006-AIR-14 at 3. The ALJ found that "*alone*, a series of accusations related

to "bad-mouthing" and writing graffiti would not necessarily raise an inference that Complainant was being targeted for the protected activity." *Id*. at 40 (emphasis added). It was only when these accusations were combined with the employer's statements specifically deriding the complainant for engaging in protected activity that the ALJ found an inference that the adverse actions were at least in part in retaliation for the complainant's protected activity. *Id*.

In comparison, here, the record evidence does not demonstrate that the "Mayday Mark" inquiry was coupled with any animus toward Estabrook's protected activity of refusing to fly; instead, the ALJ found that FedEx management did not have a problem with Estabrook's refusal to fly. D&O 52. This is supported by the fact that Estabrook was not disciplined for the Laredo incident. D&O 6. In addition, Attorney Tice testified that the concern about "Mayday Mark" was not connected to the Laredo incident, but that the pilot making the posts indicated that he might have suffered an undisclosed stroke or seizure. Tr. 436, 482. D&O 55. Thus, the "Mayday Mark" inquiry does not by itself raise an inference that Estabrook was being targeted for his protected activity because it was not combined with any animosity toward Estabrook specifically for his protected activity of refusing to fly and subsequent OSHA complaint.

These findings are well-supported by substantial evidence in the record as a whole, including the witnesses' testimony, the ALJ's credibility findings, and

documentary evidence, including Estabrook's August 4, 2013 email to McDonald. The ALJ drew entirely reasonable inferences from this evidence. Accordingly, the Court should uphold the ALJ's conclusion, as affirmed by the Board, that Estabrook's protected activity was not a contributing factor to the NOQ statuses and 15D medical evaluation requirement.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DETERMINATION, AS AFFIRMED BY THE BOARD, THAT FEDEX DID NOT WAIVE ITS CLAIM OF ATTORNEY-CLIENT PRIVILEGE

Estabrook argues that the ruling by the ALJ, and the Board's affirmance, that FedEx did not waive its claim to attorney-client privilege was clearly erroneous. Pet. Br. 54. As an initial matter, the Secretary notes that because this Court regards waiver of attorney-client privilege as a question of fact, the correct standard of review for this determination is substantial evidence. *See Dickinson v. Zurko*, 527 U.S. 150, 154, 161 (1999) (holding that, absent a clear exception, a court must apply the APA's agency review standards when reviewing a factual finding from an agency subject to the APA); *United States v. Campbell*, 73 F.3d 44, 46-47 (5th Cir. 1996) (holding that an attorney-client privilege determination is a question of fact while analyzing an issue of waiver).[7] Regardless, the ALJ and

[7] The ARB reviewed this issue for abuse of discretion. *See* FDO at 13. Applying the abuse of discretion standard here was, at most, harmless error because the ARB's decision makes amply clear that it would have reached the same conclusion under the more stringent substantial evidence standard.

the Board did not err in finding that FedEx preserved its attorney-client privilege, and substantial evidence supports that determination.

The federal common law of attorney-client privilege governs this analysis since Estabrook's claim arises under federal law. *See Willy v. Admin. Review Bd.*, 423 F.3d 483, 495 (5th Cir. 2005). Under the relevant standard, this Court has held that the attorney-client privilege is waived if it is not asserted when confidential information is sought in legal proceedings. *Nguyen v. Excel Corp.*, 197 F.3d 200, 207 (5th Cir. 1999) (holding that a company waived its claim to attorney-client privilege because it did not object to questions designed to elicit information about privileged communications); *see also United States v. Sanders*, 979 F.2d 87, 92 (7th Cir. 1992) ("…the appellant waived the privilege by failing to make a timely objection."). As the Board noted, FedEx objected when Attorney Tice's testimony would have revealed attorney-client communications; thus, FedEx did not waive its claim of attorney-client privilege and, as a result, did not waive its privilege to all communications pertaining to the same subject matter, as Estabrook argues.

Before he inspected the documents, the ALJ acknowledged that Attorney Tice could be acting as an attorney in some moments and as a decisionmaker in others. Tr. 514. The ALJ stated that the attorney-client "privilege is one of the most sacred privileges in our judicial system. I will guard it zealously. But if in fact it's waived, it's waived." *Id*. The ALJ conducted an *in camera* inspection and

held that the documents were either attorney-client privilege or work product information not subject to disclosure; accordingly, there had been no waiver. Tr. 523. The Board affirmed the ALJ's determination, holding that FedEx did not voluntarily waive its claim of privilege, as FedEx made assertions of privilege on two occasions during Attorney Tice's testimony. FDO 13. These findings are sufficient to meet the substantial evidence standard and, in the alternative, are not clearly erroneous. *See Ripley v. Chater*, 67 F.3d 552, 555 (5th Cir. 1995) ("Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion… we do not reweigh the evidence nor substitute our judgment for that of the Secretary"); *Bertucci Contracting Corp. v. M/V ANTWERPEN*, 465 F.3d 254, 258 (5th Cir. 2006) (noting under the clearly erroneous standard that "[i]f the district court's finding is plausible in light of the record viewed as a whole, the court of appeals cannot reverse even though, if sitting as the trier of fact, it would have weighed the evidence differently.").

The authorities that Estabrook uses to argue that FedEx waived its claim of privilege are inapplicable here. First, Estabrook, in citing to *In re Itron* for the proposition that revealing communications in open court waives the privilege, relies on Mississippi state law that is inapplicable here. *See* Pet. Br. 56 (citing *In re Itron, Inc.*, 883 F.3d 553, 558 (5th Cir. 2018)). Estabrook also cites numerous cases to argue that "voluntary disclosure of the content of a privileged attorney

communication results in waiver as to all other communications on the same subject." Pet. Br. 56 (citing *Hernandez v. Tannien*, 604 F.3d 1095, 1100 (9th Cir. 2010) (holding that the party had waived attorney-client privilege by raising a claim that required disclosure of protected communications); *Nester v. Textron, Inc.*, No. A-13-CA-920-LY, 2015 WL 1020673, at *5 (W.D. Tex. Mar. 9, 2015) (applying Texas law to find that a company waived attorney-client privilege by producing protected communications in discovery without any claim of privilege).

However, as explained, FedEx did not *voluntarily* disclose the content of privileged attorney-client communications because Attorney Tice was compelled to testify when the ALJ initially overruled FedEx's objections. Thus, Estabrook's argument that FedEx waived its claim to attorney-client privilege fails. This Court should affirm the ALJ's decision, as affirmed by the Board, that FedEx did not waive its claim to attorney-client privilege.

CONCLUSION

For the foregoing reasons, this Court should affirm the Board's FDO and deny Estabrook's Petition for Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2020 a true and correct copy of the foregoing Brief for the Secretary of Labor was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that service on counsel of record will be accomplished by this system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a) and Fifth Circuit Rule 32, the undersigned certifies that this brief complies with the applicable type volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,947 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

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