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UNITED STATES DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
OFFICE OF ADMINISTRATIVE LAW JUDGES

MARK ESTABROOK, **Complainant,** **v.** **FEDERAL EXPRESS CORPORATION,** **Respondent.**	**CASE NO. 2014-AIR-00022** **ADMINISTRATIVE LAW JUDGE SCOTT R. MORRIS**

COMPLAINANT'S POST-TRIAL BRIEF

INTRODUCTION

At the conclusion of the hearings in this matter, the Tribunal requested that the Respondent's post-trial brief focus on the issue of whether there was "clear and convincing" evidence to support the position that the Respondent would have taken its adverse employment actions against Captain Mark Estabrook in the absence of his protected activity. The request implicitly recognized the Tribunal's prior partial summary judgment decision confirming Estabrook's protected activity and the multiple adverse employment actions he suffered following this activity. The Tribunal's recommendation also came in the aftermath of a trial in

which both direct and overwhelming circumstantial evidence supported the conclusion that the Complainant's protected activity contributed to the Respondent's adverse employment actions.

The Tribunal's decision of May 9, 2016, held that Captain Mark Estabrook engaged in protected activity on April 10, 2013, by refusing to depart from Laredo into hazardous weather conditions, and on April 29 through May 2, 2013, by initiating a prior AIR 21 complaint process in response to the Company's disciplinary investigation into the Laredo departure. (Partial Summary Judgment Decision at 15-17, 25).

The Tribunal also held that, barely three months later, the Respondent subjected Captain Estabrook to three separate adverse employments actions by: (1) placing him on Not Operationally Qualified (NOQ) status on August 5, 2013, (2) reinstating him to NOQ status on August 9, 2013, and (3) subsequently ordering him to submit to a mandatory health examination under threat of discipline if noncompliant. (Partial Summary Judgment Decision at 20-22, 25). Under AIR 21 precedent, the temporal proximity of the Laredo-related protected activity to these three adverse employment actions, standing alone, warrants an inference of a causal connection.

However, throughout the trial process, the evidence of a causal connection between Captain Estabrook's protected activity and the adverse actions he suffered became overwhelming, including: (a) the Respondent's willful withholding of any rationale for its actions in disregard of the Complainant's repeated written requests, (b) shifting rationales including the abrupt admission, at trial, that the August 5 NOQ designation was for the purpose of grounding the Complainant rather than to merely "facilitate" a meeting as sworn to in the Respondent's interrogatory responses and initial testimony, and (c) trial testimony establishing that immediately prior to its August 2013 adverse actions, the Respondent had determined to interrogate Captain Estabrook concerning its suspicions that he had communicated with fellow

pilots regarding the Laredo departure. Significantly aggravating the Respondent's misconduct, and obliterating its institutional credibility, was the disclosure that Respondent – with its legal counsel present – falsely represented to OSHA's investigator that the Complainant's supervisor had no prior knowledge of Captain Estabrook's Laredo-related AIR 21 filing. Given these facts, the Respondent's obligation to provide "clear and convincing" evidence demonstrating that it would have taken adverse employment actions against Captain Mark Estabrook in the absence of his protected activity cannot be satisfied.

The Tribunal also requested that the Complainant's post-trial brief address whether Captain Estabrook had engaged in further protected activity during a meeting with Respondent's representatives on August 9, 2013. Just hours prior to the adverse employment actions of August 9, 2013, Captain Estabrook endeavored to convince the Respondent that it was failing to take adequate measures to prevent the conversion of FedEx aircraft into terrorist missiles. The trial established that Al Qaeda has identified FedEx as a means for delivering explosive devices and was seeking data on how to better time the detonation of these explosive devices.

On August 9, 2013, the Complainant communicated to the Respondent that FedEx's reckless dissemination of aircraft and package tracking information provides valuable intelligence that actually incentivizes Al Qaeda to view FedEx as a particularly effective means of delivering its explosive devices. Respondent's own Managing Director of Security agreed that, at the August 9 meeting, Estabrook had presented "rational" concerns that FedEx's tracking dissemination policies constituted a failure to deter terrorist activity.

In its defense, Respondent's lawyers make two technical arguments as to why Estabrook's August 9 communications should not be considered protected activity: (1) that FedEx's disseminates only "historical" package tracking information of no use to Al Qaeda, and

(2) that – irrespective of the utility of aircraft tracking data to Al Qaeda and other terrorists – the release of this data into the public domain is beyond the Respondent's control. The latter might be termed FedEx's "they made me do it" terrorism defense.

The trial record and the law dispose of both of these arguments. The historical data released through FedEx's package tracking, including information as to when the package arrives at the Memphis sorting facility, is precisely the type of data that would assist Al Qaeda in timing its detonations. As to aircraft tracking data, FedEx has the unfettered legal right to prevent the Federal Aviation Administration's release of this data and, as the known target of an Al Qaeda bomb plot, should have asserted this right in fulfillment of its legal obligation to deter terrorist activity. The only reason Respondent ever gave to Captain Estabrook for its continued dissemination of this data was that safety had to be subordinated to the modern marketing appeal of a constant flow of electronic information.

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, the Respondent is permitted to evade responsibility for its actions, AIR 21 will have become an empty shell.

FACTUAL BACKGROUND

Laredo-Related Protected Activity and the August 5 NOQ Grounding

As relevant to this case, the Complainant engaged in three instances of "protected activity" related to aviation safety issues. The first two instances involved the Complainant's resistance to pressure from FedEx Duty Officer Mark Crook to fly into hazardous weather conditions, which required the delay of a Laredo departure on April 10, 2013, and – in response to a retaliatory

disciplinary investigation by the Respondent – his initiation of an AIR 21 action on April 29, 2013. (Partial Summary Judgment Decision at 15-17, 25). Estabrook subsequently withdrew the AIR 21 action, on May 2, 2013, after FedEx terminated its disciplinary proceedings and personally advised Fisher of this withdrawal. (Estabrook, Tr. 91-92; RX 12).

It was System Chief Pilot Captain William McDonald who directed Fleet Captain Rob Fisher to conduct the disciplinary investigation. (Fisher, Tr. 344; McDonald, Tr. 680; CX 7). FedEx Labor Relations Counsel Robb Tice participated in the investigation of the Laredo departure and consulted with management representatives Fisher and McDonald regarding the Laredo-related AIR 21 complaint. (CX 10, items 2-5; Fisher, Tr. 346-47).

The Laredo investigation was prompted by an email, dated April 10, 2013, from Respondent's Duty Officer Mark Crook who faulted the Complainant for taking it "upon himself to delay a flight without coordinating and coming to an agreement with the dispatcher." Crook condemned Captain Estabrook for being the "sole source of weather" and for having "delayed the flight by that sole source of information." (CX 6; RX 8). Crook accused Estabrook of having been "directive" with Dispatcher Sherrie Hayslett and for telling her "how it was going to be." *Id*. The angry Crook sought action against Estabrook based on the captain's alleged disregard of a "system that runs by time not much slop." *Id.*

Notwithstanding Crook's allegations, the audiotaped conversation between Captain Estabrook and Dispatcher Hayslett reflects a cordial exchange, punctuated by friendly laughter, in which Hayslett – not Estabrook – first observed the necessity of a weather-related delay. (JX. 1; RX 10 at 1-2). Far from being "directive," Estabrook gave Hayslett his cell phone number and requested an "update" with respect to any changes in conditions. *Id.* Far from being the "sole source" of weather, Respondent's internal documents reflect that Hayslett told the flight crew

that they would have a WX – or weather-related delay. (RX 7 at 2). In fact, departure was not even a legal option, since the weather was so severe that Captain Estabrook was subject to an ATC gate hold, which confirms the mercenary nature of the Respondent's pilot pushing. (Estabrook, Tr. 70; Fisher, Tr. 360).

Crook's April 10 email emphatically denounces Captain Estabrook's supposed presumption in asserting his authority, as pilot-in-command, to invoke a weather-based delay. Although the Respondent has attempted to portray the carrier's concern as one based on the crew's determination to monitor the thunderstorms from the hotel, rather than the airport, this pretense is belied by the audiotaped conversation between Crook and Estabrook wherein Crook never questioned why the crew was still at the hotel, but only queried: "So what time are you planning to take off?" (RX 10 at 4). The cunning Crook later forwarded his Flight Duty Officer phone conversations with Estabrook to his non-recorded personal cell phone line which enabled him to exert coercive pressure by asserting that "everybody else is taking off" and "I am watching you very closely." (Estabrook, Tr. 78-80; Crook, Tr. 270, 292-93). When Sherrie Hayslett reported to the GOC Manager that Estabrook felt he was being "pushed to leave," Crook's boss responded: "It's his damn job." (RX 10 at 8).[1]

Fleet Captain Fisher and System Chief Pilot McDonald knew all of this. Attached to Crook's April 10 email were the recorded conversations that confirmed Hayslett's raising of the weather issue, Estabrook's cordiality and request for updates, and Crook's focus on the question

[1] Respondent not only concedes that Captain Estabrook expressed objections to being pressured by management to fly into hazardous weather conditions, but also that Estabrook had a good faith belief that he was being subjected to such pressure. (Fisher, Tr. 359-60). Fisher promised Estabrook that he would counsel Crook regarding his misconduct, but, in fact, never did. (Estabrook, Tr. 90; Fisher, Tr. 316, 360).

of an on-time takeoff, rather than the contrived issue of the crew's location at an airport hotel. In short, several weeks in advance of the investigative hearing, Fisher and McDonald were in possession of all the recorded evidence that cleared Estabrook of any misconduct. (Fisher, Tr. 352, 354; McDonald, Tr. 683).[2]

Nevertheless, McDonald directed Fisher to summon Estabrook to Memphis for a hearing identified by the Respondent in a lawyer-vetted email as part of a "disciplinary" process. (Fisher, Tr. 346; CX 8). The Fisher email was in response to a letter, from Estabrook's legal counsel, Alan Armstrong, dated April 29, 2013, advising Fisher of the filing of an AIR 21 complaint as a result of Respondent's Laredo-related retaliatory actions. (CX 8 at 3). Fisher would later deny to an OSHA investigator that he had any knowledge of the Laredo-related AIR 21 filing despite the presence of FedEx counsel during the OSHA investigatory meeting. (Fisher, Tr. 408-09; CX 23 at 3: "I did not know Mark filed a whistleblower complaint until you just told me.").

At the close of the investigatory hearing on May 1, 2013, Fisher advised Estabrook that based on his review of the tapes, which had been in his possession for three weeks, no disciplinary action would be taken. In light of this development, Estabrook advised Fisher that he would withdraw his AIR 21 complaint. (Estabrook, Tr. 92; Fisher, Tr. 317). Fisher responded by confessing to Estabrook that Fisher's own boss, System Chief Pilot McDonald, was disappointed that no disciplinary action would be taken against Estabrook. (Estabrook, Tr. 90). In sum, McDonald was left frustrated.

McDonald, however, perceived an opportunity, just three months later, to pursue adverse

[2] Significantly, the very use of these tapes to initiate a disciplinary investigative process reflects the Respondent's discriminatory treatment of the Complainant in view of FedEx policy that these tapes not be used for disciplinary purposes. (Dunavant, Tr. 249-50).

action against Captain Estabrook based on his Laredo-related protected activity. McDonald determined that, under the title Mayday Mark, Estabrook may have been communicating with fellow pilots on an internet forum regarding the Laredo departure. (McDonald, Tr. 711-12). McDonald directed Respondent labor counsel Tice to question Estabrook, at a meeting scheduled for August 9, 2013, for the purpose of determining whether Estabrook was Mayday Mark. (McDonald, Tr. 711; Tice, Tr. 459-60, 495). According to Tice, McDonald never told him the reason for his interest in the identity of MayDay Mark, and McDonald claims to have destroyed the Laredo-related postings. (Tice, Tr. 442; McDonald, Tr. 711).

The fact that McDonald had a disciplinary objective in mind is confirmed by his own testimony in which he asserted that he considered the Laredo-related postings to constitute a potential violation of FedEx policy. (McDonald, Tr. 713, lines 22-24). Also indicative of FedEx's disciplinary objective entering the August 9 meeting was its determination to bring its labor attorney. Heedless of the fact that no one had advised Estabrook that he was going to be subject to a disciplinary investigation, Tice expressed "surprise" that the unsuspecting Captain Estabrook declined union representation for the August 9 meeting. (CX 20).[3] McDonald told Estabrook that the August 9 meeting was for the purpose of discussing an email that Estabrook had sent to him, dated August 4, 2013. (CX 14).

In the August 4 email to McDonald, Estabrook had requested a call from Respondent CEO Fred Smith to discuss security concerns, unrelated to the flight department, that he had previously raised with FedEx Vice President of Corporate Security William Hendrikson in his

[3] Tice conceded that the primary reason for having a union representative present at pilot-management meeting is to provide representation in the context of a disciplinary investigation. (Tice, Tr. 518-19).

capacity as the pilot union's Security Committee Chairman.[4] McDonald responded by ordering that the Complainant be placed on an indefinite NOQ. (McDonald, Tr. 700; CX 18).

In its interrogatory responses, the Respondent first represented that the indefinite NOQ grounding of Captain Estabrook, on August 5, 2013, was for the purpose of scheduling the Complainant for a mandatory 15.D health examination. (CX 19 at C-92). The Respondent subsequently disavowed this representation in a supplemental interrogatory response in which it asserted that the real reason for the August 5 NOQ grounding was to "facilitate the scheduling of a meeting [Estabrook] requested." *Id*. As the Respondent disingenuously explained, the objective of the NOQ was to "clear his work schedule and prevent the scheduling of conflicting activities." *Id*.

On its face, the purported rationale for the August 5 NOQ designation is implausible. In fact, Captain Estabrook never requested a meeting with management – his August 4 email requested a telephone call. Moreover, when the Respondent insisted on grounding him for a meeting, Captain Estabrook plaintively responded that a 15-minute teleconference could address the issue and expressed his regret that he was being removed from a much-desired trip to Panama. (RX 14 at 1; Estabrook, Tr. 61-62).

FedEx typically utilizes the NOQ to ground a pilot, and suspend his jumpseat privileges, due to a pilot health/training issue or to conduct a disciplinary investigation. (Estabrook, Tr. 48-49; Fisher, Tr. 325-26, 370, 405; McDonald, Tr. 700-01). Moreover, Respondent 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. 700; CX 30,

[4] The August 4 email constituted protected activity in that it communicated to the respondent that Estabrook was "about to" engage in protected activity. 49 U.S.C. §42121(a)(1).

Response No. 17 at 6).

Attorney Tice agreed that the "standard reason" for a jumpseat suspension is that the subject pilot is under investigation for a serious matter. (Tr. 464). Further evidencing FedEx's hostile objective at this juncture was its determination to staff the upcoming August 9 meeting with FedEx labor attorney Tice. As Tice testified, the "main occasions" for his legal presence at a pilot meeting would be for disciplinary investigations. (Tr. 433-34). In short, the August 5 NOQ designation, combined with attorney Tice's participation at the August 9 meeting, confirms that Estabrook walked into the August 9 meeting with a target on his back.[5]

At first, Respondent's trial witnesses toed the company line that the sole purpose of the August 5 NOQ was to "facilitate" a meeting. In furtherance of this obfuscation, the Respondent was greatly assisted by its successful effort to withhold from evidence the flurry of emails discussing the rationale for the August 5 NOQ on the basis of attorney-client privilege.

The lie was exposed at trial, however, when attorney Tice blurted out, over the fervent objections of FedEx counsel, that the Respondent's NOQ designation was, in fact, for the purpose of grounding Captain Estabrook and that the directive emanated from Vice President of Flight Operations James Bowman, whose authority exceeded that of any other Respondent witness. (Tice, Tr. 465-66, 481-83).[6] Bowman supposedly wanted Estabrook grounded and

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[5] The scheduling of a meeting could have been arranged via an RMG (Remove for Management) designation, the designation "typically" used by FedEx to remove a pilot from a scheduled trip to facilitate a meeting. Indeed, Fisher did not know why the RMG designation was not used for Estabrook's August 9 meeting. (Fisher, Tr. 368, 370).

[6] Although the Tribunal permitted Tice's testimony, it declined to order the disclosure of the email communications underlying his testimony. (Tr. 524). Complainant respectfully submits that this Tribunal's evidentiary ruling was in error. *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) ("voluntary disclosure of the content of a privileged attorney communication

stripped of his jumpseat privileges due to the content of his August 4 email. (Tr. 481).

Tice's testimony confirmed the aggravated falsity of the Respondent's interrogatory response that identified the participants in the August 5 NOQ decision as Fisher, Ondra, Tice, and McDonald. (CX 22 at C-123-24). The sworn testimony of Fisher, Ondra and Tice confirmed the untruthfulness of FedEx's representation because, in fact, none of these three men participated in the August 5 NOQ determination. (Fisher, Tr. 420-21; Tice, Tr. 436, 467-68, 483; Ondra, Tr. 567-68). According to the trial testimony of McDonald, he made the August 5 NOQ decision "alone." (McDonald, Tr. 666-67, 700).

But FedEx also falsely excluded from its interrogatory responses the participation of the Vice President of Flight Operations James Bowman – McDonald's boss – in the NOQ decision, until Tice let it slip on the second day of trial, thereby exposing a lie, of over two years' duration, imposed on Complainant's counsel, OSHA, and this Tribunal.

With the Respondent's credibility in tatters, the thesis that the August 5 NOQ grounding was merely for the purpose of facilitating a meeting to allow Estabrook to air his safety concerns has collapsed. Indeed, when Estabrook had completed his admittedly rational presentation on August 9 concerning how FedEx's reckless dissemination of intelligence data incentivized terrorist activity, the Respondent's representatives did not ask him a single question nor did they ever get back to him about the issues he had raised. (Estabrook, Tr. 100; Ondra, Tr. 592).

As confirmed by Ondra's notes from the August 9 meeting, the *only matter* discussed

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results in waiver as to all other communications on the same subject."); *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.")

during the Respondent's pre-meeting caucus was how to interrogate Captain Estabrook regarding his purported Mayday Mark postings. (Tr. 495-96; JX 3).

Protected Activity of August 9, 2013

The third instance of protected activity concerned the Complainant's communication to the Respondent, on August 9, 2013, that FedEx's cargo practices encourage and incentivize the introduction of destructive devices into FedEx aircraft for terrorist purposes.

Prior to 2013, Captain Estabrook had a history of deep involvement in safety issues at FedEx and served as the Security Chairman for the FedEx Pilots Association (FPA), the certified labor representative of the FedEx pilots during the Complainant's service in this position from 2001-2002. (Estabrook, Tr. 41-47; CX 15; CX 16; CX 17). Of particular concern to the Complainant was FedEx's publication of both package and aircraft tracking data, which he considered to compromise the carrier's obligation to deter the utilization of cargo aircraft as a means of terrorist attack. (Estabrook, Tr. 40-42, 45-46; CX 14 (package tracking); CX 15, item 15 (aircraft tracking)). FedEx's Senior Vice President of Air and Ground Freight Services, William Logue, rejected Estabrook's safety concerns on the grounds that "security is not going to trump marketing." (Estabrook, Tr. 46).

Frustrated at every turn, Captain Estabrook discontinued his efforts to promote FedEx's compliance with safe cargo practices until he obtained various media reports during the night of August 3-4, 2013, which confirmed the immediacy of the threat to safety posed by FedEx's practices. (Estabrook, Tr. 38-39, 50-51, 52-53). 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 AQAP 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…." (Estabrook CX 12). Numerous other media sources had made similar reports.[7]

AQAP's magazine, *Inspire*, explained in its November 2010 edition that FedEx was in its cross hairs for the indefinite future:

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[7] *See, e.g.* http://www.nytimes.com/2010/11/01/world/01terror.html?_r=0&adxnnl=1&page=&adxnnlx=1389849214-YEL+UkmTOFcs5bnM5AhunA ("American and British authorities were leaning toward the conclusion that the packages were meant to detonate in midair, en route to their destinations in Chicago," and reporting statement by Congressman Ed Markey that: "It is time for the shipping industry and the business community to accept the reality that more needs to be done to secure cargo planes so that they cannot be turned into delivery systems for bombs targeting our country."); http://en.wikipedia.org/wiki/Cargo_planes_bomb_plot ("U.S. officials said that an analysis of the cellphone circuitry in the bombs suggested that the intent was to delay their mid-air detonations until U.S.-bound planes carrying them were close to landing in the U.S."); http://www.spiegel.de/international/world/foiled-parcel-plot-world-scrambles-to-tighten-air-cargo-security-a-726746.html ("Officials suspect that the aim of the September shipment may have been to test how long it would take for the packages to reach their destination."); http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8124582/Parcel-bomb-set-to-go-off-over-the-US-police-say.html ("Ensuring that [ink cartridge bombs] exploded over land would cause more casualties on the ground and US intelligence officers believe that an earlier parcel sent to an Islamic bookshop in Chicago was planned as a dry run to get the timing right."); http://www.nytimes.com/2010/11/02/world/02terror.html http://abcnews.go.com/Blotter/us-feared-mail-bomb-plot-coming-september-dry/story?id=12025563 ("The dry run is always important to al Qaeda," said Dick Clarke, a former White House counterterrorism official and now an ABC News consultant. "In this case they wanted to follow the packages using the tracking system to know exactly when they got to a point, how long the timer had to be set for, so the bomb would go off at the right point, which presumably was over Chicago.").

> We have succeeded in bringing down the UPS plane [on September 3, 2010] but because the enemy's media did not attribute the operation to us we have remained silent so we may repeat the operation. This time we sent two explosive packages, one was sent through UPS, and the other through FedEx.
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> * * *
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> [A]ir freight is a multi-billion dollar industry. FedEx alones flies a fleet of 600 aircraft and ships an average of four million packages per day. It is a worldwide industry. For the trade between North America and Europe air cargo is indispensable ….

(*CX 14 at 4,* 7). AQAP explained that it had "singled out the two U.S. air freight companies: FedEx and UPS for our dual operation." (*Id*.).

It was in this context that Captain Estabrook resumed his efforts to make FedEx fulfill its legal obligation to prevent and deter the introduction of explosive devices into cargo aircraft. Having already exhausted the hierarchy of FedEx executives in 2001 and 2002, Estabrook felt it was time to appeal to the Chairman and CEO of FedEx Corporation. (Estabrook, Tr. 39, 47). By email dated August 4, 2013, the Complainant sought a teleconference with FedEx CEO Fred Smith to discuss the security issues that he had previously raised in his capacity as the pilot union's Security Committee Chairman. (Estabrook, Tr. 47, RX 13). As previously discussed, McDonald's immediate response was to ground the Complainant and bar him from FedEx aircraft for an indefinite period of time.

The Respondent representatives attending the August 9 meeting were Fleet Captain Rob Fisher, Labor Relations Counsel Robb Tice, and Managing Director of Aviation and Regulatory Security Todd Ondra.

During the August 9 meeting, Captain Estabrook discussed the FedEx-specific October, 2010 bomb plots and how they confirmed the threat he had previously identified to the Company in the post 9/11 period. (Estabrook, Tr. 96-97). Estabrook urged the Respondent to restrict the

release of aircraft and package data to the initial pick-up and final delivery of the package because the dissemination of anything beyond that information incentivizes terrorists to introduce explosives into FedEx aircraft. (Estabrook, Tr. 94, 96-97, 99; Ondra, Tr. 604; JX 4; CX 31 at 1). Fisher agreed that Estabrook admonished the Respondent that "in terms of FedEx's dissemination of tracking information, the Company was not doing enough to deter terrorists from utilizing FedEx aircraft as a potential weapon." (Fisher 366-67). The Respondent's representatives made no response to Captain Estabrook's expressed concerns. (Estabrook, Tr. 99-100).

Instead, at the request of McDonald, attorney Tice posed questions to Captain Estabrook for the purpose of determining whether Estabrook had placed postings on an internet forum under the name of Mayday Mark. (Tice, Tr. 442; Estabrook, Tr., 100-01). When unable to establish the Mayday Mark connection, Tice hung his head in disappointment – Estabrook's connection to the Laredo postings could not be established. (Estabrook, Tr. 101). Immediately thereafter, Fisher reinstated Estabrook to flight duty. (*Id*.)

Nevertheless, later that evening, Fisher called Estabrook to tell him that he was being placed back on NOQ status and directed him to undergo a mandatory 15.D psychiatric examination. (Estabrook, Tr. 105-06). The only rationale identified by Fisher for the company's actions was that Estabrook "knew too much." (Estabrook, Tr. 108; Fisher, Tr. 332). The Tribunal has previously held that both the August 9 reinstatement of NOQ status, and the subsequent 15.D directive, constituted adverse actions under AIR 21. (Partial Summary Judgment Decision at 20-22, 25).

Fisher issued a written order dated August 16, 2013, ordering Estabrook to submit to a 15.D examination, and stating that he would be subject to "disciplinary action" if he failed to

comply. (JX 5). As Estabrook's direct supervisor, Fisher made an independent determination to issue the 15.D directive based, in part, on Estabrook's comments relating to FedEx's publication of live tracking information and al-Qaeda. (Fisher Tr. 380-81, 391, 399-400; RX 15).

Section 15.D of the pilots' collective bargaining agreement (CBA) restricts the decision to refer a pilot to a company-mandated medical examination to the VP of Flight Operations, the System Chief Pilot, or a Regional Chief Pilot, and further requires that the decision-maker have a "reasonable basis" for the referral. (JX 6 at 5). Despite repeated demands from Complainant's legal counsel, the Respondent declined to provide the Complainant with the "reasonable basis" for the referral in defiance of its own past practice. (CX 27 at 5; CX 29 at 1; Tice, Tr. 511-12). It was not until almost four months later, in the context of a position statement submitted to OSHA Investigator Jason Brush, that the Respondent proffered its purported "reasonable basis" for the compulsory 15.D medical examination.

The Respondent's position statement dated December 4, 2013, states three reasons for its adverse actions against the Complainant: (1) that Complainant's August 4 email "cryptically requested that the Chairman and CEO of FedEx give him a call to discuss 'something related to 9-11,'" (2) that Captain Estabrook had asserted that "he had been chased all over Russia in his youth," and (3) he allegedly made "assertions" regarding the conversion of former FedEx hijacker Auburn Calloway to Islam and "relayed wholly unfounded suspicions that Calloway might be advising Al Qaeda." (RX 31 at 5; CX 32 at 5). As discussed further in section C.3 below, Respondent has effectively disavowed each of the above-stated rationales and/or the supposed factual predicate therefor. Moreover, McDonald and Fisher have conceded that Captain Estabrook's protected activity contributed to the adverse actions taken against him.

McDonald testified that, immediately prior to his placement of the Complainant on NOQ

status, he had targeted Captain Estabrook for an investigation of a probable violation of FedEx policy based on his airing of issues related to the Laredo departure. (McDonald, Tr. 711-12). Fisher testified that his issuance of the 15.D directive, dated August 16, 2013, was based in part on Estabrook's statements at the August 9 meeting relating to al Qaeda's potential exploitation of live tracking information released by the Respondent. (RX 15; Fisher Tr. 380-81, 391, 399-400).

ARGUMENT

A. Estabrook's Protected Activity Contributed to Respondent's August 5 NOQ Determination and Respondent Cannot Demonstrate by Clear and Convincing Evidence That This Adverse Action Would Have Occurred in the Absence of His Protected Behavior

Under AIR 21, once the complainant has established a *prima facie* case, the burden shifts to the employer to "demonstrate[], by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [the protected activity]." 49 U.S.C. § 42121(b)(2)(B)(iv).

As discussed above, the Tribunal has already determined that Estabrook engaged in protected activity with respect to the Laredo departure of April 10 and the related AIR 21 process from April 29 through May 2, 2013. On August 5, barely three months later, McDonald ordered Estabrook placed on an indefinite NOQ, which the Tribunal has held to be an adverse action.

Temporal proximity between protected activity and an adverse personnel action "normally" will satisfy the remaining burden of making a *prima facie* showing of knowledge and causation. 29 C.F.R. § 1979.104(b)(2). Temporal proximity in this matter falls well within the bounds justifying an inference of causal connection. *Clark v. Pace Airlines, Inc.,* ARB No. 04-150, ALJ No. 2003-AIR-28 (ARB Nov. 30, 2006)(protected activity occurring as much as four

and even eight months prior to adverse action characterized as a "relatively short time" warranting inference of causation). In this case, however, temporal proximity is just the tip of the iceberg with respect to evidence of causal connection.

McDonald's determination, immediately prior to the August 5 NOQ designation, that Estabrook's suspected Laredo-related communications as Mayday Mark warranted investigation, confirms that the Complainant's protected activity was at the forefront of McDonald's mind. To pursue this connection, he sent in attorney Tice, whose primary function at pilot meetings is to manage disciplinary investigations. The Mayday Mark connection was the sole topic of management's pre-meeting caucus on August 9. When the connection to Complainant could not be proven, all further investigation of Mayday Mark's identity came to a screeching halt.

Against this backdrop of temporal proximity and direct evidence of discriminatory intent, one must further consider FedEx's serial mendacity. Despite interrogatory responses to the contrary, Ondra, Tice, and Fisher had nothing to do with the August 5 NOQ determination. Rather, McDonald made the decision "alone" with, perhaps, some involvement from the cloistered James Bowman.

And the August 5 NOQ determination had nothing to do with facilitating a meeting that the Complainant purportedly requested:

- Estabrook never asked for a meeting, but repeatedly asked for a mere call;
- Respondent gave no consideration to Estabrook's safety concerns either before, during, or after the August 9 meeting (Estabrook, Tr. 99-100; Ondra, Tr. 606-07);
- None of the management participants researched Estabrook's prior role as Security Committee Chairman or his past dealings with the Vice President of Corporate Security (Tice, Tr. 490; Ondra, Tr. 563-65; McDonald, Tr. 676, 709);
- Respondent decided to staff the upcoming August 9 meeting with its labor counsel

whose primary purpose is to conduct disciplinary investigations;

- The Respondent resorted to an open-ended NOQ, designed for pilot performance and disciplinary investigations, rather than the RMG designation "typically" used for non-disciplinary pilot meetings; and,

- The NOQ was *admittedly* for the purpose of grounding Estabrook and stripping him of his jumpseat privileges (Tice, Tr. 481-83).

In this context, the Tribunal has appropriately directed FedEx to focus on whether it has clear and convincing evidence that it would have implemented the August 5 NOQ grounding even in the absence of Captain Estabrook's protected activity. This the Respondent cannot do.

However, the only conceivable argument the Respondent can now make is that Estabrook's August 4 email provides clear and convincing evidence of a mental health concern that would justify the August 5 NOQ designation. In view of the evidentiary record, this argument is clearly untenable.

The Respondent failed to produce a single witness who could provide clear and convincing evidence that the August 5 NOQ was based on legitimate fitness for duty or mental health concerns. To the contrary, Fisher testified that he had no fitness for duty concerns with respect to Estabrook prior to August 9, 2013. (Fisher, Tr. 373-74). Tice testified that he had no concern about Estabrook's mental health at the time of the August 5 NOQ determination. (Tice, Tr. 483). McDonald testified that he did not question Estabrook's mental health until his August 9 teleconference with Ondra. (McDonald, Tr. 705-06). Ondra testified that his 15.D recommendation was based *exclusively* on Estabrook's comments during the August 9 meeting. (Ondra, Tr. 578).

Respondent identified only one person – Vice President of Flight Operations James Bowman – as taking the position that Captain Estabrook's August 4 email justified grounding

him and barring him from all FedEx aircraft the following day. (Tice, Tr. 481-83). But Bowman never testified. Such a carefully sheltered and mute witness cannot satisfy the Respondent's obligation to establish, through clear and convincing evidence, that there was a non-discriminatory rationale for the August 5 NOQ other than the perjurious explanation offered in the Respondent's interrogatory responses.

B. Estabrook's August 9 Communications Regarding FedEx's Failure to Deter Terrorist Activity Due to its Reckless Dissemination of Aircraft and Package Tracking Data Constituted Protected Activity

1. Estabrook's August 9 Communications Constituted Protected Activity

Prior to addressing in Section C below the lack of clear and convincing evidence supporting a non-discriminatory basis for the Respondent's August 9 NOQ and 15.D orders, we respond to the Tribunal's request that Complainant address whether Captain Estabrook had engaged in further protected activity at the meeting of August 9, 2013.

On August 9, Captain Estabrook communicated his rational fact-based conclusion that Respondent was violating federal law relating to air carrier safety, including the Respondent's duty to:

(a) "[p]rovide for the safety of persons and property traveling on flights provided by the aircraft operator against acts of criminal violence and air piracy, and the introduction of explosives, incendiaries, or weapons aboard an aircraft," 49 C.F.R. § 1544.103(a)(1);

(b) implement a cargo control policy that "[p]revents the carriage of any unauthorized person, and any unauthorized explosive, incendiary, and other destructive substance or item in cargo onboard an aircraft," 49 C.F.R. § 1544.205(c)(1); and,

(c) "[p]reven[t] or dete[r] the carriage of any unauthorized persons, and any unauthorized explosives, incendiaries, and other destructive substances or items in cargo onboard an aircraft. 49 C.F.R. § 1544.205(a).

Significantly, during the OSHA proceeding in this matter, the Respondent stipulated that:

> Estabrook's main concerns revolved around his personal belief that terrorist groups like Al Qaeda might use shipping companies like FedEx as a vehicle for carrying out their attacks. As documented in his complaint and in letters from his counsel, Estabrook's August 9 conversation with Fisher and Ondra centered on his belief that the industry-wide practice of providing up-to-date package tracking information, "albeit inadvertently, facilitate[s] and maximize[s] the criminal destruction of cargo, aircraft, and human lives, by granting terrorists the ability to carefully select the time of detonation." This has the "unfortunate result of encouraging terrorists to view FedEx as a particularly effective means of utilizing explosive, incendiary, and other destructive devices by placing in the terrorists' hands the ability to select the most optimum timing for detonation."

(RX 31 at 4). These stipulated facts regarding Estabrook's communications mirror the safety standards mandated in 49 C.F.R. §§ 1544.103(a)(1); 1544.205(a), and 1544.205(c)(1).

Similarly, Respondent counsel's letter of January 15, 2015, in reply to Complainant's demand for a more forthcoming response to his Requests for Admissions, provides:

> FedEx admits Complainant raised safety-related issues associated with the industry's package tracking systems. FedEx also admits Complainant express [sic] concern that terrorist groups could use tracking information in carrying out terrorist attacks.

(CX 31 at 1).

Trial testimony corroborated these stipulations. (Estabrook, Tr. 94; Fisher, Tr. 366-67, 411; Tice, Tr. 517; Ondra, Tr. 554, 592-96). Estabrook urged the Respondent to restrict the release of aircraft and package data to the initial pick-up and final delivery of the package because the dissemination of any additional information had value to terrorists in terms of their programs of introducing explosives into FedEx aircraft. (Estabrook, Tr. 94, 99; Ondra, Tr. 596; JX 4). Estabrook stated that Respondent had to change its tracking dissemination policies in order to discourage terrorists from looking at FedEx as a means of delivering their bombs. (Ondra, Tr. 604). Fisher agreed that Estabrook communicated that "in terms of FedEx's

dissemination of tracking information, the Company was not doing enough to deter terrorists from utilizing FedEx aircraft as a potential weapon." (Fisher 366-67).

Ondra not only agreed that Captain Estabrook conveyed that changes in Respondent's tracking data dissemination policies were needed for the purpose of "deterring terrorists" from introducing explosives into FedEx aircraft, but also agreed that Estabrook's concerns and proposals in this regard were "rational." (Ondra Tr. 594, 606). Indeed, Estabrook's comments were in direct response to Al Qaeda's specific targeting of FedEx. (Ondra, Tr. 592-93; CX 12; CX 13).

Whistleblower legislation, such as AIR 21, must be read broadly because "[a] narrow hyper technical reading" of the employee protection provision of the Act would do little to effect the statute's aim of protecting employees who raise safety concerns. *Kansas Gas & Electric Co*., 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986).

In order to engage in protected activity under AIR 21, an "employee need not cite to a specific violation; his concerns need only relate to violations of FAA orders, regulations, or standards." *Sitts v. Comair, Inc.*, ALJ No. 2008-AIR-7, slip op. at 9 (ALJ July 31, 2009) (*citing Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-081, slip op. at 5 (ARB Mar. 14, 2008)). It is sufficient that the complainant's concern "'touch on' the subject matter of the related statute." *Weil v. Planet Airways, Inc*., ARB 04-074, ALJ No. 2003-AIR-18, slip op. at 36 (ALJ Mar. 16, 2004) (*citing Nathaniel v. Westinghouse Hanford Co.*, 91 SWD 2 (Sec'y Feb. 1 1995)); *Evans v. Miami Valley Hospital*, ARB Case No. 07-118, -121, ALJ Case No. 2006-AIR-022 (ARB June 30, 2009), slip op. at 14 (finding complainant engaged in protected activity despite failure to "identify a specific air safety regulation.").

Captain Estabrook made a factually specific report to FedEx on August 9, 2013, in the words of the ARB, certainly "touch[ed] on" FedEx's failure 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[] 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)); and
- "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)).

Concerns expressed in a more general fashion than those conveyed here by Captain Estabrook have been held to constitute protected activity under AIR 21. For example, in *Svendsen v. Air Methods, Inc.*, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), a helicopter pilot's report of a dust cloud near the airport that was produced by a local car race constituted protected activity under the contours of AIR 21 because the potential for "reduced airfield visibility touched on air carrier safety, consistent with the purpose and intent of AIR 21." ALJ slip op. at 47.

In light of AIR 21 precedent cited above, there can be no credible dispute that Captain Estabrook's factually specific concerns conveyed to management during the meeting, on August 9, 2013, constituted protected activity under AIR 21.

2. Addressing the Tribunal's Specific Reservations

While the Tribunal's prior decision determined that the subject matter of Estabrook's August 9 communications "clearly relates to air carrier safety," it identified two issues that needed to be addressed: (1) whether FedEx was compelled, by law, to release its aircraft

tracking information into the public domain, "which would make FedEx incapable of violating FAA regulations on this basis as a matter of law," and (2) insofar as the Complainant's August 9 communications related to package tracking information, whether the reasonableness of his belief in non-compliance with federal aviation safety standards could be credited "if there was no genuine dispute of material fact that the published data were merely historical tracking information." (Partial Summary Judgment Decision at 17, 19 n.18). Both of these issues must now be resolved in favor of the Complainant.

a. FedEx's Ability to Control ASDI Dissemination

While the FAA requires the transmission to the agency of Aircraft Situation Display to Industry data (ASDI), the issue of its further dissemination to the general public is completely in the hands of the carrier.[8] As early as June 3, 2011, the FAA established the Blocked Aircraft Registration Request (BARR) program, which allows aircraft operators to remove their aircraft from the public data systems. (CX 44 at C-279). Initially, the BARR program required that operators provide a Certified Security Concern (CSC) providing a security rationale for the placement of limitations on the public dissemination of the operator's aircraft tracking data. (*Id*.). Certainly, the fact that Al Qaeda had – in words and deeds – made FedEx a leading target of its terrorist activity would have satisfied the CSC requirement.

Nevertheless, on November 18, 2011, the federal government eliminated the CSC

[8] When airlines provide ASDI tracking to the public, they allow anyone with an internet connection to track a plane in real time. Simply by going to a website like *flightradar24.com* or *flightaware.com,* any member of the public can find an airplane's flightpath, location, speed, altitude, and directional bearing, and can track all of this information in real time. The Tribunal took judicial notice of the scope of *flightaware*'s activity. (Tr. 196).

requirement when President Obama signed into law H.R. 2112, which provided in pertinent part:

> Notwithstanding any other provision of law, none of the funds made available under this Act or any prior Act may be used to implement or to continue to implement any limitation on the ability of any owner or operator of a private aircraft to obtain, upon a request to the Administrator of the [FAA], a blocking of the owner's or operator's aircraft registration number from any display of the [FAA's ASDI and NASSI] data that is made available to the public…."

(*Id.*).

In explaining the effect of the program to regulated carriers, and making plain the elimination of the CSC requirement, the FAA stated:

> The FAA will honor each written request of an aircraft owner and operator, submitted in accordance with paragraphs 2 and 3 to block or unblock their aircraft's appearance in the FAA's public ASDI feed.

(*Id.* at C-281). Thus, the Respondent's "they made me do it" terrorism defense does not work. FedEx had the unrestricted ability to prevent this intelligence from being placed in hands of terrorist organizations.

b. The Utility to Terrorists of Package Tracking Information

In the aftermath of the 9/11 terrorist attacks, Estabrook forcefully brought to Respondent's attention that "package tracking information, a staple in FedEx customer service, may be a source of intelligence gathering for terrorists." (CX 14).[9] On August 9, 2013, he re-engaged in this effort. (Estabrook, Tr. 38-39, 50-51; CX 31 at 1). The Tribunal's apparent concern regarding the value of package tracking data is misplaced for two reasons. First, as Ondra proudly testified, the lightning fast nature of FedEx's transmission of package tracking

[9] The letter was drafted by the Complainant and signed by FedEx Pilot Association David Webb and addressed to FedEx Vice President of Flight Bruce Cheever.

data renders the data "close to real time." (Ondra, Tr. 537). Second, according to American intelligence sources, it was "historical" data that Al Qaeda coveted.

The value of historical package tracking information is that it provides information concerning the arrival of the package at a FedEx sorting facilitating. (Estabrook, Tr. 40-41, 56; Fisher, Tr. 414; Ondra, Tr. 595). The utility of that information is that it allows terrorists to eliminate non-flight time blocks and provide an estimate of timing for a mid-air detonation. (Estabrook, Tr. 155). Ondra conceded that this information "potentially could be of interest or value" to terrorists. (Ondra, Tr. 596).

The value of the package tracking information is in no way diminished because it is "historical" rather than "real time" data because the printer bombs discovered by American intelligence officials were not engineered for real time detonation; rather, Al Qaeda was using pre-timed detonation devices. Consequently, both historical package data and real time aircraft data had precisely the same utility, i.e., the ability to estimate the approximate location and duration of *future* flights. (Estabrook, Tr. 50-51; CX 12).

The New York Times and numerous other media sources reported that American intelligence officials had determined that air freight shipments originating from Al Qaeda in the Arabian Peninsula were being used to gather *historical* data for future terrorist attacks:

> 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 time for two printer cartridges packed with explosives.
>
> * * *
>
> The apparent test run might have permitted the plotters to estimate when cargo planes carrying the doctored toner cartridges would be over Chicago or another city. That would conceivably enable them to set timers to set off explosions where they would cause the greatest damage.

CX 12 at 1-2.

On August 9, 2013, Estabrook brought to the Respondent's attention that it was providing valuable intelligence to terrorists, in the form of *both* live aircraft and package tracking, that would incentivize future attempts to introduce explosives into FedEx aircraft. He implored the Company, in the interest of public safety to limit the dissemination of tracking information to initial pickup and delivery. (JX 4 at 1).

Notwithstanding that it was a target of Al Qaeda, and that credible media and intelligence sources confirmed that Al Qaeda was seeking its flight timeline data, FedEx continued to pursue a policy of putting valuable intelligence into the hands of terrorists. On August 9, 2013, FedEx provided no rationale for this reckless choice. (Estabrook, Tr. 99-100). However, the unrebutted testimony establishes that FedEx's determination reflected a policy of subordinating public safety to marketing because customers love their electronic data. (Estabrook, Tr. 56).

Estabrook had a reasonable belief that subordinating air carrier safety to marketing did not satisfy FedEx's obligation to deter terrorist's from converting its aircraft into flying missiles. His effort, on August 9, 2013, to convince the Company to put safety first and commit to deterring terrorist activity, is precisely the kind of activity that AIR was designed to protect.

c. FedEx's Silence Confirms Complainant's Reasonableness

In addressing the legal standard to be applied to Estabrook's August 9 communications, the Tribunal stated:

> It is well-established that an AIR 21 complainant "need not prove an actual violation"; however, "the complainant's belief that a violation occurred must be objectively reasonable." *See Hindsman*, ARB No. 09-023 at 5.

(Partial Summary Judgment Decision at 19). The *Hindsman* case involved a flight attendant who attempted to invoke AIR 21's protections based on a communication to the air carrier's safety director relating to carriage of a portable oxygen concentrator (POC) made *only after* she had learned from a captain, gate agent, and her own consultation of the flight attendant manual that no violation had occurred. *Hindsman,* ARB No. 09-023 at 2. The ARB held that, once she discovered that the POC was FAA-permitted, she could not have had a reasonable belief that flying with it on board violated air safety regulations. *Id.* at 5.

On August 9, 2013, Estabrook communicated that FedEx was a specifically designated Al Qaeda target and that FedEx was handing over to these terrorists the information they considered necessary to detonate their explosives to maximum advantage. Unlike the *Hindsman* complainant, Estabrook was met with deafening silence. No one told him that the Respondent's conduct was safe or lawful. Indeed, at trial, Respondent conceded that Estabrook's concerns were rational. Remarkably, his expressed concern that Respondent was not fulfilling its obligation to deter the introduction of explosives into its aircraft went unanswered despite the Respondent's subsequent admission that the information FedEx disseminates could have value for terrorists. (Ondra, Tr. 596). Given these facts, the *Hindsman* precedent is inapposite and Estabrook's belief that Respondent was failing to fulfill its duties under federal law was objectively reasonable.

C. Estabrook's Protected Activity Contributed to Respondent's August 9 NOQ Determination and 15.D Examination Order and Respondent Cannot Demonstrate by Clear and Convincing Evidence That These Adverse Actions Would Have Occurred in the Absence of His Protected Behavior

1. Laredo-Related Protected Activity Contributed to These Adverse Actions

All of the factors militating in favor of a finding that Complainant's protected activity resulted in the Respondent's adverse action on August 5, 2013, apply with equal vigor to the adverse actions taken on August 9, 2013 and thereafter.

As discussed in Section A above, the temporal proximity, standing alone, is sufficient to create an adverse inference in favor of the Complaint. But the Tribunal must also consider that the Respondent deceived Estabrook (and later this Tribunal) into thinking that it scheduled the August 9 meeting to hear his security concerns. In reality, McDonald had decided to sandbag Complainant by sending in his labor counsel, whose services normally are reserved for disciplinary matters, to ferret out whether Estabrook had engaged in Laredo-related comments. FedEx management representatives made no response to Estabrook's rational safety concerns and never got back to him on those issues. From the Respondent's perspective, the August 9 meeting was originally all about Laredo, then mutated into a program of silencing and discrediting Estabrook after he demonstrated that he "knew too much" about the carrier's disregard of its legal obligation to deter terrorist activity.

2. The Protected Activity of August 9 Contributed to These Adverse Actions

Assuming that the Tribunal accepts the protected nature of the Complainant's August 9 comments, then the direct evidence of discriminatory animus is overwhelming since Fisher acknowledged that these comments contributed to his 15.D decision.

The only substantive, documented communication between the Respondent and the aeromedical advisor Harvey Watt came in the form of an email, dated August 16, 2013, from Fisher to Harvey Watt representative Christopher Johnson, in which Fisher explains the basis for the Respondent's 15.D determination. (RX 15; Fisher, Tr. 338).

In the August 16 letter, Fisher states in pertinent part that during the August 9th meeting:

> Captain Estabrook proceeded to describe a number of security concerns that he has, many of which related to Al-Qaeda, and the possibility that FedEx Express could be a target for Al-Qaeda terrorist acts.

(RX 15 at 1).

When asked to identify the comments related to Al-Qaeda that led to his 15.D referral decision, Fisher was recalcitrant, at first denying that Estabrook's comments related to the availability of tracking information contributed to his 15.D referral. However, when confronted with his prior sworn testimony, Fisher finally told the truth:

> Q: "I don't want to leave anything out. I just want to get the whole basket. And if I misrepresent anything, please, please tell.
>
> So as I understand your testimony, it was the combination of the references to Fred in the August 4th, 2013, email, the references to Mr. Calloway **and the references to Al-Qaeda and the live tracking issues** that together as a whole constituted your basis for referring Captain Estabrook to a 15.D evaluation, is that correct?" "Correct." Is that your testimony?
>
> A: That is my testimony.

(Fisher, Tr. 400)(emphasis supplied).

Thus, Fleet Captain Fisher testified, twice, that Captain Estabrook's protected activity related to Al-Qaeda's potential exploitation of FedEx's dissemination of real-time tracking information contributed to his decision to order Captain Estabrook to a 15.D examination. Because the August 16, 2013, email to Harvey Watt was co-authored by Fisher and Tice, the unlawful retaliatory motive reflected in that communication must also be attributed to attorney Tice.

Both with respect to Fisher's credibility and motives, the Tribunal should also consider his false representations to the United States Department of Labor regarding Captain Estabrook's

Laredo-related AIR 21 filing. With respect to the issue of knowledge as it related to the Complainant's prior AIR 21 filing, the OSHA investigator concluded:

> Though Respondent legal department acknowledges Complainant's previous whistleblower complaint, it is explained below that the decision maker of the adverse action of removing Complainant from flight status had no knowledge of Complainant's prior whistleblower complaint.

(CX 24 at 2). The OSHA investigator's fact finding conclusion was based on Fisher's statement during his interview that: I did not know Mark [Estabrook] filed a whistleblower complaint until you just told me. (CX 23 at 3).

Documentary evidence establishes that Fleet Captain Fisher's representations to the OSHA investigator concerning his lack of knowledge of the Laredo-related AIR 21 complaint were untruthful. Attorney Armstrong's correspondence to Fisher dated April 29, 2013, not only attaches the Laredo AIR complaint, but references it in the brief text of the letter. (CX 8 at 2). Fisher admits that he read the Armstrong letter and responded to it via email with copies to Respondent counsel. (CX 8 at 2; Fisher, Tr. 346). Respondent's privilege log reflects that Fisher discussed his response to Armstrong's April 29 letter with Respondent legal counsel. (CX 10, item 3).

What makes this misrepresentation of fact particularly inexcusable is that it was stated to OSHA in the presence of Respondent's counsel and, apparently, Respondent's counsel made no effort to correct the misrepresentation. (Fisher, 408-09). The evidence indicates, therefore, that not only did Fisher lie, but FedEx, as an institution, lied to the federal government.[10]

[10] OSHA interviews are generally conducted under oath and, in this matter, the OSHA investigator administered an oath to Captain Estabrook prior to the commencement of the interview. If a similar oath was administered to Captain Fisher, it is Complainant's position that this matter should be referred by the Tribunal to the appropriate law enforcement official to

3. FedEx's Pretextual Rationales Cannot Satisfy the Clear and Convincing Standard

In addition to the direct evidence of retaliatory motive discussed above, the Respondent's repeated refusal to provide the Complainant with *any* rationale for its adverse personnel actions combined with the management witnesses' disavowal, under oath, of the rationales proffered by Respondent to OSHA, compel a summary judgment in favor of the Complainant with respect to the question of liability.

As a threshold matter, ARB precedent provides for an adverse inference to be drawn against the legitimacy of Respondent-proffered rationales where these rationales were not provided at the time of the adverse personnel action. *See Clemmons v. Ameristar Airways, Inc.,* ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010). In the instant case, the Respondent withheld the contractually-required "reasonable basis" for its 15.D referral despite repeated requests from Estabrook's legal counsel. (CX 27 at 5; CX 29 at 1; Estabrook, Tr. 108-10, Tice, Tr. 511-12). Attorney Tice admitted that the Respondent's past practice had been to disclose its purported reasonable basis upon request. (Tice, Tr. 451, 511).

It was not until almost four months later, in the context of a position statement submitted to OSHA Investigator Jason Brush, dated December 4, 2013, that the Respondent proffered three reasons for its adverse actions against the Complainant: (a) that Complainant's August 4 email "cryptically requested that the Chairman and CEO of FedEx give him a call to discuss 'something related to 9-11,'" (b) that Captain Estabrook had asserted that "he had been chased all over Russia in his youth," and (c) he allegedly made "assertions" regarding the conversion of former FedEx hijacker Auburn Calloway to Islam and "relayed wholly unfounded suspicions that

initiate an investigation of perjury pursuant to 18 U.S.C. § 1001. The integrity of the AIR 21 investigatory process, and therefore aviation safety, requires nothing less.

Calloway might be advising Al Qaeda." (Dep. Ex. FF at 5). Nevertheless, the *undisputed evidence* confirms that the above-referenced rationales were pretextual.

a. Request for a Phone Call from FedEx CEO Fred Smith

Respondent's attempts to bootstrap the August 4 email as a basis for its August 9 adverse actions are condemned to failure as a result of its own construct that the purpose of the August 5 NOQ designation was to "facilitate" a meeting. In support of this construct, Fisher testified that he had no fitness for duty concerns with respect to Estabrook prior to August 9, 2013. (Fisher, Tr. 373-74). Tice testified that he had no concern about Estabrook's mental health at the time of the August 5 NOQ determination. (Tice, Tr. 483). McDonald testified that he did not question Estabrook's mental health until his August 9 teleconference with Ondra. (McDonald, Tr. 705-06). And Ondra testified that his 15.D recommendation was based *exclusively* on Estabrook's comments during the August 9 meeting. (Ondra, Tr. 578).

The text of Complainant's August 4 email identified Estabrook as man who had served as the pilot union's Security Committee Chairman, had worked directly with the FedEx Vice President of Corporate Security and who had been unsuccessful in his prior efforts to obtain an adequate response to security issues he had raised. (CX 11 at 2). In this context, he asked for a call from the CEO, who has been addressed by pilots and general public, at his own request, as "Fred." (Ondra, Tr. 561-62; McDonald, Tr. 720; CX 39). The Respondent proceeded with willful ignorance, declining to look into Estabrook's prior security-related activities or his relationship with top FedEx security officers, including Mr. Ondra himself. (Tice, Tr. 490; Ondra, Tr. 563-65; McDonald, Tr. 676, 709; CX 16).

b. Chased All Over Russia

There is no dispute that Captain Estabrook sought to enhance his own credibility regarding the security issues that concerned him by providing an account of his prior service in Air Force military intelligence. (Fisher, Tr. 383; Ondra, Tr. 550). More specifically, he advised the participants at the meeting that, as an aircraft commander of an AWACS aircraft, he was responsible for chasing Russian bombers in the North Atlantic as part of his surveillance mission. (Estabrook, Tr. 36, 96, 112). The Respondent's own files contain records of this service and the air medals and two Oak Leaf Clusters awarded therefor. (Estabrook, Tr. 36-38; CX-1, CX-2, CX-3).

Not one of the four FedEx employees identified by Respondent as participating in the 15.D referral decision stood by the "chased all over Russia" rationale when questioned under oath. Indeed, neither Fisher nor Tice had *any* recollection of Estabrook making comments related to Russians or Russia. (Tice Tr. 440, 507; Fisher, Tr. 384). Moreover, Ondra made no reference to Russia or Russians in his post-meeting teleconferences with Tice or McDonald. (Tice, Tr. 506; McDonald, Tr. 692).

At trial, Ondra conceded that it was possible that Estabrook referenced that it was he who was "chasing Russians" (Ondra Dep. 552). Indeed, Ondra's own handwritten notes confirm that Estabrook's version of his comment was correct. (JX-3, Ondra, Tr. 583). In short, there is not one shred of credible evidence that Estabrook ever stated that he was "chased all over Russia."

Moreover, no investigation of Estabrook's possible connection with Russia was conducted prior to consigning him to psychiatric examination. (Ondra, Tr. 559, 581).

c. Calloway Comments

The sworn testimony of Respondent's own witnesses belies the proffered rationale that Captain Estabrook made "assertions" regarding Calloway's conversion to Islam or that his Calloway-related comments warranted subjection to psychiatric examination.

The Calloway comments came late in the meeting and were described by Tice as a brief "add-on," to Estabrook's presentation on the safety issues raised by FedEx's dissemination of tracking information. (Tice, Tr. 515). Moreover, Captain Estabrook *never* asserted that Calloway had converted nor that he had engaged in communications with Al Qaeda. With respect to the conversion, Estabrook merely reported that, over a six-month period, he had twice heard rumors to that effect from two fellow pilots. (Estabrook, Tr. 96, 113; Fisher, Tr. 395; Tice, Tr. 440, 515; Ondra, Tr. 584). Indeed, Ondra's own notes confirm that Estabrook asserted nothing, but rather commented that he had "heard" the rumor twice in six months. (JX-3).

Aside from the conversion rumor, Estabrook merely suggested that, given the similarity of tactics used by Calloway and Al Qaeda, it would behoove the federal authorities to engage in surveillance of Calloway if such a prison cell conversion had taken place. (Estabrook, Tr. 164; Fisher, Tr. 397). With respect to the existence of Calloway-Al Qaeda contacts, Ondra's notes reflect the modest statement from Estabrook: "Don't know if Calloway is using communication path to Al Qaeda." (JX-3).

The unanimous view that Captain Estabrook was merely reporting rumors of Calloway's conversion is of double significance. First, it reflects the undisputed falsity of Respondent's rationale that Estabrook had made "assertions" regarding Calloway's conversion. Second, the Respondent's reliance on Estabrook's report of rumors as the basis for referring him to compulsory examination reflects the deep-seated animus toward the Complainant in view of the

fact that the Respondent engaged in no effort to identify the source of these rumors. (Ondra Tr. 608). If there were any legitimate mental health concern tied to the reported Calloway conversion, it should have been directed to the originator of the rumor rather than someone who innocently reported it. Similarly, FedEx had zero interest in identifying the FedEx pilot, posting as Mayday Mark, who admitted to having suffered a stroke, as long as it wasn't Captain Estabrook. (Tice, Tr. 495-497).

Calloway was a home-grown FedEx terrorist who hammered through the skulls of his fellow pilots with weapons that had passed through the Respondent's lackluster screening procedures. Due to the brain damage these pilots suffered, they never flew again. (Fisher, Tr. 393). Managing Director of Aviation and Regulatory Security Todd Ondra described the Calloway hijacking as one of the most traumatizing incidents in FedEx's history and said that it is known throughout the FedEx community. (Ondra Dep. 607, 622). The Calloway incident has had an "enduring impact" on FedEx operations and still comes up in response to the Company's policy formulation process. (Tice, Tr. 516).

Estabrook knew Calloway better than anyone on the property. He had trained with him, played chess with him, and had him over to his house for dinner. (Estabrook, Tr. 102-03). His knowledge of Calloway was sufficiently intimate that a member of the FedEx legal team in this case – Paralegal Maryanne Miller – was required to serve Estabrook with a subpoena to testify in the Calloway trial. (Estabrook, Tr. 103-04; CX-34).

The professional discourtesy demonstrated to Estabrook as the former Security Committee Chairman of the pilots' labor union is striking. FedEx's top security representative did not conduct any research whatsoever into what Ondra himself characterized as Estabrook's "rational" security concerns nor did he ever follow up with Captain Estabrook regarding these

concerns. (Ondra Dep. 76). He made no effort to verify Captain Estabrook's military service, which would have confirmed that the Complainant had served his country "chasing around Russians" as the captain of an AWACS surveillance aircraft. (Ondra Dep. 76; Estabrook Dep. 21, 151). He also acknowledged that he "didn't do any research" regarding Captain Estabrook's Calloway reports. (Ondra Dep. 86-87). The undisputed evidence supports only one conclusion: the Company's objective was to punish Captain Estabrook.

4. Exploding the Ondra Hoax

One of the ham-handed stratagems employed by the Respondent during the trial was to suggest that Ondra was the sole decision-maker with respect to the adverse action of reinstating Estabrook to NOQ status and consigning him to a 15.D psychiatric examination. The logic underlying this strategy is that, since there is no evidence that Ondra knew of Estabrook's Laredo-related protected activity, the required AIR 21 element of knowledge cannot be established.

Even before the trial commenced, there were at least five separate reasons why the Ondra argument carried no water: (1) McDonald identified himself as the principal decision-maker who considered Ondra's recommendations in the context of his Laredo-related prejudices (McDonald, Tr. 654); (2) Fisher made an independent, and contractually necessary, decision based on his own rationales (Fisher, Tr. 338, 380-82); (3) Fisher and Tice together submitted to Harvey Watt a pre-textual "reasonable basis" for pursuing a psychiatric examination, which relied upon Estabrook's August 9 protected activity (Fisher, Tr. 338); (4) Ondra, at most, made recommendations and had zero participation in the critical August 10-16 time period when lawyers conferred, flight management huddled, and the evidence contained in the Armstrong

letter of August 13, 2013, was considered; (Ondra, Tr. 573-74, 612-14), and (5) the collective bargaining agreement between Respondent and its pilots specifies those individuals empowered to make the 15.D medical referral, and Ondra, the Managing Director of Security, was not one of them. (JX 6 at 15.D.1). Indeed, Ondra himself testified that he was *not* the primary decision-maker (Ondra, Tr. 573-74).

Even if the Tribunal were to conclude that Ondra played a predominant role, the law requires an analysis as to whether any person who participated in the decision-making process had a discriminatory motive. *See, e.g., Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001) (discriminatory intent may be based on animus of any individual who "influenced or participated" in the adverse action); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir. 2000)(discriminatory intent can based on "discriminatory attitudes" of individuals who had "influence" in decision-making process); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (discriminatory intent may be imputed to the employer based on the animus of subordinate manager "involved" in the process). *Cf. Evans v. Miami Valley Hospital,* ARB Nos. 07-118, ALJ No. 2006-AIR-22 (ARB June 30, 2009)(Employer other than complainant's immediate employer could be held liable based on the fact that it could "influence" the direct employer to take adverse action against a complainant).

But what utterly explodes the Ondra hoax into sub-atomic bits is the exposure, at trial, that Flight Management had already determined to target Estabrook for a mental health examination **prior to** any involvement of the security officer in the decisional process. Ondra was not a driving force, but rather, a tool utilized by McDonald – and perhaps the stealthy Bowman – in condemning Estabrook for a lack of "situational awareness." (McDonald, Tr. 652-

53, 674, 701-02). In other words, the former Security Committee Chairman of the pilot union failed to know his place. If you see something, say something … and get sent to a psychiatrist.

5. The Respondent's Interference with Contractual Safeguards Constituted Adverse Action and Precludes a Finding that the Respondent Can Satisfy the Clear and Convincing Evidentiary Standard

As argued in Complainant's summary judgment motion, closely connected with the adverse action of the 15.D referral was the Respondent's interference with the contractually required examination process. Section 15 of the collective bargaining agreement embodies important safeguards to prevent the Soviet-style abuse of psychiatric examination. As pertinent to this matter, these safeguards include that: (a) only a member of flight management – the VP of Flight Operations, the System Chief Pilot, a Regional Chief Pilot, or a Chief Pilot – may direct a pilot to see the Company's aeromedical advisor, (b) the referring flight management representative must have a "reasonable basis" to question where the pilot has developed an impairment, and (c) Flight Management is prohibited from requiring a pilot to submit to a psychological or psychiatric examination; rather, the determination to require a pilot to undergo a psychological/psychiatric examination must be based on the aeromedical advisor's "independent" examination. (JX 6 at sections 15.D.1 and 15.G.1; Tice, Tr. 449).

As discussed above, the Respondent never provided Complainant with a "reasonable basis" for its action. Moreover, in violation of 15.G.1 Respondent management representatives actually directed Dr. Thomas Bettes to send Captain Estabrook to a psychiatrist. (Estabrook, Tr. 117). When asked what the reasonable basis for Captain Estabrook's mandatory psychiatric

evaluation was, Dr. Bettes answered: "I don't know." (*Id*.).[11]

The manipulation of Dr. Bettes was presaged by Fisher's call to Estabrook, on the evening of the August 9 meeting, to advise him that FedEx would be requiring him to submit to a psychiatric examination. (Estabrook, Tr. 105-06). Four days later, in a letter dated August 13, 2013, Captain Estabrook's attorney, Alan Armstrong, demanded that the Company withdraw its decision to compel his client to submit to a "psychiatric examination," which the Respondent declined to do. (JX 7). Fisher conceded that during the period preceding any contact between Captain Estabrook and the FedEx aeromedical advisor, it is "possible" that Fisher might have told Captain Estabrook that he would have to submit to a psychiatric examination. (Fisher, Tr. 400). Via a letter dated August 16, 2013, Attorney Tice responded to the August 13 Armstrong letter asserting that FedEx had requested the "appropriate medical examination" because it determined that Estabrook had developed an "impairment." (CX 26).

FedEx's determination to trample underfoot the very contractual safeguards designed to prevent a Soviet-style abuse of the psychiatric examination process precludes a finding that the Respondent can establish clear and convincing evidence that its adverse action would have taken place in the absence of Captain Estabrook's protected activity.

DAMAGES

A. Complainant is Entitled to Compensatory Damages

AIR 21 and its implementing regulations permit an administrative law judge to award compensatory damages for emotional distress, inconvenience and the like. 49 U.S.C.A. §

[11] The Fisher/Tice letter of August 16, 2013 also neglects a violation of the contractual requirement that the aeromedical advisor make an "independent evaluation."

42121(b)(3)(B)(iii); 29 C.F.R. § 1979.109(b). The ARB has upheld awards of such compensatory damages based on a complainant's own account of his suffering. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, ALJ No. 2006-AIR-22 (ARB June 30, 2009)(affirming ALJ's award of compensatory damages despite the lack of medical evidence); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004)(ARB affirms compensatory damages claim based on complainant's testimony regarding economic stress). *See also Hobby v. Georgia Power Co*., ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001)(awarding complainant compensatory damages for emotional distress, humiliation, and loss of reputation despite the absence of expert medical or psychiatric testimony).

In *Negron*, the ARB upheld an award of $50,000 in compensatory damages *in addition to* damages that made the complainant whole for all lost pay and benefits. The basis for the additional compensatory damages was based on the economic stress associated with a period of economic uncertainty lasting approximately three months. In *Hobby*, the ARB upheld an award of $250,000 (in 2001 dollars), despite the lack of expert medical or psychiatric testimony, based on the impairment of reputation, humiliation, and mental anguish of the complainant. Although these cases are instructive, neither of them provide an adequate gauge for the appropriate level of compensatory damages in this matter.

In the first instance, the Respondent's employment of psychiatric analysis as an offensive weapon threatened not only his job at FedEx, but any hope of employment throughout the entire aviation industry. The Respondent not only subverted his status as an employee, but as a pilot and a man.

Leveraged by the threat of termination if he failed to comply, Captain Estabrook was forced to allow a hostile psychiatrist to probe the most tender areas of man's life and psyche: his

relationship with his wife, his libido, and incidents of marital infidelity.

The Glass report, while declining to find Estabrook unfit to fly, referenced "personality issues" based, in substantial part, on his disapproval of the Complainant's union activities and conclusion that he "suspect[ed]" that Captain Estabrook wanted to emulate the pilot advocacy of his father. (RX 3). The Glass report concluded with the obtuse observation that the Complainant "might" benefit from some "relatively brief" therapy to "help him realize how his behavior is seen by others…." (RX 3 at 5).

Instead of treating the report of this anti-union hack with the derision it deserved, Dr. Bettes, in further violation of the procedural safeguard of the pilot collective bargaining agreement, declared Captain Estabrook unfit to fly and refused to rule out psychiatric drug therapies that even Glass had not suggested. (Estabrook, Tr. 176).

Small wonder that Estabrook described his four-month ordeal on NOQ in the following terms:

> It was terrible. It was the worst chapter of my life. I didn't know if I had a job. I didn't know if I could get another one. My legal expenses were going through the roof… I thought what they were doing was punitive. I thought they were trying to shut me up. They told me that I knew too much. I didn't think I was doing anything wrong. But they were trying to destroy me.

(Estabrook, Tr. 120-21).[12] Moreover, the Company knew every step of the way that they were making Captain Estabrook "very upset" and subjecting him to a prolonged period of "anguish." (Fisher, Tr. 332; McDonald, Tr. 656).

The emotional stress continued even after his vindication by two other FAA Aeromedical

[12] The Tribunal will note the ellipsis in the above quote; a break required for the normally stolid Captain Estabrook to regain his composure as he recounted the betrayal of an Air Force veteran and employee of twenty-seven years.

Examiners and an additional psychiatrist, because the Respondent's NOQ-designation forced him to miss his annual training requirements and into a shortened up-or-out simulator evaluation conducted under a cloud of company hostility. (Estabrook, Tr. 50). The Respondent's deliberate inducement of mental anguish continued from the very start of its mean-spirited deposition of Estabrook by questioning him about his union activity, his wife and children, sources of income, and consideration of bankruptcy, which prompted the Complainant to seek the Tribunal's protection via a motion *in limine*. (Estabrook, Tr. 122).

The Respondent sought to limit the consequences of its discriminatory conduct by implicitly threatening Captain Estabrook's employment if he dared to admit the full impact of the Respondent's misconduct on his mental health. Thus, the Respondent perversely sought to turn the three additional medical evaluations finding Estabrook fit to fly – and expressly rejecting the medical opinions of the Glass report – into evidence that its torment of the Complainant had caused no harm.

Respondent will attempt to dispute the claim to emotional damages by saying that the Complainant is trying to have it both ways. Respondent will argue that, if Captain Estabrook was emotionally fit to fly, then he must not have suffered enough to have sustained emotional damages. In fact, the medical reports submitted by FedEx dispute this. The report submitted by Dr. William E. Green, for example, states that:

> All during our interview I never saw any evidence of inappropriate or excessive paranoia, and clearly there was no evidence of delusions. His current fears and sense of being 'targeted' by the company do appear to be appropriate for the situation. Throughout out interview, I never saw any 'paranoia' as referred to in Dr. Glass's report, and he very clearly DOES NOT have any evidence of psychosis. His concerns about his job appear to be appropriate for the situation. His insight was intact and his judgment was also felt to be entirely intact.

(RX-4 at page 5)(emphasis in the original). Thus, unlike the *Negron* and *Hobby* cases, expert

psychiatric analysis confirms the mental anguish inflicted on Captain Estabrook. Unfortunately, his fear of reprisal will persist throughout his remaining employment with Respondent.

The trial record in this matter reflects not only discriminatory intent, but also a particularly reprehensible resort to psychiatric analysis as an offensive tool. Worse still, the record evidences the Respondent's further corruption of that process through the violation of contractual safeguards prohibiting the Respondent's interference with the independent analysis of the aeromedical advisor's independent medical review. Complainant respectfully seeks a compensatory damages award of five million dollars to properly compensate him for his mental anguish. Any lesser award would leave Soviet-style psychiatric analysis in the Respondent's toolkit of abuse.

B. Complainant is Entitled to the Full Award of His Attorney's Fees

AIR 21 provides that a complainant is entitled to be compensated for aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred. 49 U.S.C. § 42121(b)(3)(B)(iii). Complainant has previously submitted his pre-trial attorneys' fees for the undersigned firm as CX 47 in the amount of $191,685.86. Attached hereto are the additional post-trial fees of the undersigned firm and the pre-trial fees of Alan Armstrong, Esq. in the amounts of $65,957.81 and $6,325.28, respectively.

Both the reasonableness of Complainant's attorneys' fees, and the institutional credibility of the Respondent must be evaluated in the context of Respondent's disregard of the discovery process. The Complaint served on the Respondent just one combined Request for Admissions, Interrogatories, and Requests for Documents served on Respondent Federal Express Corporation on August 29, 2014. FedEx did not provide a response to Complainant's First Combined

Discovery until October 29, 2014, a full month after the original due date.

Due to numerous deficiencies in the Respondent's responses, and Respondent's failure to answer correspondence from Complainant's counsel, Complainant filed the first of three motions to compel on November 17, 2014.

Respondent's persistent failure to properly supplement its discovery responses necessitated the filing, on February 18, 2015, of Complainant's Amended Motion to Compel. By order dated May 28, 2015 – Order Regarding Discovery – the Court directed an *in camera* review of documents for which the Respondent had asserted a privilege.

By order dated July 20, 2015, the Court ordered the Respondent to produce four items listed in its privilege log. By order dated August 19, 2015 – Order to Produce Documents or to Show Cause – the Court addressed the Respondent's failure to respond to interrogatory 7 and document requests 1, 6, 7, 8, 10, 11, 12, 13, 14, 17, 18, 19, 20, 23, and 27. The Court ordered the Respondent to "produce the requested discovery within 10 days of the issuance of this order or show good cause why it should not be required to do." The Court also admonished Respondent's counsel via telephone that further non-compliance with discovery could result in sanctions.

Unfortunately, neither with respect to document demands, interrogatories, nor requests for admissions did the Respondent comply with its discovery obligations. Because page limitations preclude a full discussion of the Respondent's discovery misconduct, we highlight below Respondent's failure to properly respond to Complainant's Request for Admissions.

In responding to admission requests, the Federal Rules of Civil Procedure permit the answering party to assert lack of knowledge or information as a reason for failing to admit or deny "only if the party states that it has made reasonable inquiry and that the information it

knows or can readily obtain is insufficient to enable it to admit or deny." Fed. R. Civ. P. 36(4). The obligation to engage in "reasonable inquiries" must include the "investigation and inquiry of employees, agents, and others, who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response." *Henry v. Champlain Enters.*, 212 F.R.D. 73, 78 (N.D.N.Y 2003) (internal citations omitted). *See also Asea, Inc. v. Southern Pacific Transp. Co*., 669 F.2d 1242 (9th Cir. 1981); *Herrera v. Scully*, 143 F.R.D. 545 (S.D.N.Y. 1992); *Diederich v. Department of Army*, 132 F.R.D. 614 (S.D.N.Y. 1990). Pursuant to Fed. R. Civ. P. 37(2), to the extent FedEx has failed to engage in the requisite reasonable inquiries, Complainant would be entitled to recover expenses, including attorney's fees, incurred in the process of proving these statements.

With respect to all of the following Requests for Admissions, the Respondent provided the response that it was "without knowledge or information sufficient to form a belief about the truth of the contention" despite the failure to engage in reasonable inquiry or, worse still, the certain knowledge of a principal Respondent witness that the contention was true. (CX 30).

REQUEST NO. 12: That Mr. Fred Smith, Chairman and Executive Officer of FedEx Corporation, is commonly referred to by your pilots by the single name "Fred."

Nevertheless, McDonald testified that it was "fairly common" for pilots to refer to the FedEx CEO as "Fred" and Ondra testified that was not surprised that "Fred" had invited the general public to call him by his first name. (Ondra, Tr. 561-62; McDonald, Tr. 720; CX 39).

REQUEST NO. 13: That the Complainant served as the Security Chairman of the FedEx Pilots Association (FPA), which was the certified labor representative of the FedEx pilots from 1996 to 2002.

Nevertheless, in his August 4, 2013, email Estabrook identified himself as the pilot

union's former Security Committee Chairman and Respondent's witnesses claim to have acknowledged that fact at the time of the August 9 meeting. (Tice, Tr. 489; Ondra, Tr. 563-64). Neither Respondent nor Respondent's counsel made any effort to reasonably inquire into this issue. (Tice, 490-91; Ondra, Tr. 565; McDonald, Tr. 675-76)

REQUEST NO. 14: That, in his capacity as Security Chairman of the FPA, the Complainant requested that Respondent cease publishing package tracking information on the grounds that such publication would give potential terrorists assistance that would facilitate timing the detonation of bombs or incendiary devices.

Nevertheless, Ondra was never asked to review his correspondence until a week prior to his deposition in March 2016. (Ondra, Tr. 565).

In derogation of its obligations under the federal rules of discovery, Respondent also denied:[13]

REQUEST NO. 10: That at your meeting with the Complainant on August 9, 2013, the Complainant stated his belief that Respondent's practice of providing up-to-date package tracking information had the result of encouraging terrorists to view the Respondent as a particularly effective means of utilizing explosive, incendiary and other destructive devices by placing in the terrorists' hands the ability to select the most optimum timing for detonation.

Despite this denial, not only are the trial transcripts replete with acknowledgements by the Respondent's witnesses that Estabrook was trying to decrease the likelihood of terrorists introducing explosive devices into FedEx aircraft by limiting public access to package tracking

[13] Responses to requests 10, 11 were expressed as "Denied as written" and referred the Complainant to "Ondra's notes" by way of evading the definitive response to which Complaint was entitled under the federal rules.

information, but the Respondent actually stipulated to this fact even prior to its evasive discovery response. (Fisher, Tr. 366-67, 411; Tice, Tr. 517; Ondra, Tr. 554, 592-96; RX 31 at 4).

REQUEST NO. 11: That at your meeting with the Complainant on August 9, 2013, the Complainant expressed an interest in improving the Respondent's security.

Despite this denial, here again, the trial transcripts are replete with acknowledgements by the Respondent's principal witnesses that Estabrook was trying to decrease the likelihood of terrorists introducing explosive devices into FedEx aircraft. (Fisher, Tr. 366-67, 411; Tice, Tr. 517; Ondra, Tr. 554, 592-96).

REQUEST NO. 16: That, prior to December 4, 2013, you declined to respond to the repeated requests of the Complainant and his legal counsel to provide the "reasonable basis" for the Respondent's directive that Complainant submit to psychiatric evaluation.

Despite this denial, at trial, Tice flatly admitted that he had refused to respond to Complainant's request for the "reasonable basis" underlying the Respondent's determination. (Tice, Tr. 511-12).

When these responses are considered together with Respondent's false representations regarding the decision-makers involved in the August 5 NOQ determination and Fisher's denial during his OSHA investigatory interview, despite the presence of Respondent's counsel, of any knowledge of Estabrook's Laredo AIR 21 filing, FedEx's credibility should be deemed non-existent. Any factual dispute in this matter should be resolved in the Respondent's favor.

REMEDY REQUESTED

Respectfully, Complainant Estabrook seeks the following relief:

1) A final judgment on the merits based on the direct and undisputed evidence that the

Complainant's protected activity was a contributing factor in the Respondent's determination to subject him to adverse action and that the Respondent has failed to provide "clear and convincing" evidence to support the position that it would have taken its adverse employment actions against Captain Mark Estabrook in the absence of his protected activity;

2) An Order directing FedEx to suppress, remove and expunge all disciplinary proceedings, medical and psychiatric evaluations concerning Captain Estabrook from FedEx personnel files, including all contracted medical agents' records;

3) An Order directing FedEx to cease and desist from all discriminatory conduct toward Captain Estabrook;

4) An Order awarding Captain Estabrook the costs of this action, including payment of reasonable attorney's fees **in the amount of $263,968.95**;

5) An Order granting such additional relief as the Tribunal, deems proper and just;

6) An Order granting full compensatory damages including compensation for pain, suffering and emotional distress due to this adverse action in the amount of $5,000,000.00; and

7) An Order directing Respondent to post for ten (10) years OSHA Fact Sheet "Whistleblower Protection for Employees in the Aviation Industry" (Publication DEP FS-3670 1/2008) in a visible location in every FedEx Express Corporation employee break room nationwide and establishing an appropriate monetary penalty in the event the Respondent fails to comply with this Order.

Respectfully submitted on:

Date: August 11, 2016 By: ***/s/ Lee Seham***

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