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

_____)	
MARK ESTABROOK,)	
)	
Complainant,)	
)	CASE NO. 2014-AIR-00022
v.)	
)	ADMINISTRATIVE LAW JUDGE
FEDERAL EXPRESS CORPORATION,)	JOHN P. SELLERS, III
)	
Respondent.)	
)	
)	
_____)	

**COMPLAINANT’S NOTICE OF MOTION, MOTION, AND MEMORANDUM
TO COMPEL REQUESTS FOR ADMISSIONS, INTERROGATORIES, AND
REQUESTS FOR DOCUMENTS**

NOTICE

PLEASE TAKE NOTICE, that Complainant, Mark Estabrook, by and through his attorneys, Seham, Seham, Meltz & Petersen, LLP, requests and moves that this Court issue an order pursuant to 29 CFR § 18.21 and Fed. R. Civ. P. 37 to compel responses to Complainant’s Request for Admissions, Interrogatories, and Requests for Documents served on Respondent

Federal Express Corporation on August 29, 2014. (Exhibit A).

MOTION AND MEMORANDUM

PROCEDURAL BACKGROUND

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

FedEx did not provide a response to Complainant's First Combined Discovery until October 29, 2014 -- a full month after the original due date. (Exhibit B). By letter dated November 4, 2014, Complainant's counsel advised FedEx that its responses were substantially defective and requested the courtesy of a response by November 10, 2014, as to whether FedEx would correct the specifically identified defects. (Exhibit C). Alternatively, Complainant's counsel offered to discuss the issues by telephone upon request of FedEx. To date, Complainant's counsel has received no substantive response from FedEx.

Due to the broad scope of the Respondent's discovery violations, and its refusal to respond to Complainant's efforts to resolve the matter without the intervention of the Court, the Complainant seeks a motion to compel appropriate responses and all reasonable expenses arising from this motion, including attorney's fees, pursuant to FRCP 37(d).

FACTUAL BACKGROUND

Exclusively for the purposes of facilitating the Court's review of this motion, the Complainant provides the following summary factual background.

As relevant to this case, the Complainant engaged in "protected activity" related to two separate aviation safety issues. The first concerned his refusal to depart from Laredo into a severe

and solid line of thunderstorms on April 10, 2013, and – in response to a retaliatory disciplinary investigation by the Respondent – his initiation of an AIR 21 action. The AIR 21 action was initiated on April 29, 2013, and subsequently withdrawn on May 2, 2013, after FedEx terminated its disciplinary proceedings. FedEx’s retaliatory disciplinary proceedings were conducted by Fleet Captain Rob Fisher and relied, in substantial part, on the reports of the Flight Duty Officer, Mark Crook.

The second aviation safety issue concerned the Complainant’s position that FedEx’s existing cargo practices facilitated the introduction of destructive devices into FedEx aircraft for criminal and terrorist purposes. By email dated August 4, 2013, the Complainant sought a meeting with FedEx CEO Fred Smith to discuss terrorist-related issues that he had previously raised in his capacity as Security Chairman of the pilots’ labor union. The August 4 email refers to FedEx’s CEO as “Fred.” On August 5, 2013, FedEx engaged in retaliatory action – in response to Complainant’s protected activity related to the Laredo departure and the August 4 email – by removing the Complainant from flight duty as not qualified (NOQ).

On August 9, 2013, FedEx arranged a meeting between the Complainant and three company officials: Fleet Captain Rob Fisher, Labor Relations Counsel Robb Tice, and Managing Director of Aviation and Regulatory Security Todd Ondra. During the meeting, the Complainant presented his position that FedEx’s existing cargo practices, including publication of live tracking information, facilitated the introduction of destructive devices into FedEx aircraft for criminal and terrorist purposes. By way of explaining his credential with respect to security issues, he referenced his military service on AWACS aircraft that engaged in the surveillance of Russian bombers. He also referenced a “rumor” that he had heard that Auburn Calloway – a FedEx pilot who had hijacked a FedEx aircraft and inflicted physical injuries ending the careers of three FedEx pilots – might be advising Al Qaeda. The meeting concluded with an extensive interrogation of the

Complainant by Labor Relations Counsel Tice as to whether the Complainant posted on a pilot website under the sobriquet “Mayday Mark.” A package of highlighted “Mayday Mark” postings in Tice’s possession indicated that the individual had suffered a stroke. The Complainant denied that he was “Mayday Mark” and the Company representatives accepted this denial.

Security Director Ondra did not attend the entire August 9, 2013 meeting and was absent at the meeting’s conclusion. At the conclusion of the meeting, Fleet Captain Fisher decided to restore the Complainant to active flight status. Fleet Captain Fisher subsequently called Complainant and told him that he was required to, once again, remove the Complainant from active flight duty because “you know too much.” FedEx subsequently engaged in further retaliatory action by advising the Complainant that it would terminate him unless he submitted to psychiatric examination. After being analyzed by three psychiatrists, the Complainant was returned to flight duty.

PRIORITY ISSUES

In his November 10 letter to FedEx counsel, Complainant identified the items listed below as being among the defects of “primary concern.” Because of the significant and obvious nature of these defects, and the potential for the underlying non-compliance to prolong the litigation process, we respectfully request that the Court consider scheduling a teleconference with counsel to address the resolution of these issues on an expedited basis:

- (1) the failure to provide a **privilege log** in accordance with FRCP 26(b)(5) despite the fact FedEx’s responses specifically reflect the withholding of allegedly privileged documents in no less than seven of its responses to Complainant’s Request for Documents;
- (2) the **selective provision of privileged and confidential documents** relating to the supposed basis for referring the Complainant to compulsory psychiatric review (Exhibit D- FDX4-60-64) despite well established federal case law holding that the provision of selected privileged documents effectuates a waiver of privilege for all

documents related to this same subject matter. *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.");

- (3) the apparent withholding of any internal documents/communications originated by or sent to **Labor Counsel Robert Tice**, identified by FedEx as one of the **primary decision-makers**;
- (4) the selective furnishing and withholding of **taped conversations**;
- (5) the apparent refusal to search for, or provide, **any documents** related to the Complainant's communications with FedEx in his capacity as **Security Chairman of the FedEx Pilots Association**;
- (6) the refusal to respond, or resort to evasive responses, to **Requests for Admissions** that were designed to narrow the issues for trial;
- (7) the complete **absence of any e-mails** between the four FedEx-identified decision-makers, and any e-mails between FedEx and the doctors who evaluated Complainant – it is simply not credible that no such emails exist; and
- (8) the **redaction of documents** without providing any basis for such redaction.

DEFECTIVE RESPONSES TO REQUESTS FOR ADMISSIONS

REQUEST NO. 8: That at your meeting with the Complainant on August 9, 2013, the Complainant referenced the fact that his military service included the tracking of Soviet aircraft.

RESPONSE TO REQUEST NO. 8: Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed.

DEFICIENCY: FedEx provides identical responses to RFA's 8 through 11, which request admissions to statements made by the Complainant at a meeting on August 9, 2013: "Denied as written. See Ondra's notes and summary of conversation, which summarizes the information

discussed.” Request No. 8 is pivotal since it directly relates to one of the three reasons proffered by the Respondent for compelling the Complainant to submit to compulsory psychiatric analysis. The response is defective because: (1) FedEx does not identify Ondra’s notes in its discovery responses, (2) Ondra did not attend the entire meeting, and (3) the Complainant is entitled to an admission or denial, rather than a reference to a hearsay document, in order to achieve the objective of narrowing the issues for trial. We request that the Respondent’s evasive response be treated as an admission. *Asea, Inc. v. Southern Pacific Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981)(“an evasive denial, one that does not "specifically deny the matter," or a response that does not set forth ‘in detail’ the reasons why the answering party cannot truthfully admit or deny the matter, may be deemed an admission.”).

REQUEST NO. 9: That at your meeting with the Complainant on August 9, 2013, the Complainant stated his belief that the Respondent’s practice of providing up-to-date package tracking information facilitated and maximized the criminal destruction of cargo, aircraft and human lives by granting terrorists the ability to carefully select the time of detonation.

RESPONSE TO REQUEST NO. 9: Denied as written. See Ondra’s notes and summary of conversation, which summarizes the information discussed.

DEFICIENCY: FedEx provides identical responses to RFA’s 8 through 11, which request admissions to statements made by the Complainant at a meeting on August 9, 2013: “Denied as written. See Ondra’s notes and summary of conversation, which summarizes the information discussed.” Request No. 9 directly relates to the nature of the Complainant’s protected activity of August 9, 2013, which was previously admitted in a submission to OSHA Investigator Jason Brush. The response is defective because (1) FedEx does not identify Ondra’s notes in its

discovery responses, (2) Ondra did not attend the entire meeting, and (3) the Complainant is entitled to an admission or denial, rather than a reference to a hearsay document, in order to achieve the objective of narrowing the issues for trial, (4) the Respondent's response conflicts with its prior admission of the same factual issue in its submission to OSHA Investigator Jason Brush dated December 4, 2013 at page 4. (Exhibit E). We request that the Respondent's evasive response be treated as an admission. *Asea, Inc. v. Southern Pacific Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981)("an evasive denial, one that does not "specifically deny the matter," or a response that does not set forth 'in detail' the reasons why the answering party cannot truthfully admit or deny the matter, may be deemed an admission.").

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.

RESPONSE TO REQUEST NO. 10: Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed.

DEFICIENCY: FedEx provides identical responses to RFA's 8 through 11, which request admissions to statements made by the Complainant at a meeting on August 9, 2013: "Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed." Request No. 10 directly relates to the nature of the Complainant's protected activity of August 9, 2013, which was previously admitted in a submission to OSHA Investigator Jason Brush. The response is defective because (1) FedEx does not identify Ondra's notes in its

discovery responses, (2) Ondra did not attend the entire meeting, and (3) the Complainant is entitled to an admission or denial, rather than a reference to a hearsay document, in order to achieve the objective of narrowing the issues for trial, (4) the Respondent's response conflicts with its prior admission of the same factual issue in its submission to OSHA Investigator Jason Brush dated December 4, 2013 at page 4. (Exhibit E). We request that the Respondent's evasive response be treated as an admission. *Asea, Inc. v. Southern Pacific Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981)("an evasive denial, one that does not "specifically deny the matter," or a response that does not set forth 'in detail' the reasons why the answering party cannot truthfully admit or deny the matter, may be deemed an admission.").

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.

RESPONSE TO REQUEST NO. 11: Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed.

DEFICIENCY: FedEx provides identical responses to RFA's 8 through 11, which request admissions to statements made by the Complainant at a meeting on August 9, 2013: "Denied as written. See Ondra's notes and summary of conversation, which summarizes the information discussed." Request No. 11 directly relates to the nature of the Complainant's protected activity of August 9, 2013, which was previously admitted in a submission to OSHA Investigator Jason Brush. The response is defective because (1) FedEx does not identify Ondra's notes in its discovery responses, (2) Ondra did not attend the entire meeting, and (3) the Complainant is entitled to an admission or denial, rather than a reference to a hearsay document, in order to achieve the objective of narrowing the issues for trial, (4) the Respondent's response conflicts with its prior admission of the same factual issue in its submission to OSHA Investigator Jason Brush

dated December 4, 2013 at page 4 (Exhibit E) and with all meetings notes relating to the August 9 meeting that have been produced by the Respondent. (Exhibit D- FDX4-60-64). We request that the Respondent's evasive response be treated as an admission. *Asea, Inc. v. Southern Pacific Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981)(“an evasive denial, one that does not "specifically deny the matter," or a response that does not set forth 'in detail' the reasons why the answering party cannot truthfully admit or deny the matter, may be deemed an admission.”).

DEFECTIVE RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 3: Identify each person you intend to call to testify in your case in chief.

RESPONSE TO INTERROGATORY NO. 3: Respondent has not completed its preparation for the hearing in this matter and has not yet determined each and every person it intends to call in the case in chief. Respondent will supplement this response as required.

DEFICIENCY: FedEx's failure to provide even a preliminary response to an interrogatory requesting identification of witnesses for its case in chief is unacceptable. The fact that Respondent has not determined “each and every” witness does not excuse it from a response based on present information.

INTERROGATORY NO. 4: Identify each person you might call to testify in your rebuttal case.

RESPONSE TO INTERROGATORY NO. 4: Respondent has not completed its

preparation for the hearing in this matter and has not yet determined each and every person it intends to call in the case in chief. Respondent will supplement this response as required.

DEFICIENCY: FedEx's failure to provide even a preliminary response to an interrogatory requesting identification of witnesses for its rebuttal case is unacceptable. The fact that Respondent has not determined "each and every" witness does not excuse it from a response based on present information.

INTERROGATORY NO. 7: State the reasons why the Complainant was placed on NOQ status on or about August 5, 2013.

RESPONSE TO INTERROGATORY NO. 7: Complainant was placed on NOQ status on or about August 5, 2013 because he had been referred for examination under Section 15.D. of the collective bargaining agreement between Respondent and the Air Line Pilots Association.

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

DEFECTIVE RESPONSES TO REQUESTS FOR DOCUMENTS

REQUEST NO. 1: Produce each document in your possession that you reviewed to obtain facts relating to the Complaint.

RESPONSE TO REQUEST NO. 1: Respondent objects to Request No. 1 to the extent it seeks production of documents protected by the attorney-client relationship and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: FedEx's response to Request No. 1 indicates that FedEx is withholding "non-privileged documents" based on "the attorney-client relationship and/or the attorney work product doctrine." As a preliminary matter, the response is unacceptable because FedEx has failed to provide a privilege log identifying the documents by date, identity of sender, identity of all recipients, the subject matter, and the basis for the privilege – without which information the Complainant will be unable to evaluate the legitimacy of the asserted privilege. FRCP 26(b)(5).

Moreover, it is well established that the "voluntary disclosure of the content of a privileged attorney communication results in waiver as to all other communications on the same subject." *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010). *See also United States v. Nobles*, 422 U.S. 225, 239-40 (1975) ("Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on

matters reasonably related to those brought out in direct examination.”). In its discovery responses, FedEx has produced meeting notes marked “Privileged and Confidential” at FDX4-60-64, and relies heavily on those notes to address the critical meeting of August 9, 2013, in response to Requests for Admissions 8 through 11. FedEx has thus waived any privilege related to its conduct toward Captain Estabrook subsequent to his email request of August 4, 2013, for a meeting with Fred Smith.

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

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

REQUEST NO. 6: Produce each document in your possession related to or referencing the Laredo Departure referenced in paragraphs 4 through 8 of the Complaint, including any document originating from, or recorded telephone call involving, Chief Pilot Bill McDonald or Rob Fisher.

RESPONSE TO REQUEST NO. 6: Respondent objects to Request No. 6 to the extent

it seeks production of documents protected by the attorney-client privilege and/or the attorney work product doctrine. Responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399. Respondent is unaware of any other documents responsive to this Request. Respondent is also unaware of any recorded telephone calls involving Chief Pilot Bill McDonald or Rob Fisher responsive to this Request.

DEFICIENCY: FedEx has failed to produce and clearly identify with sufficient particularity the number, date and time of all recorded telephone calls relating to the Laredo departure during the evening of April 10-11, 2013. Specifically, Complainant requested FedEx to produce ALL seven recordings of these calls:

901-397-8025 at 8:25 PM Central on April 10, 2013;

901-860-2600 at 9:14 PM Central on April 10, 2013;

901-397-8214 at 9:16 PM Central on April 10, 2013;

901-397-8025 at 9:39 PM Central on April 10, 2013;

901-397-8214 at 9:43 PM Central on April 10, 2013;

901-397-8025 at 9:50 PM Central on April 10, 2013;

901-397-8025 at 3:23 AM Central on April 11, 2013.

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

REQUEST NO. 7: Produce each document in your possession relating your knowledge of any terrorist organization targeting your operations or the operations of another cargo aircraft operator and the measures taken by you, if any, to respond to this threat.

RESPONSE TO REQUEST NO. 7: Respondent objects to Request No. 7 on the grounds that it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 7 to the extent it seeks production of documents and information protected by the attorney-client privilege and/or the attorney work product doctrine. Respondent further objects to Request No. 9 to the extent it seeks production of documents and information that may be highly confidential and/or proprietary, and would not be produced absent a showing of relevance and entry of an appropriate protective order.

DEFICIENCY: FedEx has refused to produce *any* documents in response to Request No. 7 on the grounds, *inter alia*, that the request – seeking knowledge of the efforts of terrorist organizations to target FedEx and the company’s measures in response – seeks documents that are irrelevant and/or privileged. Nevertheless, FedEx’s defense of its discriminatory conduct in this matter relies on delegitimizing the Complainant’s security concerns and the denial that his expression of these concerns constitutes protected activity. A core focus of the pivotal August 9, 2013 meeting on which FedEx based its discriminatory actions was a discussion of FedEx’s susceptibility to terrorist actions. Respondent requests an order compelling a full response to Request No. 7.

REQUEST NO. 8: Produce each document in your possession relating to the Complainant’s

request of August 4, 2013, for a meeting with you and/or the arrangement for the requested meeting.

RESPONSE TO REQUEST NO. 8: Responsive documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: FedEx's response is defective in that it fails to identify with particularity the documents responsive to the request (documents related to the request for an August 4 meeting), but, instead, compels the Complainant to seek the needles in a haystack. *See, e.g., Bratka v. Anheuser-Busch Co.*, 164 F.R.D. 448, 462-63 (E.D. Ohio 1995)(discovery responses may not "hide the needle in the haystack" requiring hours of unnecessary work to locate responsive documents); *Chiaradonna v. Rosemont College*, 2007 U.S. Dis. LEXIS 21202 (E.D. Penn. 2007)(party cannot produce documents *en masse*, but must "specifically identify responsive documents").

The Complainant demands that the documents responsive to Request No. 8 be specifically identified. In addition: (1) all documents that have been withheld in response to Request No. 8 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1.

REQUEST NO. 10: Produce each document in your possession that you brought to your meeting with the Complainant on August 9, 2013.

RESPONSE TO REQUEST NO. 10: Respondent objects to Request No. 10 to the extent it seeks production of documents that are protected by the attorney-client privilege and/or the attorney

work product doctrine. Without waiver of the foregoing objections, see the non- privileged documents produced in Response to Request No. 13. Although other documents may have been brought to the meetings, Respondent is currently unaware of any other relevant documents responsive to this request. To the extent any such relevant documents were brought, Respondent believes they have been included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: FedEx’s objections are invalid. As discussed in Request No. 1 above, the privileges asserted by FedEx are inapplicable. Specifically with respect to the postings related to Mayday Mark, FedEx has failed to produce the same postings or in the same condition (including notations and highlighting) in which they were brought to the meeting by Robert Tice on August 9, 2013. These documents must be produced. In addition: (1) all documents that have been withheld in response to Request No. 10 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1.

REQUEST NO. 11: Produce each document in your possession addressing the issue as to whether the Complainant was “Mayday Mark.”

RESPONSE TO REQUEST NO. 11: Respondent objects to Request No. 11 on the grounds that it seeks documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 11 to the extent it seeks production of documents that are protected by the attorney-client privilege and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, see non-

privileged documents produced in Response to Request No. 13.

DEFICIENCY: For the reasons stated under Request No. 10 above, FedEx's responses are unacceptable. Moreover, here too, FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant requests an order requiring that the documents responsive to Request No. 11 be specifically identified. All Mayday Mark documents must be produced, including, but not limited to, the documents brought to the meeting of August 9, 2013. In addition: (1) all documents that have been withheld in response to Request No. 11 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1.

REQUEST NO. 12: Produce each document in your possession referencing Mayday Mark.

RESPONSE TO REQUEST NO. 12: Respondent objects to Request No. 12 on the grounds that it is overly broad and unduly burdensome in that it seeks the production of each document in Respondent's possession that in any way references "Mayday Mark." Respondent further objects to Request No. 12 on the grounds that it seeks documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 12 to the extent it seeks production of documents that are protected by the attorney-client privilege and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, see non-privileged documents produced in Response to Request No. 13.

DEFICIENCY: For the reasons stated under Request No. 10 above, FedEx's responses are unacceptable. Moreover, here too, FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 12 be specifically identified. All Mayday Mark documents must be produced, including, but not limited to, the documents brought to the meeting of August 9, 2013. In addition: (1) all documents that have been withheld in response to Request No. 12 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1.

REQUEST NO. 13: Produce the documents referenced in paragraph 16 of the Complaint.

RESPONSE TO REQUEST NO. 13: Responsive documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: For the reasons stated under Request No. 10 above, FedEx's responses are unacceptable. Moreover, here too, FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 13 be specifically identified. All Mayday Mark documents must be produced forthwith, including, but not limited to, the documents brought to the meeting of August 9, 2013. In addition: (1) all documents that have been withheld in response to Request No. 13 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1.

REQUEST NO. 14: Produce each document referencing the Complainant originating between on or before August 4, 2013 through and including August 9, 2013.

RESPONSE TO REQUEST NO. 14: Respondent objects to Request No. 14 on the grounds that it is vague and ambiguous, and overly broad and unduly burdensome, in that it seeks the production of “each” document originating between the specified dates. Respondent further objects to Request No. 14 on the grounds that it is vague and ambiguous in that the term “originating” is subject to various interpretations and Complainant fails to further define what is meant by the term.

Respondent further objects to Request No. 14 to the extent it seeks production of documents protected by the attorney-client privilege and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, and to the extent Respondent interprets the request as seeking documents that “originated” with Respondent, responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: All documents that have been withheld in response to Request No. 14 on the basis of privilege must be identified in an appropriate privilege log, and all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1.

REQUEST NO. 15: Produce each document in your possession relating to correspondence, or any other communication, between you and Dr. Thomas Bettes relating in any way to the Complainant.

RESPONSE TO REQUEST NO. 15: Respondent objects to Request No. 15 on the grounds that it is overly broad and unduly burdensome in that it fails to identify a reasonable temporal scope. Respondent further objects to Request No. 15 on the grounds that, to the extent it seeks production of documents not related to the events described in the Complaint, it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Without waiver of or prejudice to the foregoing objections, responsive documents are included in the documents produced herein and Bates labeled FDX 4- 000001 through FDX 4-000399.

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

REQUEST NO. 16: Produce each document in your possession relating to correspondence, or any other communication, between you and Dr. George Glass relating in any way to the Complainant.

RESPONSE TO REQUEST NO. 16: Respondent objects to Request No. 16 on the grounds that it is overly broad and unduly burdensome in that it fails to identify a reasonable temporal scope. Respondent further objects to Request No. 16 on the grounds that, to the extent it seeks production of documents not related to the events described in the Complaint, it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible

evidence. Without waiver of or prejudice to the foregoing objections, responsive documents, if any, are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: Here again FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 16 be specifically identified. In addition: (1) all documents that have been withheld in response to Request No. 16 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1.

REQUEST NO. 17: Produce any correspondence or communication in your possession from January 1, 2008, to the present date referencing Auburn Calloway.

RESPONSE TO REQUEST NO. 17: Respondent objects to Request No. 17 on the grounds that it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 17 to the extent it seeks production of documents that are protected by the attorney-client privilege and/or the attorney work product doctrine. Respondent further objects to Request No. 17 on the grounds that it is overly broad and unduly burdensome in that it seeks the production of “any correspondence or communication” and in that the temporal scope is too broad and bears no relation to this case.

DEFICIENCY: FedEx’s outright refusal to provide any documents is particularly shocking in view of the fact that Complainant’s reference to Auburn Calloway at the meeting of August 9,

2014, was **one of the three reasons proffered by FedEx** in its submissions to the OSHA Investigator substantiating an intervening event justifying its discriminatory treatment of the Complainant. Complainant requests an order requiring that FedEx furnish documents in response to Request No. 17 or waive any argument that its discriminatory treatment of the Complainant was justified by an intervening event or statement that in any way relates to Auburn Calloway.

REQUEST NO. 18: Produce each document in your possession referencing any connection between the Complainant and Russia or the Soviet Union.

RESPONSE TO REQUEST NO. 18: Respondent objects to Request No. 18 on the grounds that it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to Request No. 18 on the grounds that it is vague and ambiguous in that the term “any connection” is subject to various interpretations and Complainant fails to further define what is meant by the phrase. Without waiver of or prejudice to the foregoing objections, any responsive documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399. Respondent is unaware of any other documents responsive to this request.

DEFICIENCY: Here again FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 18 be specifically identified. In addition: (1) all documents that have been withheld in response to Request No. 18 on the basis of privilege must be identified in an appropriate privilege log, and (2) all documents asserting an attorney-client privilege or work product must be produced per our objections above under Request No. 1. Finally, in view of the

fact that the Complainant's alleged references to Russia or the Soviet Union were **one of the three reasons proffered** by FedEx in its submissions to the OSHA Investigator substantiating an intervening event justifying its discriminatory treatment of the Complainant, it is not credible that FedEx representatives engaged in no communications regarding this issue beyond the notes of the meeting of August 9, 2014.

REQUEST NO. 19: Produce each document relating to the decision to place the Complainant on NOQ status on or about August 5, 2013.

RESPONSE TO REQUEST NO. 19: Respondent objects to Request No. 19 to the extent it seeks production of documents protected by the attorney-client privilege and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

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

REQUEST NO. 20: Produce each document in your possession referencing the basis or rationale for your determination in August, 2013, that Complainant should be required to submit to psychiatric evaluation.

RESPONSE TO REQUEST NO. 20: Respondent objects to Request No. 20 to the extent it seeks production of documents protected by the attorney-client privilege and/or the attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

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

REQUEST NO. 22: With respect to any denial in response to the Requests for Admissions below, produce any document you relied upon to support that denial.

RESPONSE TO REQUEST NO. 22: Respondent objects to Request No. 22 to the extent it seeks production of documents protected by the attorney-client privilege and/or the attorney work

product doctrine. Without waiver of or prejudice to the foregoing objections, responsive non-privileged documents are included in the documents produced herein and Bates labeled FDX 4-000001 through FDX 4-000399.

DEFICIENCY: Here again FedEx has failed to identify the relevant documents, but forces the Complainant to seek needles in a 400-page haystack. The Complainant demands that the documents responsive to Request No. 22 be specifically identified with particular reference to each Request for Admission denied.

REQUEST NO. 23: Produce each document in your possession relating to the Complainant's military service.

RESPONSE TO REQUEST NO. 23: Respondent objects to Request No. 23 on the grounds that it seeks production of documents not relevant to this case nor reasonably calculated to lead to the discovery of admissible evidence. Without waiver of or prejudice to the foregoing objections, responsive documents may be found in Complainant's personnel file, produced in Response to Request No. 28.

DEFICIENCY: FedEx has failed to produce copies of Complainant's military service record from his employee records, including but not limited to, his DD-214, military flight logs and Officer Evaluation Reports, all of which were submitted during his initial application for employment at FedEx.

REQUEST NO. 27: Produce each document, including any recording or ESI information, related to conversations between FedEx GOCC, the Flight Duty Officer and the Complainant on April 10, 2013, and recorded conversations between Complainant and Manager of A300/310 Fleet Operations, Captain Rob Fisher on August 9, 2013.

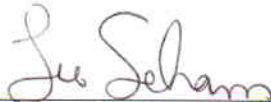
RESPONSE TO REQUEST NO. 27: With respect to the April 10, 2013 conversations, see the enclosed CD which contains copies of the recorded conversations. With respect to the August 9, 2013 conversation, Respondent is unaware of any documents, recordings or ESI responsive to the request.

DEFICIENCY: FedEx has failed to identify all of the calls from April 10 and 11, 2013, with enough specificity to clearly define the date, phone number and time of call. In the case of at least one phone call, FedEx has refused to provide a conversation between Duty Officer Mark Crook and the Complainant, and hereby requests that a recording of the missing conversation be supplied. FedEx has also failed to produce a copy of the recorded telephone call from 901-224-3435 at 5:30 PM Central on August 9, 2013, which was a call between A300 Fleet Supervisor Rob Fisher to Complainant. In the absence of production of the requested documents, the Complainant seeks an evidentiary ruling that his account of the relevant conversations will be admitted as fact.

WHEREFORE, Complainant respectfully requests that its motion to compel responses pursuant to 29 CFR § 18.21 and Fed. R. Civ. P. 37 be GRANTED and that, due to the broad scope of the Respondent's discovery violations, and its refusal to respond to Complainant's efforts to resolve the matter without the intervention of the Court, the Court ORDER Respondent to pay all reasonable expenses arising from this motion, including attorney's

fees, pursuant to FRCP 37(d).

Respectfully submitted this 17th day of November, 2014.



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*Attorneys for Captain Mark Estabrook,
Complainant*

CERTIFICATE OF SERVICE

A copy of the foregoing document was personally served on November 17, 2014, by email (without attachments) and by Federal Express overnight delivery (with attachments) to:

David P. Knox, Esq.,
Senior Counsel
David.Knox@fedex.com,
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3rd Floor Memphis, TN, 38125



Stanley Silverstone