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

MARK ESTABROOK,	)	
Complainant,	)	
	)	**ARB-2017-0047 (AIR)**
v.	)	
	)	**ADMINISTRATIVE REVIEW BOARD**
FEDERAL EXPRESS CORPORATION,	)	
Respondent.	)	

COMPLAINANT'S BRIEF SUPPORTING THE PETITION FOR REVIEW

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INTRODUCTION

The Administrative Law Judge (ALJ) found "deeply troubling" the Respondent's adverse actions against the Complainant, which he characterized as an "over-reaction" to Complainant's "demonstrated knowledge of security issues" with the effect of "chill[ing] the open dialogue in the area of aviation security…" (Decision at 61-62).

Prior to the commencement of trial, ALJ had already decided, pursuant to a summary judgment motion, that the Complainant had engaged in protected activity by refusing to depart from Laredo into a solid line of thunderstorms on April 10, 2013 (hereinafter, "the Laredo departure"), and by subsequently filing an AIR 21 complaint on April 29, 2013, in response to the Respondent's disciplinary investigation of the Laredo departure. The ALJ had also determined that Respondent's grounding of the Complainant on August 5, 2013, pursuant to a Not Operationally Qualified (NOQ) designation, constituted an adverse personnel action. Thus, a principal focus of the trial was the issue of a causal link between the two Laredo-related incidents of protected activity and the adverse actions taken just over three months later.

The ALJ's rejection of a causal link under the "contributing factor" standard rested on two erroneous determinations: First, that the reason for Respondent's NOQ grounding "had nothing to do with protected activity, but [was] solely to coordinate" an August 9 meeting with the Complainant to address his security concerns, and that there was "no evidence" that the NOQ grounding could be associated with adverse motivations on the part of the Respondent. (Decision at 53-54). Second, that the *only* basis for inferring an adverse intent with respect to the August 5 NOQ grounding was the temporal proximity of the Complainant's protected activity. (*Id*. at 62). These determinations are unsustainable in view of the overwhelming evidence from Respondent's own witnesses that the Complainant was grounded due to his purported lack of

"situational awareness" and for the purpose of having a Respondent attorney interrogate him as to whether he was the source of anonymous internet postings relating to the Laredo departure.

A second principal focus of the trial was the issue of whether Complainant's communications regarding security issues at the August 9 meeting constituted protected activity. Respondent conceded that the Complainant articulated "rational" concerns that Respondent's cargo practices incentivized the introduction of explosives into its aircraft by terrorists. (Decision at 46). The ALJ took notice of federal aviation standards that require a carrier to prevent or deter such introduction of explosives. (Decision at 38). Moreover, in terms of causal link, the ALJ found that Respondent's written justification for its August 9 NOQ grounding of Complainant, and its order of compulsory psychiatric evaluation, was based, in part, on Complainant's communications regarding Respondent's failure to properly deter the introduction of explosives into Respondent's aircraft. (Decision at 57). Nevertheless, the ALJ determined that Complainant's communications, which fit within the plain language of Respondent's regulatory obligation, did not constitute protected activity. The ALJ did not base his legal conclusion on his own interpretation of the regulatory mandate, but rather, on his inference that the FAA's acquiescence to the Respondent's practices was dispositive of their legality.

The ALJ's abdication of his obligation to interpret the law constitutes a legal error that requires reversal of his dismissal of this action. The evidentiary record established that FedEx is a specific target of Al Qaeda terrorist activity and that, in furtherance of this activity, it covets the information that Respondent releases into the public domain. In this factual context, the Complainant raised undisputedly rational concerns that the Respondent's policies incentivized, rather than prevented or deterred, the introduction of explosives into its aircraft. AIR 21 should

be construed to protect an airline employee from termination, suspension or punitive psychiatric examination in retaliation for such communications.

FACTUAL BACKGROUND

A. LAREDO-RELATED PROTECTED ACTIVITY AND THE AUGUST 5 NOQ GROUNDING

The ALJ's decision reaffirmed an earlier partial summary judgment determination that the Complainant had engaged in protected activity by refusing to depart Laredo into a solid line of thunderstorms on April 10, 2013, and by filing an OSHA complaint on April 29, 2013, in response to the Respondent's disciplinary investigation into the Laredo departure. (Decision at 46 and footnote 47).[1] Nevertheless, the ALJ declined to find a causal connection between these two separate incidents of protected activity and the August 5 NOQ grounding based on three clearly erroneous determinations: (a) that the anger directed toward the Complainant as result of the Laredo departure related not to the flight's delay, but rather to the Complainant's determination to wait out the storm at his hotel, (b) that the only basis for drawing a causal connection between the Laredo-related protected activity and August 5 NOQ was their temporal proximity, and (c) that the Respondent's only purpose in implementing the August 5 NOQ was to coordinate a meeting to discuss the Complainant's security concerns.

1. Hostility Based on Delayed Departure

The ALJ determined that:

> The evidence before this Tribunal shows that no Respondent member had an issue with Complainant's refusal to fly through severe weather on April 10, 2013. The issue for Respondent's management personnel was Complainant's failure to arrive at the airport one hour prior to this departure time at Laredo.

[1] Complainant withdrew his Laredo-related AIR 21 complaint on May 1, 2013, after the Respondent terminated its disciplinary investigation of him. (Estabrook, Tr. 85-86; RX 12).

(Decision at 53). The ALJ's factual determination failed to consider the Respondent's own documentary and audiotape evidence establishing that it was Complainant's decision to delay the flight, not his presence at the hotel, that prompted the Respondent's animus. Moreover, wholly apart from the departure issue of April 10, the ALJ's decision failed to give *any* independent consideration of the potential animus generated by the Complainant's subsequent filing of an AIR 21 complaint on April 29.

With respect to the former issue, Respondent's disciplinary 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 Complainant 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 Complainant based on the captain's alleged disregard of a "system that runs by time not much slop." *Id.*[2]

Similarly, nowhere in the audiotapes attached to the Crook email is there any critique of Complainant's location at the hotel; rather, Crook's pointed inquiry is "what time are you planning to take off?" (RX 10 at 4). The ALJ acknowledged that there were further unrecorded

[2] 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. (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 placed on an ATC gate hold, which confirms the mercenary nature of the Respondent's pilot pushing. (Estabrook, Tr. 65; Fisher, Tr. 357).

conversations between Crook and Complainant. (Decision at 16-17). However, the decision fails to make any credibility determination regarding Complainant's account that Crook utilized the unrecorded calls to exert coercive pressure by asserting "everybody else is taking off" and "I am watching you very closely." (Estabrook, Tr. 73-74; Crook, Tr. 273, 283-284). Similarly, the ALJ fails to give any consideration to the Respondent's audiotape evidence that, when the dispatcher reported to the GOC Manager that the Complainant felt he was being "pushed to leave," Crook's boss responded: "It's his damn job." (RX 10 at 8).

The ALJ failed to consider Respondent's concession that Complainant had a good faith belief that he was being subjected to pressure to depart in hazardous conditions. (Fisher, Tr. 350). Fleet Captain Rob Fisher promised Complainant that he would counsel Crook regarding his misconduct, but, in fact, never did. (Estabrook, Tr. 84; Fisher, Tr. 315, 356-357).

Instead, the Respondent representatives – Fisher and System Chief Pilot Captain William McDonald – proceeded with their investigative hearing based on email and audiotape evidence that solely pressed the issue of Complainant's refusal to depart, rather than his position at the airport hotel. (CX 8; Fisher, Tr. 349-350, 354; McDonald, Tr. 674). McDonald directed Fisher to summon the Complainant to Memphis for a hearing identified by the Respondent in a lawyer-vetted email as part of a "disciplinary" process. (Fisher, Tr. 343-344; CX 8).

The Fisher email was in response to a letter from the Complainant's legal counsel advising Fisher of the filing of an AIR 21 complaint in response to Respondent's Laredo-related retaliatory actions. (CX 8 at 3). Nevertheless, 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 David Knox during the OSHA investigatory meeting. (Fisher, Tr. 398-399; CX 23 at 3). Despite Fisher's false denial of knowledge with respect to the Laredo AIR 21 filing, condoned

by Respondent's legal counsel, the ALJ decision failed to give any consideration to the retaliatory animus that may have been generated by this second incident of protected activity.

At the conclusion of the Respondent's investigatory interview regarding the Laredo departure, Complainant advised Fisher that he would withdraw his AIR 21 complaint (Estabrook, Tr. 85-86; Fisher, Tr. 315). Fisher responded by confessing that McDonald was "upset" that no disciplinary action would be taken against the Complainant. (Estabrook, Tr. 84).

As discussed below, the ALJ's determination that there was no animus generated by the Complainant's Laredo departure and AIR 21 filing is belied by the fact that, three months later, on the eve of the August 5 NOQ grounding, McDonald directed Respondent's labor counsel to interrogate Complainant to determine his responsibility for Laredo-related internet postings.

2. Connection Between Laredo-Related Activity and the August 5 NOQ

The ALJ concludes: "There is little, if any, evidence that the adverse actions … related to Complainant's actions back in April 2013." (Decision at 53). The conclusion is stupefying in view of the testimony of Respondent's witnesses directly tying the Laredo departure to the August 5 NOQ grounding and subsequent interrogation of the Complainant on August 9.

Immediately prior to the August 5 NOQ, McDonald determined that, under the title "Mayday Mark," a Respondent pilot had been communicating with fellow pilots on an internet forum regarding the Laredo departure. (McDonald, Tr. 699-701; Decision at 10 fn. 25, 23, 29, 54). McDonald directed Respondent labor counsel Tice to question Complainant, at a meeting scheduled for August 9, 2013, to determine whether Complainant was posting under the name Mayday Mark. (McDonald, Tr. 705-706; Tice, Tr. 435, 485). 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. 436; McDonald, Tr. 700-701).

McDonald testified that he considered the Laredo-related postings to constitute a potential violation of Respondent policy. (McDonald, Tr. 702-704). The investigation of Mayday Mark's identity came to a halt after Respondent representatives determined that the anonymous poster – who may also have suffered a stroke – was not the Complainant. (McDonald Tr. 706).

3. ALJ's Determination that the Purpose of the August 5 NOQ Grounding was "Solely to Coordinate" the August 9 Meeting is Clearly Erroneous

The ALJ determined that the August 5 NOQ grounding was "solely to coordinate" an August 9 meeting concerning security issues raised by the Complainant, and that there was "no evidence" that the NOQ grounding could be associated with adverse motivations on the part of the Respondent. (Decision at 53-54). The evidence to the contrary is overwhelming; moreover, the evidence derives primarily from the Respondent's witnesses and interrogatory responses.

As discussed in the section above, McDonald's objective for the August 9 meeting was to have the Complainant interrogated by Respondent's lawyer to determine if Complainant should be disciplined for posting communications related to the Laredo departure.

Significantly, the Complainant never requested a meeting with management – his August 4 email requested a telephone call. Moreover, when the Respondent insisted on grounding him (allegedly for a meeting), Complainant 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. 57-58).

As Respondent's witnesses testified, FedEx typically utilizes the NOQ to ground due to a pilot health/training issue or to conduct a disciplinary investigation. (Fisher, Tr. 322-324, 365-366, 400; McDonald, Tr. 690-691). Moreover, Respondent placed Complainant not just on an NOQ, but on an NOQ UFN (Until Further Notice) thereby indefinitely grounding him and

suspending his travel privileges. (CX 18; McDonald, Tr. 690; CX 30, Response No. 17 at 6). The mechanism "typically" used by the Respondent to facilitate a non-disciplinary meeting with a pilot is the RMG (Remove for Management) designation, which would not trigger jumpseat suspension; indeed, Fisher claimed that he did not know why the RMG designation was not used for Complainant's August 9 meeting. (Fisher, Tr. 363-365).

Respondent attorney Tice agreed that the "standard reason" for a jumpseat suspension is that the subject pilot is under investigation for a serious matter. (Tr. 456). Moreover, the "main occasions" for his presence, as counsel, at a pilot meeting was for disciplinary investigations. (Tr. 427).

Respondent's privilege log indicated a flurry of emails discussing the rationale for the August 5 NOQ were never produced based on an assertion of attorney-client privilege. (CX 10). Nonetheless, Respondent attorney Tice blurted out, over the objections of Respondent counsel, that the Respondent's NOQ designation was, in fact, for the purpose of grounding the Complainant and that the directive emanated from Vice President of Flight Operations James Bowman, whose authority exceeded that of any other Respondent witness. (Tice, Tr. 457-459, 473-475).[3]

In a sworn interrogatory response, Respondent identified the participants in the August 5

[3] Although the ALJ permitted Tice's testimony, he declined to order the disclosure of the email communications underlying this testimony. (Tr. 512-514). Complainant respectfully submits that this ALJ 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 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.")

NOQ decision as Fisher, Ondra, Tice, and McDonald. (CX 22). At trial, however, Fisher, Ondra and Tice each denied that they had participated in the August 5 NOQ determination. (Fisher, Tr. 414-415; Tice, Tr. 429,459; Ondra, Tr. 564). Confirming the untruthfulness of the Respondent's interrogatory response, McDonald averred that he made the August 5 NOQ decision "alone." (McDonald, Tr. 658-662, 690-691). However, Respondent interrogatory responses, and McDonald's testimony, falsely omitted the participation of Bowman in the NOQ decision, until Tice's trial testimony exposed a lie of over two years' duration.

After the Complainant had completed his admittedly rational presentation on August 9 concerning Respondent's reckless dissemination of aircraft and package tracking data, the Respondent's representatives did not ask him a single security related question. (Estabrook, Tr. 93-94; Ondra, Tr. 587-588). Instead, they commenced the Mayday Mark interrogation. (Decision at 54).

B. PROTECTED ACTIVITY OF AUGUST 9, 2013 AND RETALIATORY RESPONSE

The Complainant objects to the ALJ's determination that he did not engage in protected activity during his meeting with the Respondent on August 9, 2013. In terms of facts, the ALJ found that:

> On August 9, 2013 a meeting occurred where Complainant raised safety concerns he had about Respondent's operations. During this meeting Complainant relayed his concerns about dissemination of aircraft and package tracking information to the public. Mr. Ondra agreed that the Complainant's concerns were rational.

(Decision at 46 (citation omitted)). The ALJ correctly characterized the Complainant's communication as conveying "Respondent's cargo practices encourage and incentivize

the introduction of explosives on to its aircraft by terrorists." (*Id*. (citation omitted)).[4] Respondent witness Fisher agreed that Complainant 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 362-363). See also, (Estabrook, Tr. 90-93, 99-100; Ondra, Tr. 601; JX 4; CX 31 at 1).

The Complainant's communication to the Respondent that it was not adequately deterring, but was actually incentivizing, terrorist introduction of explosives into the Respondent's aircraft, touched upon the Respondent's obligation under federal law 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).

Nevertheless, the ALJ concluded:

> Complainant may well be correct that the use of [a] combination of package tracking data and aircraft tracking data may allow one to narrow the timeframe of a package's presence on an aircraft, but that alone does not constitute a violation of an FAA requirement or federal law related to air carrier safety.

(Decision at 47).

The ALJ found that Fisher and Respondent counsel Tice relied, in part, on Complainant's

[4] The Complainant's sense of urgency was heightened by Al Qaeda's past efforts to obtain timeline information for FedEx package delivery and its identification of FedEx as a specific target for its terrorist activity. (Decision at 27, 49; CX 12; CX 13; CX 14 at 4, 7).

"statements about security concerns relating to Al Qaeda, and the real-time tracking of Respondent's packages during the August 9, 2013 meeting as reasons for the evaluation request." (Decision at 57 (citations omitted). Although the ALJ found the referral of the Complainant for psychiatric examination "deeply troubling," he nonetheless concluded that the adverse action was not actionable under AIR 21 because the Complainant's communication of security concerns did not constitute protected activity. (Decision at 61).

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). The ALJ found that the Complainant "time and again asked Respondent to articulate the 'reasonable basis' for its decision to subject Complainant to this process," but that Respondent adopted the "disingenuous" and "deeply troubling" approach of withholding its rationale. (Decision at 56-57, 62; CX 27 at 5; CX 29 at 1; Tice, Tr. 511-12). *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010)(the credibility of an employer's after-the-fact reasons for firing an employee is diminished if these reasons were not given at the time of the adverse action).

ARGUMENT

I.
THE ALJ VIOLATED THE SUBSTANTIAL EVIDENCE STANDARD BY FAILING TO FIND THAT COMPLAINANT'S PROTECTED ACTIVITY CONTRIBUTED TO THE ADVERSE PERSONNEL ACTION THAT HE SUFFERED

A. APPLICATION OF THE SUBSTANTIAL EVIDENCE STANDARD IN THE AIR 21 CONTEXT

ALJ determinations are unlawful and must be set aside where they are unsupported by substantial evidence. 5 U.S.C. § 706(2)(E). This standard prohibits an adjudicative body from

disregarding evidence. *Dickerson v. United States*, 346 U.S. 389, 396 (1953)(holding that evidence presented must be accepted as true unless it is impeached or contradicted). Even when faced with conflicting evidence, the adjudicative body cannot arbitrarily favor one account over another. *White Glove Bldg. Maint. Inc. v. Brennan,* 518 F.2d 1271, 1276 (9th Cir. 1975) (holding that the rejection of evidence by the ALJ without a detailed explanation of his reasons for doing so was improper as being arbitrary and that reasons for rejecting uncontradicted testimony on the grounds of credibility must be spelled out in the record); *Burlington Truck Lines v. US*, 371 U.S. 156, 168 (1962) (a decision is arbitrary if the proffered rationale runs counter to the evidence before the agency); *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007); *Louisiana PSC v. FERC,* 184 F.3d 892, 898 (D.C. Cir. 1999) (agency may not fail to consider "an important aspect of the problem" or explain its decision in a manner that "runs counter to the evidence before the agency")*; TNS, Inc. v. NLRB,* 296 F.3d 384, 394 (6th Cir. 2002)("it is not enough to merely verify that there is evidence to support the Board's determination without taking into account contradictory evidence or evidence from which conflicting inferences can be drawn."); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951) (The reviewing court must take into account whatever in the record fairly detracts from a position that the court might consider adopting).

In this matter, satisfaction of the substantial evidence standard must be considered in the context of the deliberately light burden of establishing that a complainant's protected activity contributed to the adverse action suffered. Due to the safety imperative underlying AIR 21, the contributing factor standard is satisfied by evidence of "any factor which, alone or in connection with other factors, **tends to affect in any way** the outcome of the decision." *Araujo v. New*

Jersey Transit Rail Operations, Inc., 708 F.3d 152, 158 (3d Cir. 2013) (citing *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563 (5th Cir. 2011)).

ALJs rely on circumstantial evidence in terms of satisfying the contributing factor test because direct evidence of a retaliatory motive is "rare." *See, e.g., Armstrong v. Flowserve US, Inc.*, ARB Case No. 14-023 at 7, ALJ Case No. 2012-ERA-017 (ARB September 14, 2016)("Because direct evidence of retaliation is rare, complainants may rely on circumstantial evidence to prove that protected activity contributed to the unfavorable employment action in question."); *Forrand v. FedEx Corp.*, ALJ Case No. 2012-AIR-00008 at 8 (ALJ September 6, 2012)("Direct evidence of an employer's mental processes is rare, so rare that most findings about whether intentional retaliation occurred depend on circumstantial evidence.")

"Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent applications of employer's policies, shifting explanations for its action, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the [unfavorable personnel] action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 at 7 (ARB Feb. 29, 2012).

The ALJ failed to accord proper weight to the temporal proximity factor. Moreover, the ALJ's determination that "he did not find that temporal proximity *by itself* sufficient to demonstrate that [Complainant's] protected activities were a contributing factor to the adverse actions he suffered," confirms his failure to properly consider the other sources of circumstantial evidence identified by *DeFrancesco*, including the (a) indications of pretext, (b) inconsistent applications of employer's policies, (c) shifting explanations for its actions, (d) refusal to provide

the Complainant with an explanation for its actions, and (e) the Respondent's perjurious responses to interrogatories and OSHA investigative inquiries.

B. THE ALJ FAILED TO ACCORD PROPER WEIGHT TO THE TEMPORAL PROXIMITY FACTOR

The Tribunal has determined that Complainant 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. (Decision at 46). On August 5, barely three months later, McDonald ordered Complainant placed on an indefinite NOQ.

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).

The ALJ's failure to apply the regulatory mandate that temporal proximity will "normally" establish the required causal link is particularly inexplicable in view of the evidence that the Respondent's System Chief Pilot McDonald was brooding about anonymous postings related to the Laredo departure on the eve of the August 5 NOQ decision and ordered Respondent legal counsel to interrogate the Complainant on August 9 to determine if he had authored the postings. (McDonald, Tr. 705-706; Tice, Tr. 452-453, 485). Thus, the temporal proximity between the Respondent's August 5 NOQ determination, and its consideration of the Laredo-related protected activity, consisted of a single day.

Under these circumstances, the ALJ's failure to apply the regulatory mandate that temporal proximity "normally" satisfies the *prima facie* requirement of establishing causation would require weighty contrary evidence. Here, however, the ALJ provided a single reason -- that the August 5 NOQ grounding was "solely to coordinate" an August 9 meeting with the Complainant concerning security issues he had raised, and that there was "no evidence" that the NOQ grounding could be associated with adverse motivations on the part of the Respondent. (Decision at 53-54). Overwhelming evidence of pretext, inconsistent applications of Respondent's policies, shifting explanations for its actions, refusal to provide the Complainant with an explanation for its actions, and outright perjury preclude a finding that the innocent motive of coordinating a meeting to discuss security issues could be considered the "intervening event" that justified the August 5 NOQ.

The ALJ's determination that the August 5 grounding was for the sole purpose of discussing the Complainant's security concerns is in conflict with the Respondent's fixation on the Mayday Mark internet postings and Respondent's deceptive testimony concerning this issue:

> Immediately prior the August 9, 2013 meeting with Complainant, Respondent's representatives gathered for a pre-meeting. During the meeting the issue of "Mayday Mark" was raised. Captain McDonald had asked Mr. Tice to raise the issue of "Mayday Mark" with Complainant during the meeting, which he did.
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> * * *
>
> However, despite his own notes reflecting otherwise, Mr. Ondra denied that the subject of "Mayday Mark" was discussed prior to the meeting with Complainant. This further undercuts his credibility.

(Decision at 54 (citations omitted)). Inexplicably, the ALJ discounts Ondra's testimony regarding his misrepresentations relating to the anonymous poster of Laredo-related communications, but treats the deception as non-evidence relating to the motives underlying the August 5 NOQ and the purpose of the August 9 meeting. The ALJ's finding reinforces the

immediate temporal proximity between the Respondent's consideration of Complainant's Laredo-related protected activity and the adverse actions of both August 5 and August 9, 2013. While the ALJ finding expressly recognizes the pretext and falsity of the rationale provided for the August 5 NOQ grounding, he disregards the ARB precedent in *DeFrancesco* and its progeny that hold that such pretext and falsity of rationale support a finding of causation.

C. THE RESPONDENT'S SHIFTING, FALSE AND PERJURIOUS RATIONALES FOR ITS ADVERSE ACTIONS WERE NOT ACCORDED PROPER WEIGHT BY THE ALJ

Against this backdrop of temporal proximity and direct evidence of the Respondent's preoccupation with the Laredo issue, one must further consider FedEx's serial mendacity relating to the decision-makers responsible for the August 5 NOQ grounding, the standard purpose of NOQ groundings, and shifting rationales for the August 5 NOQ grounding of Complainant:

- Respondent's interrogatory response asserted that Fisher, Ondra, Tice, and McDonald made the NOQ decision. At trial, the witnesses disavowed the interrogatory stating that McDonald "alone" made the decision. Then Tice contradicted McDonald by stating that Vice President of Flight Operations Bowman participated in the decision (*supra* at 8);

- Respondent's original interrogatory response asserted that the August 5 grounding was for the purpose of forcing a 15D fitness evaluation. (CX 22 at interrogatory No. 7). Respondent subsequently revised the response to state that the August 5 grounding was to facilitate a meeting. (CX 19 at 2) At trial, McDonald further contradicted the revised interrogatory by testifying that the August 5 grounding was implemented, in part, due to Complainant's lack of "situational awareness."[5]

- Respondent asserted that the meeting was for the purpose of addressing the Complainant's security concerns, however (a) Complainant never asked for a meeting, but repeatedly asked for a mere phone call (RX 13); (b) Respondent gave no consideration to Complainant's safety concerns either before, during, or after the August 9 meeting (Estabrook, Tr. 93-94; Ondra, Tr. 601-602); and, (c) none of the

[5] The ALJ found: "The term 'situational awareness' strikes this Tribunal as about as vague a term as one could provide in explaining his rationale." (Decision at 56).

management participants researched Complainant's prior role as Security Committee Chairman or his past dealings with the Vice President of Corporate Security (Tice, Tr. 480-482; Ondra, Tr. 560-562; McDonald, Tr. 667-678);

- The ALJ found that there was "no evidence" that the August 5 grounding was connected with adverse motivations; however, (a) McDonald ordered that Complainant be interrogated regarding Laredo-related postings, (b) McDonald arranged for labor counsel, whose primary purpose is to conduct disciplinary investigations, to conduct that interrogation; (c) Respondent's legal counsel expressed surprise that the unsuspecting Complainant attended the August 5 meeting without legal representation (CX 20);

- 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 (Fisher, Tr. 364);

- Respondent ultimately admitted that the NOQ was for the purpose of grounding Complainant and stripping him of his jumpseat privileges based on "situational awareness." (Tice, Tr. 473-74; McDonald. Tr. 666; Decision at 44); and,

- Respondent's persistently refused to respond to Complainant's requests for an explanation of its actions. (Decision at 56-57).

The ALJ failed to consider this deluge of evidence – from the Respondent's own witnesses – in the context of AIR 21 precedent that dictates that inferences of causal connection may be drawn from indications of pretext, shifting explanations for its actions, refusal to provide a complainant with an explanation for its adverse actions,[6] and the Respondent's false denials of knowledge of Complainant's prior Laredo-related AIR 21 filing in response to OSHA investigative inquiries.

The ALJ's failure to properly weigh this evidence is particularly inexplicable in light of his findings that there was "no credible evidence" supporting key factual allegations upon which the Respondent based its August 9 adverse actions, that the Respondent had attempted to "cloak

[6] *See Clemmons v. Ameristar Airways, Inc.,* ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010)(the credibility of an employer's after-the-fact reasons for firing an employee is diminished if these reasons were not given at the time of the initial discharge decision).

its decision" to require the Complainant to undergo a psychiatric analysis, that it had taken a "disingenuous approach," and that "Respondent treads on thin ice by offering such a flimsy justification for referring Complainant to a mental evaluation in this case." (Decision at 56-57).

D. DISCRIMINATORY SINGLING OUT OF COMPLAINANT FOR DISCRIMINATORY INVESTIGATION

McDonald's determination, immediately prior to the August 5 NOQ designation, that Complainant'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. (*supra* at 6-7, 15). To pursue this connection, he sent in attorney Tice, whose primary function at pilot meetings is to manage disciplinary investigations. (Decision at 56; Tice, Tr. 427). The Mayday Mark connection was a topic of management's pre-meeting caucus on August 9. (Decision at 54). When the connection to Complainant could not be proven, all further investigation of Mayday Mark's identity came to a screeching halt.

The lack of any further investigation into the identity of Mayday Mark is particularly unusual and offers further evidence that Respondent's stated reasons for the August 5 NOQ decision were pretextual. According to the Respondent, its interest in whether the Complainant was Mayday Mark emanated from the fact that he had allegedly violated Respondent's communication policies and/or suffered a stroke. (Tice, Tr. 482). Nevertheless, after learning that the Complainant was not Mayday Mark, Respondent abruptly terminated its investigation, heedless of the possibility that a pilot with an undisclosed stroke was continuing to fly its aircraft. In view of this undisputed factual context, the Tribunal failed to properly consider AIR 21 precedent that singling out a complainant, who has engaged in protected activity, for investigation of an unrelated incident supports a finding of a causal link between the protected

activity and subsequent adverse action. *Douglas v. Skywest Airlines, Inc.,* ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009).

E. THE ALJ's FINDING THAT THE AUGUST 5 NOQ WAS MERELY FOR SCHEDULING PURPOSES IMPERMISSIBLY DISREGARDS THE LAW OF THE CASE

When a court grants summary judgment on a particular factual issue, its ruling constitutes the law of the case with respect to that issue. *See Alberts v. HCA Inc., 2007 Bankr. LEXIS 6 (D.D.C. Bankr. 2007); Thorne v. Alexander,* 782 F. Supp. 677, 681 (D.D.C. 1992). "Under this doctrine, when the same issue is presented to the same court, in the same case, the results should be the same." *Feirson v. District of Columbia,* 362 F. Supp. 2d 244, 247 (D.D.C. 2005). "The law of the case applies even to a non-final, non-appealable decision … and is triggered by a final decision on a particular issue." *United States ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.,* 238 F. Supp. 2d 258, 262 (D.D.C. 2002). Moreover, litigants have the right to rely on the underlying issues as having been permanently resolved:

> Once a district judge issues a partial summary judgment order removing certain claims from a case, the parties have a right to rely on the ruling by forbearing from introducing any evidence or cross-examining witnesses in regard to those claims. If, as allowed by Rule 54(b) the judge subsequently changes the initial ruling and broadens the scope of the trial, the judge must inform the parties and give them an opportunity to present evidence relating to the newly revived issue.

Leddy v. Standard Drywall, Inc., 875 F.2d 383, 386 (2d Cir. 1989).

In the context of the parties' cross-motions for summary judgment, the Respondent argued that:

> As an initial matter, the decision to place Estabrook on NOQ status on August 5 was not an adverse employment decision. The purpose was merely to facilitate the meeting that he requested in his August 4 email, and he was paid for his time on NOQ.

Id. at 19.[7] (Appendix at 255). Nevertheless, in his order granting partial summary judgment, the ALJ flatly rejected the Respondent's argument that the August 5 NOQ designation did not constitute an adverse action:

> There is no genuine dispute that while Complainant was on NOQ status involuntarily, he was removed from service as a pilot and he was ineligible to use jumpseat privileges. When viewing the facts in the light most favorable to either party, there is no genuine dispute that NOQ status affected the terms, conditions or privileges of Complainant's employment such that it constituted adverse action under the Act.
>
> * * *
>
> When viewing all facts and reasonable inferences in the light most favorable to both parties for purposes of their respective Motions, Complainant is entitled to judgment as a matter of law that he was subjected to adverse actions when originally placed on NOQ status, when NOQ status was reinstated after the August 9, 2013 meeting, and when he was compelled to submit to a 15D evaluation.

(Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision and Denying Respondent's Motion for Summary Decision, May 9, 2016, at 22). As indicated, the ALJ's decision that the involuntary NOQ designation was an adverse action was made "in the light most favorable" to the Respondent.

Complainant respectfully submits that the ALJ's determination, in his final decision, that the August 5 NOQ designation was merely a means of facilitating a meeting with the Respondent represents an impermissible reversal of the ALJ's earlier decision that the NOQ grounding was an adverse action based on its involuntary nature and the attendant stripping of Complainant's jumpseat privileges, which the Respondent ascribed, at trial, to Complainant's lack of "situational awareness." This ALJ abandonment of the law of the case constitutes an error of law and requires the reversal of the ALJ's decision on this basis alone.

[7] Notably, here again, the Respondent falsely asserts that the Complainant's August 4 email sought a meeting.

II.

COMPLAINANT'S AUGUST 9 COMMUNICATIONS CONSTITUTED PROTECTED ACTIVITY

It is undisputed that the Respondent is subject to a federal regulatory mandate requiring it to prevent and deter the unauthorized introduction of explosives into its aircraft. 49 C.F.R. § 1544.103(a)(1); 49 C.F.R. § 1544.205(a), 49 C.F.R. § 1544.205(c)(1). It is also undisputed that, on August 9, the Complainant made a "rational" presentation that the Respondent was not adequately deterring, but was actually incentivizing, terrorist introduction of explosives into the Respondent's aircraft by providing terrorists with the tracking data – for aircraft and packages – that they coveted.[8] The rationality of Complainant's concern, and the Respondent's corresponding recklessness, is greatly heightened by the undisputed evidence that Al Qaeda has targeted FedEx and has sought FedEx's delivery timelines in furtherance of its terrorist activity. In short, the Complainant's August 9 communications fall squarely within the plain language of the federal regulatory mandate that the Respondent must prevent and deter, and certainly not incentivize, the introduction of unauthorized explosives into its aircraft.

The ALJ made no effort, however, to directly interpret the regulation. Instead, he determined that no reasonable person could find that the Respondent's actions were inconsistent with its obligation to prevent and deter because: (1) "the FAA, TSA, or some other federal

[8] The Respondent admitted:

> 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).

agency would have alerted Respondent that such disclosure constituted a violation," (2) "regarding the flight tracking data, Respondent presented evidence that the FAA *requires* the Respondent to transmit that very information to it, and it cannot control the distribution of that information thereafter," and (3) "Mr. Ondra also testified that Respondent was not violating any federal safety law by publishing the information." (Decision at 49 (citations omitted)). The three-part rationale provided by the ALJ constitutes a reversible error of law.

A. THE ALJ IMPROPERLY ABDICATED HIS OBLIGATION TO INTERPRET THE LAW

The ALJ did not directly interpret the regulations, but concluded that an agency's determination to not enforce the law in a certain manner renders the Complainant's understanding of the regulatory mandate per se unreasonable. The ALJ thereby abdicated his obligation to interpret the law. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1221 (2015)("In each case [of regulatory interpretation], the Judiciary is called upon to exercise its independent judgment and apply the law.").

The ALJ's abdication of his obligation in the instant case is particularly unjustified. First, the FAA has never issued an interpretation with respect to this issue; rather, the ALJ determined that the FAA's apparent acquiescence to unsafe practices that incentivize terrorism must mean that the carrier has fulfilled its legal duty to prevent and deter. However, even if the FAA had issued a formal interpretation of the regulation as permitting a practice inconsistent with the law's plain meaning, such an interpretation would not be dispositive. The Supreme Court in *Perez* not only recognized that the judiciary is the final arbiter of a law's meaning, but also that a federal agency is itself free to reinterpret regulatory law without going through the process required under the Administrative Procedure Act (APA) for new regulations.

In *Perez*, the Supreme Court held that an agency may issue a new interpretation of a regulation, which deviates significantly from prior interpretations, without following the APA's notice-and-comment procedures. 135 S. Ct. at 1203. Even significant changes in enforcement practice arising from such re-interpretations are permissible because "interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Id.* 1204.

In *Perez*, the Court upheld an agency's ability to re-interpret existing regulations in a manner that "upset settled reliance interests," so long as the new interpretation does not "conflict[] with the text of the regulation the agency purported to interpret." *Id*. at 1208-09. Thus, an altered enforcement policy could be justified by new factual findings that modify those which underlay a prior enforcement policy. *Id.* at 1210.

Could the FAA "wake up" tomorrow and decide that the Respondent's regulatory obligation required it, as a known Al Qaeda target, to restrict the dissemination of tracking data that incentivizes terrorists to ship explosives on its aircraft? Unless this interpretation conflicted with the regulation's general "prevent and deter" language, the answer is plainly "yes," because the FAA's interpretation is not the law – the regulation is the law. Because Complainant communicated concerns relating to the failure to prevent and deter terrorist introduction of explosives that fit squarely within the plain language of the regulations, these communications must be considered protected activity.

B. THE FAA DOES NOT REQUIRE THE DISSEMINATION OF RESPONDENT'S TRACKING DATA

The ALJ's second rationale -- "regarding the flight tracking data, Respondent presented evidence that the FAA *requires* the Respondent to transmit that very information to it, and it

cannot control the distribution of that information thereafter" – is flawed for at least three reasons.

First, the ALJ notably tailored his observation to "flight tracking data," whereas the Complainant undisputedly raised concerns about both flight *and* package tracking data. (Decision at 46-47, 49). There is no support in the record for the contention that the Respondent is required to disclose its package tracking data to the general public to the extent that it does on its business website.

Second, the ALJ's reliance on "evidence" that "Respondent presented" to conclude that the FAA requires the disclosure of flight tracking data constitutes yet another abdication of the ALJ's adjudicatory obligation. As discussed in section II.A, no FAA practice could alter the fact that the law imposes a prevent and deter obligation with respect to the unauthorized introduction of explosives into its aircraft and AIR 21 protects the Complainant's right to present concededly rational concerns regarding compliance with that obligation.

Third, the ALJ simply missed the boat with respect to the Respondent's inability to control the distribution of its flight tracking data. 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.[9] 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).

[9] 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 flight identification, 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).

Initially, the BARR program required that operators provide a Certified Security Concern (CSC) articulating 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 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.*). Thus, the Respondent's "they made me do it" terrorism defense has no legal foundation regardless of the "evidence" referenced by the ALJ. Under law, FedEx had the unrestricted ability to prevent this intelligence from being placed in hands of terrorist organizations. The above legal discussion was presented, almost *verbatim*, in the Complainant's post-trial brief; however, no treatment of the argument appears in the ALJ's decision. Even the earlier and more restrictive FAA opt-out policy tacitly recognizes that the obligation to "prevent and deter" would compel an air carrier to withhold its tracking data from the general public.

C. THE ALJ ERRED IN TREATING ONDRA'S TESTIMONY AS "EVIDENCE" OF WHAT THE LAW REQUIRED

The law requires the Respondent to prevent and deter the unauthorized introduction of explosives into its aircraft. Whether it was reasonable for the Complainant to consider providing valuable intelligence to terrorists, who had specifically targeted FedEx, as being inconsistent with the carrier's regulatory obligation, was for the ALJ to decide. Instead, he delegated his legal analysis, in part, to Respondent Security Manager Todd Ondra who "testified" that the Respondent was not violating the law. (Decision at 49). It has been universally held that no witness, not even an expert witness, can present admissible testimony concerning a legal conclusion. *See, e.g., Nieves-Villanueva v. Soto-Rivera,* 133 F. 3d 92, 100 (1st Cir. 1997) (excluding expert testimony because of legal conclusions and describing the use of such testimony as "egregious"); *Hygh v. Jacobs,* 961 F.2d 359, 363 (2d Cir. 1992) (requiring the exclusion of expert testimony expressing a legal conclusion); *Peterson v. City of Plymouth,* 60 F.3d 469, 475 (8th Cir. 1995) (holding witness testimony to be a statement of legal conclusion that are for the court to make and an abuse of discretion to allow the testimony); *Specht v. Jensen,* 853 F.2d 805, 807 (10th Cir. 1988) (emphasizing that a witness cannot be permitted to define the law).

The ALJ's reliance on Ondra's fact testimony as to the nature of the law constitutes "egregious" legal error, especially after the ALJ impeached his credibility. (Decision at 43)(Ondra testimony concerning the August 9 meeting entitled to "very little weight.").

D. THE CONGRESSIONAL POLICY EMBEDDED IN AIR 21 REQUIRES THAT THE COMPLAINANT'S AUGUST 9 COMMUNICATIONS BE TREATED AS PROTECTED ACTIVITY

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.").

The ALJ relied on *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013 (June 30, 2010) in support of his contention that the Complainant did not have an objectively reasonable basis for believing that a violation of a federal aviation standard has occurred. (Decision at 46). 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 was provided with documentary evidence that POC was lawful, 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, Complainant communicated to the Respondent that the carrier was a designated Al Qaeda target and that Respondent was handing over to these terrorists the information they considered necessary to detonate their explosives to maximum advantage. Unlike the *Hindsman* complainant, Complainant Estabrook was met with deafening silence. No one told him that the Respondent's conduct was safe or lawful. Indeed, Respondent subsequently conceded that Complainant's concerns were rational. Given these facts, the *Hindsman* precedent is inapposite and Complainant's belief that Respondent was failing to fulfill its duties under federal law was objectively reasonable. Indeed, the FARs do not specifically give the Respondent in this case the authority to enhance Al Qaeda targeting and incentivize the carriage and placement of bombs, as the flight attendant manual in *Hindsman* specifically authorized the carriage of oxygen cylinders.

As the ALJ in this case recognized: "The quickest way to chill the open dialogue in the area of aviation security is to place a person's livelihood at stake for speaking up." (Decision at 61). The policy underlying AIR 21 will be severely compromised if the Complainant's August 9 communications relating to the Respondent's regulatory obligation to prevent and deter terrorist activity are found to be unprotected.

III.

THE ALJ IMPROPERLY FAILED TO CONSIDER THE COMPLAINANT'S LAREDO-RELATED PROTECTED ACTIVITY AS A TRIGGER FOR THE AUGUST 9 NOQ DESIGNATION AND PSYCHIATRIC REFERRAL

The ALJ determined that the April 10 Laredo departure refusal and the April 29 Laredo-related AIR 21 filing were protected activity and that the August 5 and August 9 NOQ designations, and subsequent order to submit to compulsory psychiatric evaluation, were adverse actions. The ALJ then rejected a causal link on two grounds: (1) that the August 5 NOQ

designation was a mere scheduling decision, and (2) that the August 9 NOQ designation and psychiatric evaluation were triggered by the Complainant's communication of security concerns that, though rational, did not constitute protected activity under AIR 21.

Absent from the ALJ's decision, however, is any consideration of the Laredo-related activity as a trigger for the August 9 NOQ and psychiatric referral. This omission cannot be justified particularly in view of the fact that ascertaining Complainant's responsibility for discussing Laredo-related issues was the Respondent's primary objective for the August 9 meeting, as confirmed by its representatives' disinterest in discussing the security issues raised by the Complainant. The fact that Respondent's attendees at the August 9 meeting confirmed that the Complainant was not, in fact, Mayday Mark does not alter the causal linkage between Laredo and the August 9 adverse actions given that McDonald was never advised of the determination that the Complainant was not Mayday Mark. (Decision at 54). In short, McDonald's belief that the Complainant should still be punished for his Laredo-related activity and communications remained intact.

For all of the reasons discussed in Section I above, as aggravated by his failure to even address the issue, the ALJ did not conform with the substantial evidence standard in failing to find that the Laredo-related protected activity at least contributed to the Respondent's adverse actions of August 9, 2013.

IV.

ANY REMAND BY THE ARB SHOULD BE LIMITED TO ISSUES RELATED TO REMEDIAL RELIEF

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 the Complainant in the absence of his protected activity. (Judge Morris, Tr. 715-716). The Complainant understood this as the ALJ's tacit acknowledgment that Complainant had established his *prima facie* case.

In the event that the ARB determines that the Complaint has established his *prima facie* showing under AIR 21, he respectfully submits that the case should be remanded to the ALJ exclusively for the purposes of determining the appropriate remedy. The ALJ's excoriation of the Respondent's abuse of the psychiatric examination process as "deeply troubling," and undertaken with only "flimsy justification," precludes any possibility that the Respondent could satisfy the clear and convincing standard in this matter.

CONCLUSION

In the view of the foregoing, the Complainant respectfully requests that the ALJ's decision be reversed with instructions, on remand, to enter judgment for the Complainant and to determine an appropriate remedy.

Respectfully submitted on:

Date: June 22, 2017 By: ***/s/ Lee Seham***

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