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November 4, 2014

VIA ELECTRONIC AND
U.S. MAIL

david.knox@fedex.com

David P. Knox, Esq.
Senior Counsel
Federal Express Corporation
3620 Hacks Cross Rd., Bldg B - 3d Fl.
Memphis, Tennessee 38125

Re: Discovery Issues
Estabrook/Federal Express Corporation
Case No.: 2014-AIR-00022

Dear David:

FedEx's responses to the Complainant's First Combined Discovery dated August 29, were originally due on September 29, 2014. During our teleconference with Judge Sellers on September 26, 2014, we agreed to your request for a two-week extension with the caveat that we expected a full response to the Complainant's First Combined Discovery.

It was not until October 29, 2014 – a full month from the original due date – that we received from your office a response to Complainant's First Combined Discovery. Unfortunately, the delayed response is substantially defective.

Please consider what follows to be our preliminary attempt to address these defects. Among the defects of primary concern are: (1) the failure to provide a privilege log notwithstanding the fact FedEx's responses specifically reflect the withholding of allegedly privileged documents in no less than seven of its responses to Complainant's Request for Documents¹; (2) the selective provision of privileged and confidential

¹ To the extent that any documents are withheld based on the assertion of privilege, including, but not limited to, attorney-client privilege or attorney-client work product – which, as discussed herein, we consider inapplicable – we demand the immediate

documents (which, as discussed below, effectuates a waiver of privilege for all documents related to this same subject matter); (3) the apparent withholding of any internal documents/communications originated by or sent to Robert Tice, identified by FedEx as one of the primary decision-makers; (4) the selective furnishing and withholding of taped conversations; (5) the apparent refusal to search for, or provide, *any* documents related to the Complainant's communications with FedEx in his capacity as Security Chairman of the FedEx Pilots Association, during which time he raised the same security issues for which he, more recently, was punished via compulsory psychiatric evaluation; (6) the refusal to respond, or resort to evasive responses, to Requests for Admissions that were designed to narrow the issues for trial; (7) the complete absence of any e-mails, including but not limited to, any emails by and between the four FedEx-identified decision-makers, and any e-mails between FedEx and the doctors who evaluated Complainant – it is not credible that no such emails exist (we remind you that “document” is defined in Complainant's First Combined Discovery to include electronically stored information, such as emails); and (8) the redaction of documents without providing any basis for such redaction. We request the courtesy of a response no later than November 10, 2014, as to whether FedEx will correct these defects so that we can determine if the referral of these matters to Judge Sellers is necessary.

If you wish to discuss this matter by telephone, please propose a time via email. These issues need to be addressed and resolved.

Starting on September 11, 2014, we also made repeated requests that you provide convenient dates on which we could depose Messrs. Fisher, McDonald, Ondra, and Tice. Significantly, FedEx's response to Interrogatory No. 6 identifies these four men as the individuals involved in the decision to place the Complainant on not qualified (NOQ) status on August 5, 2014. It was not until seven weeks had passed that, with your October 29 discovery response, you responded that you were checking the witnesses' availability for the week of November 17, 2014. Please be advised that we cannot proceed with depositions until the discovery defects identified herein are cured.

Based on our review to date, we bring to your attention the following defects in FedEx's discovery responses:

Requests for Admissions:

RFA6: In response to a RFA that Captain Fisher made the quoted statement, FedEx responds that Captain Fisher “has no recollection.” Nevertheless, there is no dispute that Captain Fisher called Captain Estabrook after the August 9, 2014, meeting and FedEx preservation of other taped conversations reflects its policy of taping and retaining teleconferences with its pilots. We request that Captain

provision of a privilege log identifying the documents by date, identity of sender, identity of all recipients, subject matter, and nature of privilege claimed.

Fisher be required to review the tape and that FedEx provide an appropriate response.

RFA8 FedEx provides identical responses to RFA's 8 through 11, which request admissions to statements made by the Complainant at a meeting on August 9, 2013: "Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed." There are at least three problems with this generic response with respect to RFA's 8 through 11: (1) that FedEx does not identify Ondra's notes in its discovery responses, (2) that Ondra did not attend the entire meeting, and (3) the Complainant is entitled to an admission or denial in order to achieve the objective of narrowing the issues for trial. In the absence of a specific response, Complainant reserves the right to seek appropriate sanctions.

RFA9 We reiterate the defects identified under RFA8 above and add that FedEx's response conflicts with its prior communications with OSHA Investigator Jason Brush.

RFA10 We reiterate the defects identified in RFA8 and RFA 9 above.

RFA11 We reiterate the defects identified in RFA8 and RFA 9 above. In addition, assuming that Ondra's notes are at FDX4-63-63, the response is clearly evasive and disingenuous. We request the FedEx immediately change its response to RFA11 to an admission.

RFA13 For FedEx to deny knowledge and or information as to whether the Complainant was the Security Chairman of its pilot's union is evasive and disingenuous. The Complainant has previously identified his interactions with FedEx Express COO Bill Logue, yet FedEx has declined to involve him in its inquiries on this issue. Here too, the Complainant reserves the right to seek appropriate sanctions.

Interrogatories:

Int3 FedEx's failure to provide even a preliminary response to an interrogatory requesting identification of witnesses for its case in chief is unacceptable.

Int4 FedEx's failure to provide even a preliminary response to an interrogatory requesting identification of witnesses for its rebuttal case is unacceptable.

Int7 FedEx's response to the interrogatory as to why the Complainant was withheld from flight status (NOQ) is vague and evasive ("referred for examination"). FedEx must respond as to *why* Captain Estabrook was referred for an examination.

Requests for Documents:

Req1 FedEx's response to Request No. 1 indicates that FedEx is withholding "non-privileged documents" based on "the attorney-client relationship and/or the attorney work product doctrine." As a preliminary matter, the response is unacceptable because FedEx has failed to provide a privilege log identifying the documents by date, identity of sender, identity of all recipients, the subject matter, and the basis for the privilege – without which information the Complainant will be unable to evaluate the legitimacy of the asserted privilege.

Moreover, it is well established that the "voluntary disclosure of the content of a privileged attorney communication results in waiver as to all other communications on the same subject." *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010). *See also United States v. Nobles*, 422 U.S. 225, 239-40 (1975) ("Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination."). In its discovery responses, FedEx has produced meeting notes marked "Privileged and Confidential" at FDX4-60-64, and relies heavily on those notes to address the critical meeting of August 9, 2013, in responses to Requests for Admissions 8 through 11. FedEx has thus waived any privilege related to its conduct toward Captain Estabrook subsequent to his email request of August 4, 2014, for a meeting with Fred Smith.

In addition, Robb Tice has been identified by FedEx as one of the persons involved in the decision to place the Complainant on NOQ status (Response to Interrogatory No. 5). Mr. Tice was actively involved in the investigation of the Complainant's physical and mental health status and played a leading role in the interrogation of the Complainant. For these reasons too, communications to and from Robb Tice are not subject to an attorney-client or work product privilege. *See, e.g., Waugh v. Pathmark Stores, Inc.*, 191 F.R.D. 427, 432 (D.N.J. 2000)(communications created for internal investigation purposes are discoverable); *Harding*, 914 F. Supp. 1084, 1099 (D.N.J. 1996)(work product doctrine does not apply when an attorney undertakes an internal investigation to comply with internal policy).

For the above stated reasons, the Complainant demands the immediate production of all documents that have been withheld based on the attorney-client relationship and/or the attorney work product doctrine.

Req6 FedEx has failed to produce and clearly identify with sufficient particularity the number, date and time of all recorded telephone calls relating to the Laredo departure during the evening of April 10-11, 2014. Specifically, Complainant requested FedEx to produce ALL seven recordings of these calls:

901-397-8025 at 8:25 PM Central on April 10, 2013;
901-860-2600 at 9:14 PM Central on April 10, 2013;
901-397-8214 at 9:16 PM Central on April 10, 2013;
901-397-8025 at 9:39 PM Central on April 10, 2013;
901-397-8214 at 9:43 PM Central on April 10, 2013;
901-397-8025 at 9:50 PM Central on April 10, 2013;
901-397-8025 at 3:23 AM Central on April 11, 2013.

Please identify the number, date and time of the four recorded telephone calls that have been produced, and provide and identify all remaining recorded calls as shown on the above list.

- Req7 FedEx has refused to produce *any* documents in response to Request No. 7 on the grounds, *inter alia*, that the request – seeking knowledge of the efforts of terrorist organizations to target FedEx and the company’s measures in response – seeks documents that are irrelevant and/or privileged. Nevertheless, FedEx’s defense of its discriminatory conduct in this matter relies on de-legitimizing the Complainant’s security concerns and the denial that his expression of these concerns constitutes protected activity. A core focus of the pivotal August 9, 2013 meeting on which FedEx based its discriminatory actions was a discussion of FedEx’s susceptibility to terrorist actions. Respondent demands a full response to Request No. 7.
- Req8 FedEx’s response is defective in that it fails to identify with particularity the documents responsive to the request (documents related to the request for an August 4 meeting), but, instead, compels the Complainant to seek the needles in a haystack. The Complainant demands that the documents responsive to Request No. 8 be specifically identified. In addition: (1) all documents that have been withheld in response to Request No. 8 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1.
- Req10 FedEx’s objections are invalid. As discussed in Req1 above, the privileges asserted by FedEx are inapplicable. Specifically with respect to the postings related to May Day Mark, FedEx has failed to produce the same postings or in the same condition (including notations and highlighting) in which they were brought to the meeting by Robert Tice on August 9, 2013. These documents must be produced forthwith. In addition: (1) all documents that have been withheld in response to Request No. 10 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1.
- Req11 For the reasons stated under Req10 above, FedEx’s responses are unacceptable. Moreover, here too, FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant

demands that the documents responsive to Request No. 11 be specifically identified. All May Day Mark documents must be produced forthwith, including, but not limited to, the documents brought to the meeting of August 9, 2013. In addition: (1) all documents that have been withheld in response to Request No. 11 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1.

Req12 For the reasons stated under Req10 above, FedEx's responses are unacceptable. Moreover, here too, FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 12 be specifically identified. All May Day Mark documents must be produced forthwith, including, but not limited to, the documents brought to the meeting of August 9, 2013. In addition: (1) all documents that have been withheld in response to Request No. 11 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1.

Req13 For the reasons stated under Req10 above, FedEx's responses are unacceptable. Moreover, here too, FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 13 be specifically identified. All May Day Mark documents must be produced forthwith, including, but not limited to, the documents brought to the meeting of August 9, 2013. In addition: (1) all documents that have been withheld in response to Request No. 11 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1.

Req14 All documents that have been withheld in response to Request No. 14 on the basis of privilege must be identified in an appropriate privilege log, and all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1.

Req15 Here again FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 15 be specifically identified. In addition: (1) all documents that have been withheld in response to Request No. 11 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1.

Req16 Here again FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 16 be specifically identified. In

addition: (1) all documents that have been withheld in response to Request No. 11 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1.

Req17 FedEx's outright refusal to provide any documents is particularly shocking in view of the fact that Complainant's reference to Auburn Calloway at the meeting of August 9, 2014, was one of the three reasons proffered by FedEx in its submissions to the OSHA Investigator substantiating an intervening event justifying its discriminatory treatment of the Complainant. Complainant demands that FedEx furnish documents in response to Request No. 17 or waive any argument that its discriminatory treatment of the Complainant was justified by an intervening event.

Req18 Here again FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 18 be specifically identified. In addition: (1) all documents that have been withheld in response to Request No. 11 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1. Finally, in view of the fact that the Complainant's alleged references to Russia or the Soviet Union were one of the three reasons proffered by FedEx in its submissions to the OSHA Investigator substantiating an intervening event justifying its discriminatory treatment of the Complainant, it is not credible that FedEx representatives engaged in no communications regarding this issue beyond the notes of the meeting of August 9, 2014.

Req19 This request seeks documents relating to its decision to place the Complainant on NOQ status. In view of the importance of this issue, it is particularly unacceptable that FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 19 be specifically identified. In addition: (1) all documents that have been withheld in response to Request No. 19 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Req1.

Req20 This request seeks documents relating to the basis or rationale to require the Complainant to submit to a psychiatric evaluation. In view of the importance of this issue, it is particularly unacceptable that FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 20 be specifically identified. In addition: (1) all documents that have been withheld in response to Request No. 20 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an

attorney-client privilege or work product must be produced per our objections above under Req1.

- Req22 Here again FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 20 be specifically identified with particular reference to each Request for Admission denied.
- Req23 FedEx has failed to produce copies of Complainant's military service record from his employee records, including but not limited to, his DD-214, military flight logs and Officer Evaluation Reports, all of which were submitted during his initial application for employment at FedEx.
- Req25 FedEx refuses to produce any documents in response to Complainant's request for documents relating to Complainant's raising of safety and security issues in his capacity as a union representative. FedEx claims the supposed "vague and ambiguous" nature of the term "union representative," but made no effort to obtain clarification. FedEx also claims that it has "no knowledge" of Complainant's service as a union representative. FedEx's response is specious and deserving of sanction. FedEx Counsel is in receipt of Complainant's submission of January 27, 2013, in which, with substantial specificity, he identifies his position as Security Chairman for the FedEx Pilots Association from 2001 to 2002, during which period he interacted with highly placed FedEx officers including FedEx Express COO Bill Logue. Complainant demands a good faith response to this request.
- Req27 FedEx has failed to identify all of the calls from April 10 and 11, 2013, with enough specificity to clearly define the date, phone number and time of call. In the case of at least one phone call, FedEx has refused to provide a conversation between Duty Officer Mark Crook and the Complainant, and hereby requests that a recording of the missing conversation be supplied immediately. FedEx has also failed to produce a copy of the recorded telephone call from 901-224-3435 at 5:30 PM Central on August 9, 2013, which was a call between A300 Fleet Supervisor Rob Fisher to Complainant.
- Req29 In response to Complainant's request for notes related to meetings between Complainant and FedEx Express COO Bill Logue in 2002, FedEx responds it is "unaware" of any documents. We request that FedEx counsel advise what efforts were made to consult with Mr. Logue concerning this request or to review his files.

Again, we request the courtesy of response no later than November 10, 2014, as to whether FedEx will correct these defects so that we can determine if the referral of these matters to Judge Sellers is necessary.

Sincerely,

A handwritten signature in black ink that reads "Lee Seham" followed by a stylized flourish or initials.

Lee Seham