United States Court of Appeals

for the

Fifth Circuit

Case No. 19-60716

MARK ESTABROOK,

Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

FEDERAL EXPRESS CORPORATION,

Intervenor.

ON APPEAL FROM THE DEPARTMENT OF LABOR (EXCEPT OSHA)
IN CASE NO. 17-0047

REPLY BRIEF FOR PETITIONER

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I. FedEx Retaliated Against Estabrook in Violation of AIR 21

Both Respondents, Department of Labor (DOL) and FedEx, argue that the Board correctly concluded that substantial evidence supports the ALJ's determinations. However, neither Respondent addresses case law cited by Estabrook that holds that the substantial evidence standard requires an administrative law judge to fully consider the contradictory evidence submitted by both parties. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (holding that the reviewing court must take into account whatever in the record fairly detracts from a position that the court might consider adopting); *Dalton v. Copart, Inc.*, ARB Case No. 01-020, 2001 WL 870091, at *5 (ARB July 19, 2001) (noting that the ARB must evaluate all the evidence in the record and that "the substantial evidence standard does not require [the ARB] to affirm the ALJ's findings of fact merely because there is evidence in the record which would justify them, without taking into account other – contrary – evidence in the record."). In this case, neither the ALJ nor the ARB fully considered the contradictory evidence submitted by Estabrook. Thus, the ALJ and ARB decisions do not satisfy the substantial evidence standard, and this Court should set aside the ARB's decision.

A. The Laredo Events were Contributing Factors

The Respondents endorse the ALJ and ARB determinations that FedEx did not care about the Laredo delay per se, but rather its sole concern was that

Estabrook waited out the storm at a crew hotel. (DOL Brief at 49; FedEx Brief at 22-23; ALJ Decision at 53; ARB Decision at 12). The ALJ, ARB, and Respondents defend this position based on trial testimony, given only after the witnesses were fully apprised of the evidentiary issues. The ALJ and ARB made no attempt to reconcile this self-serving trial testimony with the contemporary evidence, from the date of the Laredo departure, which confirms that FedEx's *only* issue concerned Estabrook's determination to delay his departure due to weather conditions:

- Duty Officer Mark Crook condemned Estabrook for taking it "upon himself to delay a flight" (RX 8);
- Crook criticized Air Traffic Control for including Estabrook's flight in a "ground stop" gate hold in Laredo (RX 8);
- Crook lambasted Estabrook for being the "sole source of weather" (*Id.);*
- Crook criticized Estabrook for having "delayed the flight" based on his own appraisal of weather conditions (*Id.);*
- Nowhere in the audiotapes (JX 1) is there any critique of Estabrook's location at the hotel; rather Crook's pointed inquiry is "what time are you planning to take off?" (RX 10 at 4);
- The FedEx Global Operations Control (GOC) Manager, when advised that Estabrook had complained that he was being "pushed to leave," responded: "It's his damn job." (RX 10 at 8).

Presumably to compensate for the glaring lack of support provided by contemporary evidentiary sources, FedEx urges the Court to consider Crook's

representations of statements he allegedly made during *unrecorded* phone calls. (FedEx Brief at 6 – "get to the ramp."). Estabrook's more logical account was that Crook exploited the availability of an unrecorded line to engage in blatant pilot pushing, telling Estabrook, "everybody else is taking off" and "I am watching you very closely." (Estabrook, Tr. 73-74).

The ALJ and ARB failed to address the lack of any contemporaneous evidence, in the Crook email (RX 8) or the audiotapes (JX 1), that FedEx had a concern about Estabrook's presence at the hotel. The ALJ and ARB failed to address the fact that the Crook email (RX 8) evinced hostility toward the flight delay and the weather appraisal, rather than the hotel issue. The ALJ and ARB failed to address FedEx's open hostility to the flight delay expressed in the expletive – "it's his damn job." (RX 10 at 8). The ALJ failed to resolve the credibility dispute raised by Estabrook's and Crook's conflicting accounts of their unrecorded telephone conversations.[1] The ALJ and ARB failed to consider FedEx's concession that Estabrook had a good faith belief that he was being pressured to depart into hazardous weather conditions and that Crook required counseling. (Estabrook, Tr. 84, Fisher, Tr. 315, 350, 356-57). The ALJ and ARB failed to consider that FedEx representatives Fisher and McDonald proceeded with

[1] Estabrook testified that he had "several phone calls with Mark Crook. Some of them are noted in [the FedEx] transcript, some of them are noted in my cell phone records, and some of them are not on either one of them." (Estabrook, Tr. 190).

a disciplinary investigation of Estabrook based on email and audiotape evidence that solely presented the issue of Estabrook's refusal to depart, rather than his presence at the crew hotel. (RX 8; Fisher, Tr. 349-50, 354; McDonald, Tr. 674).

As discussed in greater detail in Estabrook's initial brief, the ALJ and ARB also failed to give any consideration to FedEx's potential resentment toward Estabrook's filing of an AIR 21 complaint in response to being summoned for an interrogation related to his Laredo departure. FedEx terminated its Laredo investigation without taking disciplinary action almost immediately after learning of this AIR 21 filing (Estabrook, Tr. 85-86; RX 12) and Estabrook testified that Fisher admitted that McDonald was "upset" that no disciplinary action would be taken against Estabrook (Estabrook, Tr. 84); however, the ALJ and ARB did not consider this evidence or give any reason why Estabrook's sworn testimony should be discounted. At the opposite pole of credibility, Fisher and FedEx counsel falsely represented to OSHA that they had no knowledge of Estabrook's Laredo-related AIR 21filing (Fisher, Tr. 403; CX 23 at 3); however, the ALJ and ARB gave no consideration to this obfuscation in discounting FedEx's credibility and/or as evidence of FedEx's desperate effort to cover up its resentment regarding the Laredo AIR 21 filing.

The ALJ and ARB also failed to address direct evidence that FedEx's August 5 grounding of Estabrook was, at least in part, to facilitate an interrogation

by FedEx legal counsel as to whether Estabrook was the "Mayday Mark" who had posted communications on the internet regarding the Laredo departure, including:

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

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

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

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

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

* After Estabrook completed his admittedly rational August 9 presentation,[2] FedEx's legal counsel proceeded with his interrogation as to whether Estabrook was Mayday Mark, without a single question from FedEx's representatives concerning the security issues Estabrook had raised (Estabrook, Tr. 93-94; Ondra, Tr. 587-88);

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

In view of this welter of evidence connecting the Laredo departure to the August 5 grounding and subsequent meeting, the ALJ's finding that the Laredo-related

[2] FedEx Managing Director of Aviation Security Todd Ondra agreed that Estabrook's concerns were rational. (ALJ Decision at 46).

protected activity was only tied to the August 5 grounding by virtue of temporal proximity (ALJ Decision at 62) reflects an abandonment of the evidentiary review required by the substantial evidence standard.

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

Nor did the ALJ or ARB address FedEx's disavowal of its position in interrogatory responses that the August 5 grounding was "merely to facilitate" the August 9 meeting. (CX 19 at 2). Here again, the Laredo-fixated McDonald and attorney Tice both recanted at trial and admitted that FedEx utilized the NOQ ("not operationally qualified") to ground Estabrook and strip him of his jumpseat privileges based on "situational awareness." (Tice, Tr. 473-74; McDonald, Tr. 645, 666). Nevertheless, the ALJ inexplicably accepted FedEx's abandoned

version of the August 5 grounding – that it was merely to facilitate a meeting – thereby accepting a disproven pretextual rationale for FedEx's adverse action. (ALJ Decision at 53; ARB Decision at 4).

In a further demonstration of the failure to adhere to the substantial evidence standard, the ALJ asserted that Estabrook presented "no evidence" that FedEx's application of the NOQ designation reflected hostility toward Estabrook and actually refused to "second guess the ministerial mechanism" used by FedEx. (ALJ Decision at 53 n. 60). As FedEx's witnesses testified, FedEx typically utilizes the NOQ to ground a pilot due to a health/training issue or to conduct a disciplinary investigation. (Fisher, Tr. 322-324, 365-366, 400; McDonald, Tr. 690-691). Moreover, FedEx placed Estabrook not just on an NOQ, but on an NOQ UFN ("Until Further Notice"), thereby indefinitely grounding him and suspending his travel privileges. (CX 18; McDonald, Tr. 690; CX 30, Response No. 17 at 6). The mechanism "typically" used by FedEx to facilitate a non-disciplinary meeting with a pilot is the RMG ("Remove for Management") designation, which would not trigger jumpseat suspension; indeed, Fisher testified that he did not know why the RMG designation was not used for Estabrook's August 9 meeting. (Fisher, Tr. 363-365). Particularly in view of FedEx's abandonment of its earlier posture that the August 5 NOQ ground was "merely" to facilitate a meeting, FedEx's utilization

of the punitive NOQ designation merited careful scrutiny; however, the ALJ maintained that he was simply not interested.

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

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

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

FedEx initiated its second round of adverse actions against Estabrook because "he knew too much." (ALJ Decision at 57, citing Tr. at 113, 328-29, 396).

The ALJ correctly determined that McDonald's testimony concerning the purpose of the 15D evaluation "deserves little weight." (ALJ Decision at 44). FedEx steered Estabrook into a psychological analysis and the FedEx aeromedical advisor, Dr. Thomas Bettes, confessed that he was *directed* to send Captain Estabrook to a psychiatrist. (Estabrook, Tr. 109; Bettes Decl., CL 44; ALJ Decision at 44).

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

is difficult to conceive of a greater threat to public safety and the integrity of the AIR 21 process.

B. Estabrook's Rational Presentation that FedEx was Failing to Prevent and Deter Terrorist Actions Constituted Protected Activity

Entirely omitted from Respondents' briefs is any citation to the relevant regulatory law, or discussion of its language, which requires FedEx to:

- "provide for the safety of persons and property … against acts of criminal violence … and the introduction of explosives aboard an aircraft" (49 C.F.R. § 1544.103(a)(1));
- "prevent or deter the carriage of any … unauthorized explosives, incendiaries, and other destructive substances or items in cargo onboard an aircraft" (49 C.F.R. § 1544.205(a)); and
- "prevent[] the carriage of any … unauthorized explosive incendiary, and other destructive substance or item in cargo onboard an aircraft" (49 C.F.R. § 1544.205(c)(1)).

Based on the above regulations, Estabrook had a reasonable belief that FedEx's actions were inconsistent with its obligation to prevent and deter the terrorist introduction of explosives into FedEx's aircraft by providing terrorists with real-time tracking data.

Rather than discussing the relevant regulations, Respondents' briefs replicate the ALJ's argument that the law's broad "prevent" and "deter" mandate should be read narrowly based on the testimony of Todd Ondra and the inaction of the FAA. (DOL Brief at 30-33; FedEx Brief at 27-34; ALJ Decision at 49; ARB Decision at 8-10). As discussed at greater length in Estabrook's initial brief, it is within the exclusive province of the court to determine whether the broad language of the law could reasonably be interpreted by a safety-minded airline employee to prohibit providing valuable intelligence to terrorists who had specifically targeted FedEx. (Estabrook Brief at 45-47). Or, conversely, whether the United States Congress intended to permit an air carrier to weaponize psychiatric analysis in response to a pilot who presented rational concerns relating to the carrier's incentivizing of terrorist activity.

We say "rational" because FedEx's top security official agreed that Estabrook's concerns were rational. (Ondra, Tr. at 601; ALJ Decision at 46). Only on appeal of the ALJ's order has FedEx argued that his rational concerns were "unreasonable." (FedEx Brief at 27-34).

However, the facts, as confirmed in various media reports obtained by Estabrook, confirmed the immediacy of the threat to safety posed by FedEx's practices and thus confirmed the reasonableness of Estabrook's belief. (Estabrook, Tr. 35-39, 50-53). Those reports show that al-Qaeda in the Arabian Peninsula

(AQAP) had developed a strategy of planting explosives in packages carried by US-flag cargo carriers and in September, 2010, American intelligence officials had intercepted packages shipped to Chicago that they considered to be part of a bombing test run. (CX 12). Moreover, The New York Times reported that al-Qaeda relied on the package tracking feature on the cargo carriers' websites to plan for the detonation of these devices in a manner that would create the greatest damage. The November 1, 2010 New York Times article, "Earlier Flight May Have Been Dry Run for Plotters," reported that the shipments' "hour-by-hour locations could be tracked by the sender on the shippers' Web sites…." (CX 12). Numerous other media sources had made similar reports. (Estabrook Brief at 16-17, fn. 9). Based on these reports, Estabrook testified that he believed that the publication of tracking information "was a direct violation under our obligation to deter bomb placement on our aircraft." (Estabrook, Tr. 53).

Contrary to Respondents' arguments, Estabrook's belief that FedEx's practices constituted a violation of federal law was both subjectively and objectively reasonable. "To prove subjective belief, a complainant must prove that he held the belief in good faith." *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016) (citations omitted). There is no evidence that Estabrook did not have a good faith belief, and neither the DOL nor FedEx cite any evidence that Estabrook was acting in bad faith. Estabrook's background as an Air

Force pilot and chairman of his union's security committee substantiate his good faith belief. (Estabrook, Tr. 91; ALJ Decision at 4, citing his military background as an AWACS aircraft commander who flew classified missions in the Persian Gulf and North Atlantic, including tracking and chasing Russian Bear aircraft, and referencing his several Air Medals earned during his service). Estabrook's belief was also objectively reasonable based on the fact that U.S. intelligence believed that printer bomb incidents had been planned using cargo aircraft and package tracking information. (CX 12: Reporting that "intelligence officials believe that the shipments, whose hour-by-hour locations could be tracked by the sender on the shippers' Web sites, may have been used to plan the route and timing for two printer cartridges packed with explosives…"). Estabrook rationally and reasonably raised these concerns because of the printer bomb incidents in 2010. (Estabrook, Tr. 91).

Raising such security concerns was not only rational and reasonable – it was required of Estabrook as an In-flight Security Coordinator. 49 C.F.R. § 1544.215(c) ("Each aircraft operator must designate and use the pilot in command as the In-flight Security Coordinator…"). (Estabrook, Tr. 51).

FedEx understood that Estabrook was accusing the carrier of failing to deter, and actually incentivizing, the introduction of explosives onto its aircraft by terrorists. (ALJ Decision at 46; Fisher, Tr. 362-63). Moreover, no one at the

August 9 meeting disputed his contentions. No one proffered an explanation or justification for FedEx's unsafe practices. No one said that he was unreasonable. No one made *any* response to his admittedly rational concerns other than to interrogate him regarding the Mayday Mark postings and consign him to psychiatric review.

Nor did any FedEx representative at that meeting contend that it had no choice but to continue in its practices that incentivized terrorist access. Nevertheless, in addressing a purely legal issue, the ALJ and Respondents rely on the testimony of fact witnesses to assert that the dissemination of its flight tracking information was compulsory. (ALJ Decision at 49; DOL Brief at 31; FedEx Brief at 32). Testimony as to what the law requires is inadmissible and the conclusions that flow therefrom are founded on sand.

Respondents argue that it is lawful for the carrier to punish Estabrook for expressing his rational concerns because the FAA compels FedEx to make its tracking information available to terrorists albeit in apparent contravention of its obligation to prevent and deter terrorist action. However, only Estabrook addressed the *law* – free of inadmissible "fact" testimony and speculation – and the *law* is that that air carriers are *not* required to have their tracking data disseminated. (CX 44, citing H.R. 2112, Section 119A; 78 Fed. Reg. 51804 (August 21, 2013); Estabrook Brief at 49). The public policy behind that law is to allow carriers to

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

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

II. The ARB's Ruling On Attorney-Client Privilege Should Be Reversed

Respondent DOL argues that FedEx attorney Rob Tice's disclosure of privileged attorney-client communications was not voluntary. (DOL Brief at 53). However, Tice voluntarily testified that "there were some concerns about whether [Estabrook] should be on the jumpseat" when he was testifying about the reason for the August 5 NOQ. (Tice, Tr. 457). In fairness, Tice's voluntary testimony requires disclosure of his communications with VP of Flight Operations James Bowman, upon which Tice's testimony was based. *Hernandez v. Tanninen,* 604 F.3d 1095, 1100 (9th Cir. 2010), citing *Chevron Corp. v. Pennzoil Co*., 974 F.2d 1156, 1162 (9th Cir. 1992) ("Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived.").

CONCLUSION

Captain Estabrook endeavored to convince FedEx that it was failing to take adequate measures to prevent the conversion of FedEx aircraft into terrorist missiles. The trial established that al Qaeda identified FedEx as a means for delivering explosive devices and was seeking data on how to better time the detonation of these explosive devices. Estabrook communicated to FedEx that its reckless dissemination of aircraft and package tracking information provides valuable intelligence that actually incentivizes terrorists to view FedEx as a particularly effective means of delivering its explosive devices. FedEx's own Managing Director of Security agreed that Estabrook had presented "rational" concerns that FedEx's tracking dissemination policies constituted a failure to deter terrorist activity. Estabrook's reporting of security issues was not only rational and reasonable, but, as an In-flight Security Coordinator, it was also obligatory. 49 C.F.R. § 1544.215(c) ("Each aircraft operator must designate and use the pilot in command as the In-flight Security Coordinator…"). In response, FedEx resorted to Soviet-style psychiatric analysis as an offensive tool in violation of AIR 21.

The ALJ and ARB erred in ruling that Estabrook's security concerns did not constitute protected activity. However, if communicating undisputedly "rational" concerns about the failure to deter terrorist actions is not "protected activity" under AIR 21, it is difficult to conceive what would constitute protected activity. If,

under the facts of this case, FedEx is permitted to evade responsibility for its actions, AIR 21 will have become an empty shell.

In view of the foregoing, Petitioner Mark Estabrook respectfully requests that this Court (1) set aside the ARB's decision; (2) hold that Estabrook established by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action; (3) hold that Estabrook's discussion of his security concerns about FedEx's operations on August 9, 2013 constituted protected activity; and (4) reverse the ARB's ruling on attorney-client privilege.

Dated: February 20, 2020

Respectfully submitted,

/s/ Lee Seham

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Lee Seham

_____

Lee Seham
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 5th Cir. R. 32.2 because the brief contains 3,835 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: February 20, 2020

/s/ Lee Seham
Attorney for Petitioner Mark Estabrook