United States Court of Appeals

for the

Fifth Circuit

Case No. 19-60716

MARK ESTABROOK,

Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

FEDERAL EXPRESS CORPORATION,

Intervenor.

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

RECORD EXCERPTS

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U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

MARK ESTABROOK,

COMPLAINANT,

v.

FEDERAL EXPRESS CORPORATION,

RESPONDENT.

ARB CASE NO. 2017-0047

ALJ CASE NO. 2014-AIR-00022

DATE: AUG - 8 2019

Appearances:

For the Complainant:
Lee Seham, Esq.; *Seham, Seham, Meltz & Petersen, LLP*; White Plains, New York

For the Respondent:
Daniel Riederer, Esq., and Phillip Tadlock, Esq., *Federal Express Corporation*; Memphis, Tennessee

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges.*

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121 (2000); 29 C.F.R. Part 1979 (2014). Complainant Mark Estabrook filed a complaint alleging that Respondent Federal

Express Corporation (FedEx) retaliated against him in violation of AIR 21's whistleblower protection provisions for raising air transportation safety concerns. A Department of Labor Administrative Law Judge (ALJ) concluded on May 16, 2017, that FedEx did not violate the Act. We affirm.

BACKGROUND

Mark Estabrook is a pilot at FedEx. At the time in question, Captain Rob Fisher, the Assistant Chief Pilot, supervised Estabrook. Captain William McDonald, the Managing Director of Flight Operations, was Fisher's supervisor. Todd Ondra was FedEx's Managing Director of Aviation and Regulatory Security and Rob Tice was a FedEx Labor Relations Attorney.

1. Flight from Laredo, Texas, to Memphis, Tennessee

On April 10, 2013, Estabrook was scheduled to fly from Laredo, Texas, to Memphis, Tennessee. While still at a Laredo hotel, Estabrook learned of a line of thunderstorms between the two locations.

From his hotel, Estabrook watched the weather and called the FedEx Global Operations Center (GOC) dispatcher, who recommended another route around the storm. According to Estabrook, after further discussion, the consensus reached between the two was that Estabrook was not going to fly according to the original flight time, but was to wait the storm out. Decision and Order Denying Relief (D. & O.) at 4. Estabrook understood this to mean that he was authorized to stay at the hotel.[1]

The Dispatch Duty Officer received a call from FedEx personnel at the Laredo airport that a FedEx flight crew assigned to a flight scheduled to depart soon was not there. The Dispatch Duty Officer called Estabrook, the pilot assigned to the flight, and discussed the weather and the flight. During the evening, Estabrook spoke with the Dispatch Duty Officer on the phone multiple times. Some of their conversations were recorded and some were not. According to Estabrook, he felt "pilot pushed" to fly through the storm to Memphis. The Dispatch Duty Officer denies pushing Estabrook to fly despite the weather, but he did tell Estabrook that he needed to be at the Laredo airport and not at his hotel. D. & O. at 17.

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[1] *See* D. & O. at 20; Hearing Transcript (Tr.) at 350.

Later, Memphis Air Traffic Control placed a weather hold on Estabrook's flight, and it could not depart Laredo until the hold was lifted later that evening. D. & O. at 5.

On April 10, 2013, the Dispatch Duty Officer sent an e-mail to both Captain Fisher, Estabrook's supervisor, and Chief Pilot McDonald, Fisher's supervisor, detailing the events of the prior evening. The e-mail accused Estabrook of unilaterally delaying a flight without reaching an agreement with the GOC dispatcher. Respondent's Exhibit (RX) 8.

On April 23, 2013, Estabrook was asked to attend a"19D" investigation interview meeting concerning his late arrival at the Laredo airport for the scheduled April 10th flight. D. & O. at 6. At FedEx, a "19D" investigation hearing differs from a "19E" investigation hearing in that the latter is a disciplinary hearing, whereas the former merely is to obtain the subject of the hearing's side of the story.

After being notified of the meeting, Estabrook filed an AIR 21 complaint with the Occupational Safety and Health Administration (OSHA). On May 1, 2013, Estabrook attended the 19D meeting with Captain Fisher. After listening to the three audio recordings of Estabrook's phone conversations with dispatch, Fisher believed that Estabrook may have had a good faith belief that he had permission to stay at his hotel. D. & O. at 20. Fisher informed Estabrook that FedEx was not going to take disciplinary action against him. Because no disciplinary action occurred, Estabrook withdrew his OSHA complaint. Complainant's Exhibit (CX) 9.

2. August 4 E-Mail and Estabrook's NOQ Status

After reading on the internet about terrorist activity involving cargo airlines, including FedEx, Estabrook became concerned with the misuse of FedEx's tracking data that is available on internet websites. D. & O. at 7. Estabrook was concerned that terrorist organizations might use tracking data that couriers, including FedEx, provided on the internet to coordinate an explosive detonation on a FedEx airplane over a populated area.[2] Estabrook sent an e-mail to Captain McDonald asking him

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[2] FedEx publishes general package tracking data on its internet website. But the tracking data does not list specific vehicles or planes. FedEx and other carriers send flight

to have FedEx CEO Fred Smith call him about "something related to 9-11." Estabrook's e-mail stated:

> I need to talk to Fred. It has nothing to do with Flight Ops or you. It deals with something related to 9-11. I did my best to protect the company and reported as much as I could through [FedEx Corporate Security] when I was the Security Chairman at ALPA. Ask Fred to call me on my cell but realize I turn it off when I sleep. I am about to close my eyes and call it a day.

D. & O. at 31-32; RX-13.

On August 5, 2013, Estabrook received an e-mail from Captain McDonald putting him on Not Operationally Qualified (NOQ) status in order to facilitate scheduling a meeting regarding Estabrook's concerns. D. & O. at 7, 23, 32. FedEx claims that the NOQ is used for several purposes, from scheduling to disciplinary reasons. When there are security or fitness-for-duty concerns present, the pilot will not have jumpseat privileges as a cautionary measure. D. & O. at 19, 21, 23.

3. August 9 Meeting, 15D Examination, and Renewed NOQ Status

Captain McDonald instructed Estabrook to attend a meeting on August 9, 2013. Before the meeting, Captain Fisher, Captain McDonald, Ondra, the Managing Director of Aviation and Regulatory Security, and FedEx Labor Relations Attorney Tice met to discuss online postings on a pilot group internet forum from a person calling himself "Mayday Mark." CX-21. "Mayday Mark's July 28-August 5, 2013 discussion thread covered a sleep survey, pilot fatigue, and airline management. Because some of the posts specifically mentioned FedEx management, Captain McDonald instructed Tice to ask Estabrook if he were "Mayday Mark."

Captain Fisher, Ondra, and Tice met with Estabrook on August 9, 2013, but Captain McDonald did not attend. During the meeting, Estabrook discussed his security concerns with tracking data being available to the public. Estabrook explained that he e-mailed Captain McDonald and wanted him to bring the matter up the chain of command to Fred Smith, FedEx's CEO. Estabrook recommended that FedEx stop publishing tracking information. Previously in 2001 and 2002,

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information to the Federal Aviation Administration which is not made public. D. & O. at 6-7, 19, 25.

Estabrook and others had contacted FedEx's Vice President of Corporate Security concerning posting tracking information on the internet. But FedEx indicated that the Federal Aviation Administration (FAA) took no action on Estabrook's concerns.

During the August 9 meeting, Estabrook mentioned a rumor that Auburn Calloway, a former FedEx pilot, had converted to Islam and might be communicating with Al Qaeda. D. & O. at 26. Calloway had attempted to hijack a FedEx flight in 1994 and had been imprisoned since then. Estabrook had known Calloway personally because they were hired together and had been study partners. At the meeting, Estabrook suggested that FedEx work with the Justice Department to bug Calloway's prison cell.

During the meeting, Tice asked Estabrook whether he was "Mayday Mark" and Estabrook denied it. Moreover, Estabrook displayed his flight service information, which did not match that of "Mayday Mark" as indicated on the pilot's forum. Ondra left the meeting early before the discussion on "Mayday Mark." D. & O. at 23.

At the close of the meeting, Captain Fisher took Estabrook off of his NOQ status. D. & O. at 19. But later that day, Captain Fisher placed Estabrook back on NOQ status at the recommendation of Ondra and McDonald. Ondra expressed concern with Estabrook's behavior. Ondra believed it odd that Estabrook would contact his manager and ask to speak to the CEO of FedEx when there were several other means available to report suspicious activity. D. & O. at 25. Ondra was concerned about Estabrook's mental health and recommended further evaluation of Estabrook. At the behest of Ondra, Tice passed Ondra's recommendation to Fisher who, after consulting with McDonald, informed Estabrook on August 9 that an aeromedical advisor would conduct a "15D" evaluation of him. D. & O. at 19-20. On August 13, Estabrook's attorney sent a demand letter to FedEx requesting that FedEx retract its directive that Estabrook receive a15D evaluation. On August 16, Fisher issued a formal letter to Estabrook directing him to go to the aeromedical advisor for the evaluation. D. & O. at 21, 32, 57.

As part of his 15D evaluation, Estabrook was sent to three doctors. One doctor recommended counseling and another doctor found that Estabrook was fit for duty. The third doctor, a "tie breaker," also concluded that Estabrook was fit to fly. With the positive evaluation, the aeromedical advisor informed Estabrook that he would be returned to flight duty. D. & O. at 13. Estabrook returned to flight duty status with no change in pay or job status. But Estabrook claims that he also had to

then participate in some required training to recertify for full flight duty status because his NOQ status extended past the dates for his annual training requirements. D. & O. at 8.

On October 3, 2013, Estabrook filed a second complaint with OSHA, which dismissed the complaint on July 15, 2014. Estabrook filed objections with the Office of Administrative Law Judges. The ALJ assigned to the case held a hearing and denied Estabrook's complaint on May 16, 2017.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's AIR 21 decision under Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. § 1979.110. The ARB reviews the ALJ's factual determinations under the substantial evidence standard and conclusions of law de novo. 29 C.F.R. § 1979.110(b); *Berroa v. Spectrum Health Hosps.*, ARB No. 15-061, ALJ No. 2013-AIR-021, slip op. at 2 (ARB Mar. 9, 2017).

DISCUSSION

To prevail on his whistleblower complaint, Estabrook must prove by a preponderance of the evidence that (1) he engaged in activity protected under AIR 21; (2) that an unfavorable personnel action was taken against him; and (3) that the protected activity was a contributing factor in the unfavorable personnel action taken against him. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). If the complainant proves that protected activity was a contributing factor in the unfavorable personnel action, the respondent may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same unfavorable personnel or adverse action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

1. Protected Activity

Protected activity under AIR 21 has two elements:[3] (1) the information that the complainant provides must involve a purported violation of a regulation, order,

[3] Under AIR 21, a complainant engages in protected activity when he or she does one or more of the following actions:

or standard of the FAA or federal law relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be subjectively held and objectively reasonable. "The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety." *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 5 (ARB June 30, 2010).

A. Estabrook's Refusal to Fly on April 10 in Bad Weather is Protected Activity.

Estabrook claims that the Flight Operations Manual provides that flying through thunderstorms constitutes a violation of an FAA standard. The FAA recommends maintaining a 20-mile buffer between a storm and the aircraft. In a preliminary partial summary judgment order, the ALJ found that Estabrook's refusal to fly out of Laredo constituted protected activity and that finding was incorporated into his Decision and Order. D. & O. at 46, 51. As FedEx has not

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> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
>
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
>
> (3) testified or is about to testify in such a proceeding; or
>
> (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102.

challenged the ALJ's findings that Estabrook's refusal to fly was protected activity, it is affirmed.[4]

B. Estabrook's Complaint filed with OSHA in April 2013 is Protected Activity.

The filing of complaints with OSHA claiming retaliation itself constitutes protected activity. 49 U.S.C. § 42121(a)(4) (protecting complainants who participate in a proceeding under the Act); 29 C.F.R. § 1979.102(b)(2).

C. Estabrook's discussion of his Air Carrier Security Concerns during an August 9 Meeting Regarding Publishing Tracking Information is not Protected Activity.

Estabrook also asserts that his expressed concerns about air carrier security also constitute protected activity although AIR 21's whistleblower provisions do not specifically include that providing information about "security" as a protected activity. The ALJ analyzed AIR 21's broader statutory and regulatory framework to conclude that providing information about "air carrier safety" includes expressing concerns about security. D. & O. at 48-49. To summarize, AIR 21 protects an employee who has a reasonable belief that a violation of an FAA standard or regulation or any other federal law related to air carrier safety has occurred. Significantly, AIR 21's implementing regulations extend protection to an employee who reasonably believes a violation of air carrier statutes under subtitle VII of title 49 has occurred. *See* 29 C.F.R. § 1979.102(b)(1) ("or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States"). Among the various air carrier safety statutes under subtitle VII of Title 49 is a "security" subpart that covers screening, inspecting, and ensuring the security of cargo. Because the incorporated statutory air carrier safety laws are broad and "safety" encompasses some measure of "security," the ALJ correctly concluded that "security" is covered as part of air carrier safety protected under the Act.

Although security concerns can be covered under AIR 21, FedEx argues that the security concerns Estabrook expressed on August 9 are not protected under AIR 21 because publishing tracking data is not a violation of FAA standards or any federal law related to air carrier safety or security. The ALJ agreed and found that the security concerns Estabrook expressed during the meeting were not protected

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[4] *Leiva v. Union Pacific R.R. Co., Inc.*, ARB Nos. 14-016, -017; ALJ No. 2013-FRS-019, slip op. at 8 (ARB May 29, 2015).

activity. Specifically, Estabrook's concerns were not related to a reasonable belief of a violation of federal laws related to air carrier safety or security. D. & O. at 49-50. Publishing tracking data is not a violation of regulations covering incendiary or explosive devices. Furthermore, Estabrook was merely reiterating his concern about publishing tracking data that he had raised in earlier complaint she had made to FedEx and the FAA in 2001 and 2002, but the FAA did not take any action on his complaint. D. & O. at 8. In fact, the parties do not dispute that the FAA requires that FedEx transmit tracking information to the FAA and the FAA releases some of that information to third parties.

Estabrook challenges the ALJ's determination that the concern he raised about publishing tracking information did not constitute protected activity, claiming the ALJ failed to consider regulatory provisions aimed at deterring or preventing incidents.[5] He asserts that a complainant need not point to a specific violation but need only relate to violations of FAA orders, regulations, and standards. Estabrook also argues that even if his concerns did not amount to a reasonable belief of a violation, FedEx's and the FAA's tracking policy was not effective given terrorists' attempt in 2010 to use a FedEx aircraft to carry and detonate explosives.

In response, FedEx notes that sharing tracking information is an industry-wide standard and contends that Estabrook's concern is not an objectively or subjectively reasonable belief of a violation of relevant federal laws. Specifically, given Estabrook's extensive experience and twenty years as a pilot with FedEx, it was not reasonable for him to conclude that he was engaging in activity protected under AIR 21. FedEx also points out that while expressing concern about the publication of tracking information, Estabrook never mentioned FedEx's screening procedures or other procedures in place to detect explosive devices and thereby fulfill its regulatory obligations.

We conclude that the ALJ's findings of fact on these points are supported by substantial evidence and his conclusions of law are correct. As noted above, AIR 21 protects complainants reporting a violation of a standard, rule, or regulation of the FAA or federal law related to air carrier safety. In *Hindsman*, ARB 09-023, the ARB

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[5] 49 C.F.R. § 1544.103(a)(1) (safety of persons from criminal violence and piracy, explosives, weapons); §§ 1544.205(a), (c)(1) (cargo control policy prevents incendiary devices, explosives).

held that a complainant did not engage in protected activity when the complainant knew that the FAA permitted the complained of activity:

> We agree with the ALJ's conclusion that while Hindsman was aggressively carrying out her duties as lead flight attendant to ensure safety, once she discovered that the [personal oxygen container] POC was FAA-permitted, she could not have had a reasonable belief that flying with it on board violated air safety regulations. Therefore, she did not engage in protected activity on the October 1 flight. Because Hindsman failed to establish a required element of her complaint, the ALJ properly dismissed her complaint as a matter of law.

Hindsman, ARB 09-023, slip op. at 5. Here, too, Estabrook could not have had a reasonable belief that publishing low-level flight or tracking information constituted a *violation* of federal air carrier safety or security laws. Publishing some level of tracking data is an industry-wide practice and not prohibited. D. & O. at 49-50. The FAA and other related entities had received complaints from Estabrook and others expressing concern about this practice in 2001 and 2002, but did not prohibit the activity.[6] Estabrook was only suggesting a policy change for FedEx to voluntarily or proactively withdraw publishing data to make its safety or security procedures more effective.

2. Estabrook Suffered an Adverse Action

The three adverse actions at issue in this case are the August 5 and August 9, 2013, NOQs grounding Estabrook from flight duty and the directive that Estabrook undergo a 15D examination. Captain McDonald was the decision-maker for the August 5 NOQ. McDonald and Ondra were the decision-makers for the August 9 NOQ and 15D examination. The ALJ concluded that the NOQs and the

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[6] A complainant's whistleblowing becomes unreasonable if raised again after an employer has already addressed the employee's concern. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009) ("[O]nce an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity").

directive to comply with the 15D examination were adverse actions. D. & O. at 51. As FedEx does not dispute the ALJ's findings on appeal, they are affirmed.[7]

3. Estabrook's Refusal to Fly and OSHA Complaint were not Contributing Factors to either his August 5th and 9th NOQs nor his 15D Examination

To prevail, a complainant must demonstrate "that [the protected activity] was a contributing factor in the unfavorable personnel action . . . ." 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). "A contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'" *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015). The complainant must then prove by a preponderance of the evidence that protected activity played some role and was a proximate cause in the adverse personnel action. *Koziara v. BNSF Ry.*

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[7] *Leiva*, ARB Nos. 14-016, -017, slip op. at 8. When FedEx implemented the August 9 NOQ, Estabrook was removed from his flight duties. D. & O. at 19. Estabrook claims that the currency of his flight duty status expired during his grounding. D. & O. at 8. So when he returned to flight duty following the 15D evaluation, Estabrook had to repeat some required training to recertify for full flight duty status. In his D. & O., the ALJ incorporated his conclusions that the NOQs and the 15D examination directive were adverse actions. Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision and Denying Respondent's Motion for Summary Decision (ALJ May 9, 2016).

While we do not disturb the ALJ's findings and conclusions, we note that an employer's directive to a pilot to undergo a psychological evaluation, in and of itself, is not an adverse action. *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 15-080, ALJ No. 2015-AIR-016, slip op. at 11 (ARB May 8, 2017) (an adverse action is "more than trivial" when it is "materially adverse" so as to "dissuad[e] a reasonable worker" from protected activity). FedEx's 15D evaluation is part of an air carrier's safety responsibility for employing a pilot. A requirement of periodic and "for cause" psychological assessments for aircraft pilots is beneficial to the airline community and to the public. For example, it is not an adverse action to require a pilot to undergo physicals and vision and hearing tests to ensure the pilot's physical competency to operate an aircraft. Second, a psychological assessment may benefit a pilot who actually needs counseling. The 15D evaluation is a desirable tool to protect the public and the employer from the foreseeable danger of an accident. Estabrook knew of the 15D process and it was part of the collective bargaining agreement with FedEx. The parties do not dispute that Estabrook continued to be paid during his grounding.

We do not suggest that a directive to undergo a 15D examination, in itself, could never be an adverse action. If selectively implemented or utilized in a retaliatory fashion, subjecting an employee to a 15D evaluation might be actionable as an adverse action.

Co., 840 F.3d 873, 877 (7th Cir. 2016) (distinguishing between causation and proximate causation).

The ALJ found that FedEx management was not concerned with Estabrook's refusal to fly. Rather, FedEx investigated Estabrook's breach of protocol when he unilaterally stayed at the hotel and did not report to the airport an hour before his flight. D. & O. at 53.

The ALJ's findings are supported by substantial evidence. Estabrook's late arrival for his flight was listed as the subject matter of the 19D hearing in Fisher's April 23, 2013 letter notifying Estabrook of the hearing. Joint Exhibit (JX) 2. Fisher was concerned with Estabrook's delayed arrival. The May 1, 2013 meeting focused entirely on the requirement that Estabrook report to duty on time. RX 9 (May 1 e-mail from Fisher to McDonald, and others, relaying the topic of the May 1 meeting). Although McDonald was involved with the April event in Laredo as a supervisor in the chain of command, the ALJ failed to find a causal link between McDonald's role in the August adverse actions and any potential protected activity in April at Laredo as it was alternatively unsupported and subsequently overwhelmed by Estabrook's unusual behavior in August. D. & O. at 53. Estabrook conceded that FedEx requires its pilots to arrive at the airport one hour before a flight's departure. D. & O. at 12, 18.

Estabrook claims that FedEx's treatment of the "Mayday Mark" postings provide a "Laredo-related" connection from his protected activity in April to the events in August. The ALJ did not find a causal connection between the "Mayday Mark" postings and the adverse actions in August. We affirm the ALJ's findings as supported by substantial evidence. Though the "Mayday Mark" postings were brought up in the meeting in August, FedEx accepted Estabrook's denial when he stated and verified that he was not Mayday Mark.

The ALJ also found that the August NOQs and 15D examination stemmed from the August 4, 2013 e-mail and August 9, 2013 meeting. We conclude that the ALJ's findings are again supported by substantial evidence. The August 5, 2013 NOQ followed directly after the August 4 e-mail. The August 9 NOQ and 15D examination directive followed immediately after the August 9 meeting and the strange behavior Estabrook exhibited. *Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010) (identifying strong temporal proximity as support for causation).

Estabrook further claims that FedEx did not, or could not, provide reasonable grounds for its 15D directive until the OSHA investigation. In the first instance, FedEx disputes that it was required to provide Estabrook's counsel with a reason for its referral of Estabrook for the 15D evaluation. We conclude that even if a reasonable basis were required for the referral, FedEx's omission does not undermine the substantial evidence supporting the ALJ's findings that the NOQs and the 15D examination stemmed from the behavior Estabrook exhibited in August and not from his refusal to fly in Laredo or his April OSHA complaint.

Finally, Estabrook claims that the ALJ erred in affirming FedEx's assertion of attorney-client privilege concerning e-mails connected with Tice's testimony as to who recommended that Estabrook be removed from jumpseat privileges. But Estabrook fails to convince us that the ALJ abused his discretion. *United States v. Mejia*, 655 F.3d 126, 131 (2d Cir. 2011) (findings of attorney-client privilege are reviewed for an abuse of discretion). The cases Estabrook cites to stand for the proposition that a party who uses a privileged document waives privilege to the extent it is used and cannot deny the opposing party access to the document to evaluate how it was used. *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) (fairness principle requires that voluntary partial disclosure of privileged information waives privilege with respect to the disclosure); *United States v. Nobles*, 422 U.S. 225, 239-40 (1975) (defense's use of investigator's testimony on the contents and credibility if the testimony waives privilege with respect to the investigator's report relevant to such testimony). FedEx did not voluntarily waive its claim of privilege. The ALJ overruled FedEx's assertion of privilege on two separate occasions during Tice's testimony. Tr. at 457-74.

CONCLUSION

We **AFFIRM** the ALJ's findings that Estabrook engaged in protected activity when he refused to fly and filed a complaint with OSHA. We **AFFIRM** the ALJ's findings that Estabrook suffered an adverse action when FedEx grounded him and directed him to undergo a 15D evaluation. We further **AFFIRM** the ALJ's findings that FedEx did not retaliate against Estabrook for engaging in protected activity when it grounded him and directed him to undergo a 15D evaluation. Accordingly, Estabrook's complaint is **DENIED**.

SO ORDERED.

TAB 2

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 16 May 2017

Case No.: 2014-AIR-00022

In the Matter of

MARK ESTBROOK
Complainant

v.

FEDERAL EXPRESS CORPORATION
Respondent

DECISION AND ORDER DENYING RELIEF

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act") which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a U.S. Department of Labor ("DOL") complaint procedure. Implementing regulations are at 29 CFR Part 1979. The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed, the arguments of the parties, and the applicable law.

I. PROCEDURAL BACKGROUND

Complainant filed an AIR 21 complaint on October 3, 2013. The Occupational Safety and Health Administration ("OSHA") issued the Secretary's Findings on July 15, 2014, and dismissed the complaint. Complainant appealed the Secretary's Findings by letter dated August 12, 2014.

Originally, Administrative Law Judge John Sellers, III was assigned to adjudicate this matter. By Notice of Hearing and Pre-Hearing Order dated October 2, 2014, Judge Sellers set this matter for hearing on February 24, 2015.

By letter dated November 17, 2014, Complainant moved to Compel Requests for Admissions, Interrogatories, and Requests for Documents. After the parties submitted a joint request to continue the hearing, on February 2, 2015, Judge Sellers issued an Order Continuing Hearing.

On February 18, 2015, Complainant submitted another Motion to Compel Requests for Admissions, Interrogatories, and Requests for Documents. On March 25, 2015, Complainant submitted a Motion for Partial Summary Decision. On May 28, 2015, Judge Sellers issued an Order Regarding Discovery and Scheduling. On June 12, 2015, Respondent submitted a

Memorandum of Law and attached a copy of its privilege log and documents for in camera review, and Judge Sellers issued an Order Following in Camera Review on July 20, 2015. On July 24, 2015, Complainant submitted a Notice of Amended Motion and Memorandum to Compel Requests for Admissions, Interrogatories, and Requests for Documents.

On August 12, 2015, Judge Sellers issued a Notice of Hearing and Pre-Hearing Order, and rescheduled the hearing for November 2, 2015. By Order issued August 19, 2015, Judge Sellers issued an Order to Produce Documents or Show Cause. By Order issued September 10, 2015, Judge Sellers cancelled the November 2, 2015 hearing to allow the parties to complete the ordered discovery. After the parties submitted filings via email, by Order issued October 8, 2015, Judge Sellers disallowed the filing of informal motions by the parties, and instructed them to adhere to the Rules of Practice and Procedure before the Office of Administrative Law Judges ("OALJ"). On October 27, 2015, Complainant submitted a Third Motion to Compel. Respondent submitted its opposition to Complainant's Motion to Compel on November 10, 2015. By Order issued December 23, 2015, Judge Sellers denied Complainant's Third Motion to Compel and directed Respondent to provide documents for in camera review for a second time. Respondent submitted documents pursuant to the December 23, 2015 Order on January 21, 2016. Judge Sellers issued an Order Following Second in Camera Review on February 2, 2016.

On February 2, 2016, Judge Sellers reassigned this matter to the undersigned by Order of Reassignment. On February 8, 2016, the undersigned issued a Notice of Assignment and Conference Call. Complainant submitted his position statement in response to the Notice of Assignment and Conference Call on February 16, 2016, and Respondent submitted its Position Statement in Response on February 18, 2016. By Notice of Hearing and Pre-Hearing Order issued March 10, 2016, this Tribunal set this matter for hearing on June 6, 2016 in Memphis, Tennessee.

On April 21, 2016, both Complainant and Respondent submitted respective Motions for Summary Decision with supporting argument and exhibits. On April 25, 2016, Respondent submitted a Revised Declaration of Dr. Thomas Bettes. On April 29, 2016, Complainant and Respondent submitted respective Responses in Opposition to the opposing party's Motion for Summary Decision.

By Order issued May 9, 2016,[1] this Tribunal granted in part and denied in part Complainant's Motion for Summary Decision and denied Respondent's Motion for Summary Decision. Specifically, this Tribunal found that Complainant is entitled to judgment as a matter of law that he was subjected to adverse actions when placed on not operationally qualified ("NOQ") status, when NOQ status was reinstated, and when he was compelled to submit to a

[1] Prior to this Order, on May 2, 2016, Complainant submitted a Pre-Trial Motion *in Limine*. Complainant sought to exclude the following: (1) evidence or examination related to Complainant's family status; (2) evidence or examination related to Complainant's finances; (3) evidence or examination related to Complainant's union activity; and (4) evidence or examination related to Complainant's psychiatric evaluation.

By Order issued May 5, 2016 this Tribunal granted Complainant's Motion as it pertained to items (1), (2) and (3), and directed Respondent to submit an expedited response to Complainant's Motion, addressing item (4).

15D evaluation. Therefore, Complainant's Motion for Summary Decision was granted as to this element of his claim.

The hearing was held in this matter on June 6-8, 2016.[2] At this hearing, this Tribunal admitted Joint Exhibits ("JX") 1-7[3], Complainant's Exhibits ("CX") 1-47[4], and Respondent's Exhibits ("RX") 1-33[5]. In addition, Complainant[6] and Respondent[7] made opening statements. Complainant submitted his closing brief on September 2, 2016. Respondent submitted its closing brief on October 7, 2016. Complainant submitted his reply brief on October 20, 2016. This decision is based on the evidence of record, the testimony of the witnesses at this hearing and the arguments by the parties.

II. FACTUAL BACKGROUND AND EVIDENCE

A. General Overview of the Facts

This case concerns two main events. The first is a flight from Laredo, Texas to Memphis, Tennessee on April 10, 2013 where Complainant did not arrive at the airport by his show time and was subsequently placed on NOQ status; the reason for Complainant's lateness is in dispute. The second event concerns Respondent's decision to send Complainant for a 15D medical examination following a meeting that occurred on August 9, 2013, and the imposition of NOQ status upon Complainant associated with that meeting and subsequent medical examination.

The following are a list of key names, other than the Complainant, that are referenced during this decision:[8]

- Captain McDonald is the Managing Director of Flight Operations Contract Administration and Captain Fisher's direct supervisor. Tr. at 319, 621-22.
- Captain Fisher was, at the relevant time, the Assistant System Chief Pilot and Complainant's direct supervisor. Tr. at 309, 643.
- Mr. Ondra is Respondent's Managing Director of Aviation Security. Tr. at 118, 150.
- Mr. Tice is the lead labor relations lawyer for Respondent. Tr. at 78, 424.
- Dr. Bettes is a physician who works for Harvey Watt & Company, the firm used by Respondent for its aeromedical services and conducted Complainant's 15D evaluation. Tr. at 154-55; RX-20; RX-21.
- Captain Crook was the duty officer in Memphis during the April 10, 2013 incident. Tr. at 245.

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[2] Hereafter, "Tr." refers to the transcript of the June 6-8, 2016 hearing.
[3] Tr. at 7, 22, 713.
[4] Tr. at 23, 713. CX-48 and 49 were marked for identification only and not admitted. *See* Tr. at 375 and 448.
[5] Tr. at 29-30, 176, 524, and 633. RX-34 and 35 were marked for identification only and not admitted. *See* Tr. at 382 and 621.
[6] Tr. at 7-16.
[7] Tr. at 17-19.
[8] *See also* RX-32.

- Ms. Hayslett was the dispatcher working in Memphis during the April 10, 2013 incident. Tr. at 202.
- Auburn Calloway is a former pilot for Respondent imprisoned following an attack on one of Respondent's flight crews in 1994. Tr. at 152.
- Fred Smith is Respondent's CEO and was during the period at issue. Tr. at 320.

B. Stipulated Facts

There are no stipulated facts in this proceeding.

C. Testimonial Evidence

The sworn testimony of the witnesses who appeared at the hearing is summarized below.

Mark Estabrook (Tr. at 30–198)

Complainant first started flying at age 10. He attended the University of Texas in Austin, earning a Bachelor of Science in radio, television and film. His roommate, a flight instructor, offered to help him learn how to fly. Later he joined the Air Force as a pilot. During his last four years in the service he was an AWACS aircraft commander and flew classified missions in the Persian Gulf and North Atlantic.[9] Part of his responsibilities were to track and chase Russian Bear aircraft as they rounded the northern border of Norway, down towards Washington, D.C. where they practiced attacks and then went on to Cuba. During his service he earned several Air Medals and earned a master's degree in public administration from the University of Oklahoma.[10] Tr. at 30-33. He holds an Airline Transport Pilot ("ATP") certificate and a flight engineer certificate for the Boeing 727. Complainant is type rated in the Boeing 707, 727 and Airbus A300. He has approximately 12,000 or 13,000 hours total time. Tr. at 192-93.

On April 10, 2013 he was scheduled to fly from Laredo to Memphis. While in a Laredo hotel with his first officer, Complainant became aware of a line of severe thunderstorms between Laredo and Memphis. They looked at the flight release provided by dispatch and then they looked at FedEx weather and the FedEx radar screen. They also looked at the FAA's NOAA[11] radar source as well as Intellicast. After reviewing those items, he called Ms. Sherrie Hayslett, the GOC[12] dispatcher, for flight release and advised her of their late departure from Laredo. Complainant agreed with her about the severity of the thunderstorm and indicated that he did not see any way to fly through it and reach Memphis. Originally Ms. Hayslett assigned Complainant and his first officer to a flight route that would have taken them east of the storm. Tr. at 58-59. However, discussing the route amongst themselves, they concluded that they needed to wait for the storm to pass through Memphis. Tr. at 59.

[9] *See generally,* CX-2; Tr. at 193 - 94.
[10] CX-1 is Complainant's resume at the time he applied for employment at Respondent. CX-2 is his military discharge from active duty; his DD-214. CX-3 is a copy of several Air Medal awards. Tr. at 33 – 34.
[11] National Oceanic and Atmospheric Administration.
[12] Global Operations Center. *See* Tr. at 146.

Facing significant weather, Complainant consulted three radar sources that night, including Respondent's weather resources. The captain has to review the weather before signing a flight release, attesting that he or she has checked Respondent's weather resources. Tr. at 63.

CX-4 is a series of radar shots from NOAA, one of the sources that Complainant consulted, demonstrating the weather along the route of flight that day. Tr. at 59-60. RX-8 contains an email from Mark Crook, the dispatch duty officer, accusing Complainant of unilaterally delaying a flight without coming to an agreement with the dispatcher about the flight delay and not touching based with the weather department. Tr. at 60-61. It was Complainant's understanding that he and Ms. Hayslett had agreed that he was not going to arrive in Memphis on time. Complainant mentioned that they were at the hotel on at least two or three occasions during his conversation with Ms. Hayslett and conveyed their decision to delay at the hotel for weather. Tr. at 62.

Captain Crook, the dispatch duty officer, called Complainant about the flight and Complainant disclosed to him that he was monitoring the weather from the hotel. Tr. at 63. Complainant had already received a flight plan for his departure from Ms. Hayslett but he deemed it problematic. The flight plan had him attempting to come around the back side of a line of thunderstorms to reach Memphis at a time when the thunderstorms would be above Memphis. His problems with that flight plan stemmed from the flight operations manual ("FOM"), which provides that penetrating thunderstorms constitutes a violation. Further, the FAA recommends at least a 20-mile separation between the aircraft and the thunderstorm. Later he received a second flight release at his request. Tr. at 64-65.

Consequently, Memphis air traffic control placed his flight on a gate hold for several hours. Complainant did not have the option to depart as Captain Crook had encouraged him to do. Tr. at 65. He also communicated with the Laredo tower, talking to them every 10 to 15 minutes inquiring as to status of the gate hold. Just as the tower was closing for the night, Memphis air traffic control cleared Complainant's aircraft to take off, and they departed. Violating a gate hold would have been in violation of the Federal Aviation Regulations ("FARs"), and probably would have resulted in having to see Captain McDonald. Tr. at 65.

RX-10 contains two transcripts from April 10, 2013 audio recordings between Complainant and Ms. Hayslett. It also shows only one conversation between Complainant and Captain Crook. Tr. at 67–68. However, Complainant says he had at least three documented conversations and possibly two other undocumented ones with Captain Crook. Tr. at 69. Cross-checking CX-5, Complainant's Verizon bill in April 2013, with RX-10, one can match his phone bill to the 9:39 p.m. call with Ms. Hayslett. Captain Crook called Complainant on a different line during his call with Ms. Hayslett, so that call went to voicemail and not reflected on Verizon bills. After Complainant completed his call with Ms. Hayslett, he called Duty Officer Captain Crook back at 9:43 p.m., and this two minute call to the duty officer cell phone is reflected on CX-5. Tr. at 71-72. Complainant described this call as a heated one for Captain Crook was directed Complainant to take off and fly to Memphis. Captain Crook pressured ("pilot-pushed") Complainant to fly, saying that Complainant would be the only one arriving late that night. Later, once he arrived in Memphis, Complainant learned that a dozen other airplanes were late that night as well. Tr. at 73.

CX-5 shows two more calls after that initial call with Captain Crook. One of those entries reflects a subsequent conversation with Captain Crook. Complainant attempted to obtain a new flight plan from Ms. Hayslett. Instead Captain Crook answered the GOC phone and claimed to be sitting right next to Ms. Hayslett in the GOC. Captain Crook told Complainant that he was watching him very closely in a sarcastic and intimidating manner. Captain Crook asked if Complainant had pushed yet and Complainant told him no and terminated the call. A few minutes later Complainant called back Ms. Hayslett and she answered. She was pleasant and provided a new flight plan now coming in from a westerly direction to approach Memphis after the storm passage. Tr. at 73–75.

JX-2 is a letter Complainant received April 23, 2013, asking him to attend an investigative interview concerning the events surrounding Laredo. In response to this letter, he immediately contacted counsel. Tr. at 76. CX-7 is an email from Captain Fisher, with Mr. Tice[13] courtesy copied, dated April 17, 2013. This email indicates that Captain McDonald directed a 19D investigative hearing of Complainant. At that time Captain McDonald was the acting chief pilot for Respondent. Tr. at 78. The document represents that the duty officer had to become involved because the pilots were not leaving the hotel until weather passed. Complainant never told anyone on April 10, 2013 that he refused to leave the hotel, nor did anyone tell him that staying at the hotel posed a problem. Tr. at 79.

CX-8 is an email from Captain Fisher to Ms. Katherine Walker, with copies to Mr. Alan Armstrong (Claimant's attorney at the time), Mr. Tice and others. Ms. Walker was a paralegal for Alan Armstrong. Attached to this email is a letter from Mr. Armstrong indicating that he had filed an AIR21 complainant on Complainant's behalf concerning the Laredo incident. Tr.81-82. In the email itself, Captain Rob Fisher responded to Mr. Armstrong's letter that pilots participating in disciplinary processes of the FedEX ALPA[14] collective bargaining agreement are entitled to ALPA representation and outside counsel are not permitted to attend. Tr. at 83.

On May 1, 2013, Complainant participated in an investigative meeting with Captain Fisher. Captain Fisher represented that he had reviewed the audiotapes from Laredo prior to the meeting. The meeting was brief. Captain Fisher notified Complainant that they were not going to take disciplinary action against him. Captain Fisher represented that he was going to counsel Captain Crook about "pilot-pushing."[15] Tr. 83-84. Since there was no disciplinary action taken in connection with the Laredo incident, Complainant withdrew his OSHA complaint. CX-9. He informed Captain Fisher on May 1, 2013 that he had done so. Tr. at 85.

On August 4, 2013, Complainant sent an email to Captain Bill McDonald. Tr. at 34; *see also* CX-11. He had read on the internet about Al Qaeda and al-Asiri's use of data they collected

[13] Mr. Tice is one of Respondent's labor law attorneys.

[14] Air Line Pilots Association.

[15] Commercial pilots have long been aware of the pressures associated management applies to maintain scheduled operations and that it can result in "pilot-pushing." Essentially this term means forcing a pilot to fly against his or her better judgment. *See* George E. Hopkins, Flying the Line: The First Half Century of the Air Line Pilots Association (1982), ch. 3 entitled Pilot Pushing, at p. 18, available at http://www3.alpa.org/publications/Flying_The_Line_1/Flying_The_Line_1.pdf.

off of the internet. According to American and British intelligence, they wanted package tracking data and aircraft tracking data to program the timing of their detonators. Tr. at 46. The article further reported that these terrorist organizations shipped two dummy packages, one via UPS and the other via Respondent, to Chicago, and they tracked the packages using both realtime inflight tracking data and the ground package tracking information posted on Respondent's and UPS's websites. Tr. at 46-47. These events were reported in the New York Times among other websites. Tr. at 47; *see* CX-12 and CX-13. This caught Complainant's attention because back in 2001 and 2002 he had made a prediction this would occur, and he wanted to bring it to Respondent's Chief Executive Officer Mr. Fred Smith's attention, for he wanted to revisit the issue of publishing tracking data. The publication of tracking data is totally at Respondent's discretion. Tr. at 46, 51.

Complainant was aware that Respondent's aircraft were equipped with ADS-B[16] on board and the information from that equipment was disseminated by the aircraft each time they depart. The information is gathered and published, but from what Complainant understood, there is an opt-out program for that information. Tr. at 52. He felt that publishing the information directly violated Respondent's obligations to deter bomb placement on its aircraft. Tr. at 53.

Complainant had previous experience in the union's security committee that had previously put him in touch with Mr. Bill Henrikson, Respondent's Vice President of Security and Mr. Bill Logue, its Chief Operating Officer.[17] Complainant sought out Captain Bill McDonald to see if Captain McDonald could connect him to the CEO Mr. Smith, so the two could discuss important issues Complainant had knowledge of from the 9/11 time period. Complainant wanted to talk about the package and aircraft tracking data dissemination, but he did not want to go into detail with Captain McDonald because he had already worked the issue up to the COO in 2001 and 2002. He anticipated a phone call from Captain McDonald in response to his inquiry, but did not receive one. Instead, he received an email from Captain McDonald grounding Complainant and placing him on Not Operationally Qualified ("NOQ") status. Tr. at 35-36.

CX-15 contains a letter from Captain David Webb, the president of the FedEx Pilots Association ("FPA") at the time, to Captain Jack Lewis regarding crew safety concerns. Complainant authored the letter under his signature, at Captain Webb's request, which discussed the package and aircraft bomb threat. Complainant's concern at that time was Respondent's history of publishing package tracking information for its customers, and the information's usefulness to the enemy. For example, one can block out certain hours of a package's 24-hour timeline in which the package is at a sorting hub. This would allow someone to basically black out the hours in the day to control when their detonator would go off. Complainant explained that it is more newsworthy for a package to blow up in a flying airplane than to explode in a sorting facility. Tr. at 36-37.

[16] ADS-B stands for automatic dependent surveillance-broadcast. It is a technology where an aircraft determines its position via satellite navigation and periodically broadcasts it enabling the aircraft to be tracked. *See* www.faa.gov/nextgen/programs/adsb/.

[17] Complainant later clarified that Mr. Logue was probably the senior vice president of air and ground freight services at the time these incidents occurred. Tr. at 42.

In an attachment to the letter, [18] Complainant decided to include item 15: "When will management remove flight tracking data from public access, such as customer service telephone assistance, websites, and all other sources?" Tr. at 38. Specifically, he asked the company to withdraw from disclosing the portion of tracking data from the time of pickup until the time of delivery. Tr. at 52. He never received a response to his request to remove flight tracking data from public access. Tr. at 39.

CX-16 is a letter to Complainant as FPA Security Committee Chairman from the Respondent's then Vice President of Corporate Security, dated February 26, 2002.[19] Courtesy copied on this letter is Mr. Todd Ondra. Mr. Ondra was also copied on CX-17, a letter concerning a meeting about resuming jump seat privileges for Respondent employees. However, the meeting also gave him an opportunity to address the union's concerns about package and aircraft tracking. When he raised the issue at that meeting, Respondent's senior vice president of air and ground services stated that tracking was a principle staple of Respondent's customer marketing and security was not going to trump marketing. Tr. at 41-42. In addition Complainant had face-to-face meetings with Respondent representatives concerning security issues. In his August 4, 2013 email (CX-11) he referenced Mr. Henrikson, the Vice President of Corporate Security, because Complainant had contacted him regarding security issues and he wanted to reconnect with the security department; he "didn't want to reinvent the wheel" or start from the very beginning with Captain McDonald and flight operations. Tr. at 43. In the August 4, 2013 email Complainant asked to have a telephone call with Mr. Smith. Complainant did not receive a telephone call from Mr. Smith, but did receive notice of his placement on NOQ, which in effect grounded him. Tr. at 43-44.

CX-18 is an email from Captain Rob Fisher with copies to Captain McDonald, Mr. Tice and Ms. Cindy Sartain. The email indicates that on August 5, 2013 Respondent placed Complainant on NOQ until further notice ("UFN"). A NOQ status grounds a Respondent pilot and restricts a pilot from riding the jump seat,[20] not only on Respondent's aircraft but on the jump seat on any other airline in the country. It can also impact his take-off and landing currency, and in his case it did, for he was in a NOQ status for approximately four months. Tr. at 44-45. This NOQ also took Complainant past his annual training requirements and impacted the nature of his required training. In this case, Complainant needed to take part in three simulator events followed by an evaluation. However, on the day he actually started training, he was informed that he was only going to be given one simulator event followed by an evaluation. One has to pass the evaluation to get his evaluations back, so this was very stressful for Complainant. Tr. at 45-46.

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[18] CX-15, p. C-85.

[19] Complainant asserts that he served as the Security Chairman of the FPA from 1996 to 2002, but Respondent said that it could not admit or deny this. Tr. at 54-55.

[20] In aviation, "jump seats" are provided for individuals who are not operating the aircraft. The folding seats flight attendants used are technically called auxiliary crew stations. In every Transport Category aircraft used for carrying 30 or more passengers, the airline is required to provide a "jump seat" in the cockpit. 14 C.F.R. § 121.581; *see also* C.F.R. § 25.785(l). This is called the observer's seat and is what is usually referenced when one mentions "the jump seat." In general, only pilots or FAA inspectors are permitted to use this seat during the aircraft's operation. *See, e.g.*, 14 C.F.R. § 121.547.

Complainant recalls receiving an email from Captain McDonald on August 5, 2013 advising him of his NOQ status. Tr. at 57; *see also* CX-11. He initially thought that he could resolve the NOQ issue with a simple phone call as he was scheduled to fly to Panama. But he had a funny feeling that this had something to do with Laredo and the comments Captain Fisher had made to him after his May 1, 2013 meeting with him. Tr. at 57-58.

Captain McDonald directed Complainant to attend a meeting with management on August 9, 2013. Present at the meeting was Mr. Tice, Mr. Ondra,[21] Captain Fisher, and himself. Tr. at 87. Mr. Tice, Mr. Ondra and Captain Fisher all took notes during this meeting.[22] Tr. at 95. During this meeting Complainant hoped to convince Respondent that it was not completing its obligation to deter Al Qaeda and its bomb-makers from placing bombs on Respondent's aircraft. He felt that Respondent should revisit the issue of package tracking and live aircraft tracking given what he had recently read on the Internet. He wanted them to understand his background in security and to make sure that they were aware of the similarities between Mohamed Atta and 9/11, and Auburn Calloway[23] and his attack on Flight 705.[24] Tr. at 88.

CX-20 is an email from Mr. Tice to Terry McTigue, an ALPA attorney. The email concerns Complainant not wanting counsel at the August 9, 2013 meeting. The night prior to the August 9, 2013 meeting, Complainant received a call from Mr. McTigue. Mr. McTigue relayed that he had received a telephone call from FedEx legal asking if Complainant wanted legal counsel for this meeting. This shocked Complainant because he understood the meeting to address his security concerns, and he did not believe that he needed legal counsel for that. Tr. at 89.

During the actual meeting, Complainant first talked about the consequences of not stopping the publishing of Respondent's package and aircraft data and that he wanted that practice to stop. He relayed what he learned in the articles he had read prior to his August 4, 2013 email; where he discovered that Al Qaeda exploited the package and aircraft tracking data just as he had predicted back in 2001 and 2002. He also alluded to an overheard rumor in the pilots' lounge that Auburn Calloway had converted to Islam, and he thinks he recommended to

[21] Mr. Ondra left the meeting sometime prior to its conclusion. Tr. at 434, 485-86, 553

[22] However, Respondent only produced to Complainant the notes from Mr. Ondra. Tr. at 95.

[23] Complainant stated that he knew Auburn Calloway probably "better than any other FedEx pilot on the property. We both got hired in the same class of four together, and I was assigned to him as a 727 flight engineer partner in the simulator. So I got to know him for a period of about six to eight weeks, and he was my study partner." Tr. at 96. Later, after the Flight 705 incident, Complainant was called to testify in Mr. Calloway's trial that occurred in 1995. *Id.; see also* CX-34. The last time that Complainant talked to Mr. Calloway was 1994. Tr. at 152.

[24] Federal Express flight 705 was a DC-10 carrying cargo being flown from Memphis, Tennessee to San Jose, California in 1994. Auburn Calloway, a FedEx pilot, attempted to hijack the plane after he faced termination by the company for lying about his flight hours. Mr. Calloway was deadheading on the flight carrying a guitar case that concealed several hammers and a spear gun. While en route, he attacked the flight crew with hammers striking each flight crewmember several times, fracturing both crewmembers' skulls. The flight crew was eventually able to restrain Mr. Calloway after the flight crew rolled the plane onto its back and entered a steep dive. Mr. Calloway was subsequently tried and convicted, and sentenced to life imprisonment. *See U.S. v. Calloway,* 116 F.3d 1129 (1997). *See also* Tr. at 152–53 and 602.

the meeting participants that they start an operations research group to address security issues. Complainant relayed to them his military background including that he had worked in the Persian Gulf and North Atlantic, and had chased Russian aircraft in the North Atlantic. He also told them that he had been the chairman of the FPA security committee. They discussed the October cargo aircraft attempts by Al Qaeda identified in CX-12 and CX-13. They discussed Al-Asiri, the bomb-maker credited with making two printer bombs in Yemen in 2010. Complainant acknowledged that JX-42 was a typed version of Mr. Ondra's notes of the meeting. Tr. 90-92.

Respondent's representatives at this meeting provided no response to Complainant's concerns. Tr. at 94. Instead Mr. Tice stated that Captain McDonald thought that Complainant may have had a stroke and also thought that he was "Mayday Mark".[25] Tr. at 94. Mr. Ondra was not present for this portion of the meeting. Tr. at 95. Mr. Tice then asked and Complainant denied that he posed as "Mayday Mark" and told the meeting attendees that he not visited the pilot bulletin board in 12 years. Captain Fisher then asked Complainant to present his flight physical certificate. Complainant presented it to Captain Fisher, who reviewed it and then told the group that Complainant was not "Mayday Mark." Tr. at 94-95. Captain Fisher then told Complainant that Complainant would be returned to flying status in 20 minutes, just as soon as Captain Fisher got back to his office. Tr. at 95.

After the meeting Complainant went to the airport, boarded a plane and flew to Austin, Texas. Once there he turned on his phone and Captain Fisher called him telling Complainant that he had to place Complainant back on NOQ. Complainant voiced his surprise. Captain Fisher informed Complainant that security requested he be returned to NOQ status and Respondent was requesting a psychiatric examination. Tr. at 98-100. Complainant was aware that under the collective bargaining agreement management needs to show a reasonable basis for the company to refer a pilot for a "15D" health evaluation,[26] so he asked Captain Fisher for the basis. The only reason Captain Fisher provided was because Complainant "know[s] too much." Tr. at 101. Complainant immediately contacted his attorney. JX-7 is a letter his attorney sent to Mr. Tice, Captain Fisher, Mr. Ondra and Captain McDonald. Tr. at 99. Every time his attorney requested what Respondent's reasonable basis was for the psychiatric evaluation, Respondent refused to provide its rationale. Tr. at 101; *see* CX-27, CX-28, and CX-29.

Instead, Complainant eventually received Respondent's position statement to OSHA dated December 4, 2014. Tr. at 103; CX-32. In that letter Respondent claimed Complainant exhibited bizarre behavior, cryptically requested that Respondent's CEO call him, told the

[25] Complainant learned about "Mayday Mark" after the August 9 meeting. After reading Captain McDonald's deposition testimony, he learned that Captain McDonald was concerned about information concerning Laredo "issues" being communicated about outside of the company. A person calling himself "Mayday Mark" had posted information on a pilot group bulletin that Captain McDonald believed related to the Complainant's Laredo incident. Captain McDonald suspected that Complainant was "Mayday Mark." Complainant himself learned of these postings on August 5, 2013 just prior to receiving work of his NOQ designation. Tr. at 86-87.

[26] 15D refers to a provision of the contract between Respondent and the pilot's union, a copy of which is located at JX-6.

managing director of security that he had been chased all over Russia as a youth,[27] and made unfounded suspicions that Mr. Calloway might be advising Al Qaeda. Tr. at 103–04. Further, in response to interrogatories, Respondent represented that it placed Complainant on NOQ status on or about August 5, 2013, to facilitate scheduling a meeting he requested. Tr. at 104; *see* CX-31. Complainant denied all of these assertions. Tr. at 104–106.

On August 16, 2013, Complainant received a directive from Respondent ordering him to submit to a 15D evaluation, so he contacted Dr. Bettes in Dallas. Tr. at 106. At the time he contacted Dr. Bettes, Dr. Bettes was not aware of the collective bargaining agreement. Tr. at 107. Dr. Bettes told Complainant that "he was not a gatekeeper" and that Respondent had directed him to send Complainant to a psychiatrist. Tr. at 109. When Complainant asked Dr. Bettes for the reasonable basis for seeing a psychiatrist, Dr. Bettes said "I don't know." *Id.* Yet Complainant had his personal aviation medical examiner[28] ("AME"), Dr. Nugent, provide a letter as to his fitness for duty, and he had another doctor, Dr. Leonard, provide the results of his examination. However, Dr. Bettes did not contact Complainant's doctors until after Complainant had seen psychiatrist Dr. Glass. Tr. at 110.

In all, Complainant was grounded approximately four months. He described this period as "terrible, the worst chapter of my life." He thought Respondent's actions were punitive and that they were trying to shut him up. When he finally returned to duty, he was told that he was going to have some time to reacquaint himself with the simulator, but Respondent changed its position on his day of training. He had been promised three warm-up simulations and an evaluation. Instead, he was given one simulation and Respondent notified him that his evaluation would take place the next day. Tr. at 113-14.

Complainant describes his current work environment as stressful and he feels that he is under a microscope. During the deposition he was asked very private questions about his wife and kids, and his sources of income. Respondent was establishing that Complainant's salary earned from his work for Respondent represented his singular source of income. Tr. at 114.

On cross-examination, Complainant identified Delores Pavletic, A300 fleet captain, as his direct supervisor. Tr. at 115. Fleet captains, formally called chief pilots, report to the system chief pilot who, in turn, reports to the vice president of flight operations. Complainant was unsure of the company structure above that. Tr. at 116. Complainant was aware that Mr. Ondra was the managing director of aviation security, but did not know the size of Mr. Ondra's team or the hierarchy of Respondent's security department. Tr. at 118-19. But in the 2001–2002 timeframe, Complainant headed the pilots' union security committee, advocated for pilots, interfaced with government agencies and Respondent's management. Tr. at 120. In 2001 and 2002, Complainant recalls Mr. Ondra identifying himself as an assistant to Mr. Henrikson. Tr. at

[27] Upon the Tribunal's questioning, Complainant stated that he never lived outside the United States during his youth. Tr. at 196.

[28] An AME is a physician designated the FAA who is given authority to perform flight physical evaluations and issue certain types medical certificates under 14 C.F.R. Part 67. *See* Guide for Aviation Medical Examiners (Oct. 26, 2016), available at https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/. *See also* Tr. at 124.

122. Back in 2001 and 2002, Mr. Henrikson held the position that Mr. Ondra does currently. *See* Tr. at 39, 121.

Complainant agreed that between 2002 and 2013, he did not raise any concerns about flight security or package security. Tr. at 123. In 2010 following the printer bomb attempts, he did not raise a security concern because back then he did not know that Al Qaeda had shipped boxes within the month prior to the printer bombs, a scenario that he had predicted back in 2001–2002. *Id.*

Complainant agreed that the Memphis GOC was staffed with meteorologists and dispatchers and that dispatchers work with pilots to create a flight plan release. Tr. at 127. A flight release includes an aircraft's departure, route of flight, destination, altitude, tail number, fuel amount, names of the flight crew and an alternate airport.[29] Tr. at 128-29. Flight plan releases are sent to the aircraft via the company computer. Duty officers, who are pilots, are located at the GOC and are familiar with the rights and obligations of flight crews. At the GOC, certain telephone lines are recorded. Complainant agreed that the captain has the final decision as to whether it is safe to fly.[30] Tr. at 129-30.

Complainant acknowledged that he did not arrive at the airport by his shift time for the April 2013 Laredo flight. He agreed that he was required to show one hour prior to the originally scheduled departure time. Tr. at 130. During his first call to Ms. Hayslett, he informed her that he was going to be late into Memphis, and that he was at the hotel getting his bags. He told her that he planned to hail a taxi as he watched the weather from the hotel lobby. Tr. at 131.

Captain Crook called Complainant while Complainant was still at the hotel. At that point in the hearing, Respondent played the audiotape of that conversation. JX-1; *see* Tr. at 133–36. Following the Laredo flight, Complainant met with his fleet captain, Captain Fisher, pursuant to section 19D-1 of the collective bargaining agreement. *See* JX-2. Mr. Ondra was not involved in the events surrounding the Laredo matter. Tr. at 139. Complainant agreed that his version of events and Mark Crook's version of events differed. Tr. at 136. Complainant agreed that he did not receive written discipline for his conduct following the meeting. Prior to the meeting, Complainant did file an AIR 21 complaint. Tr. at 137–38.

As for the flight tracking data, Complainant was concerned by the publishing of realtime aircraft tracking data, as well as package tracking. Tr. at 139-41. Complainant disputed Respondent's contention that it did not share its flight tracking data with customers because it shares that data with third parties[31] who in turn publish that data, albeit with a slight delay. Tr. at 143-46.

Complainant wanted to communicate his concerns to Mr. Smith, the company CEO, and asked Captain McDonald to have Mr. Smith call him. Complainant then told Captain McDonald

[29] *See* 14 C.F.R. Part 121, subpart U; *see generally* 14 C.F.R. §§ 91.153 and 91.169.
[30] *See* 14 C.F.R. §§ 91.3 and 121.627(a).
[31] Complainant later explained that by third parties he was referring to such websites as Flightaware and Flighttracker. Tr. at 196.

that he was about to go to sleep and was going to turn off his phone. *See* RX-13. In the email at RX-13, Complainant agrees that he did not explain that he was reporting some violation of FAA law or regulation. Following that email, Captain McDonald placed him in a NOQ status. Tr. at 147-49. It is Complainant's belief that he was placed on NOQ on August 5, 2013 in retaliation for the April 2013 Laredo incident in which he refused to fly through thunderstorms. Tr. at 149. But he acknowledged that he was paid while in that status. *Id.* At that time of the August 2013 meeting, Captain Fisher was his direct supervisor,[32] Mr. Ondra was the managing director of aviation security and Mr. Tice was a labor relations lawyer for Respondent. Tr. at 150-51. During this meeting Complainant expressed his concerns about the similarities between what Mr. Calloway did in 1994 and what Al Qaeda and Mohamed Atta did in 2001. During this meeting Complainant also recommended that Respondent approach federal authorities to have Mr. Calloway monitored, in part because of his conversion to Islam. Tr. at 153.

RX-7 includes an email dated August 22, 2013, in which Respondent's management and Dr. Bettes recommend that Complainant be evaluated at Talbott Recovery Campus. Tr. at 156. RX-21 is an email, dated August 30, 2013, from aeromedical consultant Dr. Christopher Johnson in which he submits a new plan of action that has Complainant going to an evaluation with Dr. George Glass. Tr. at 157. Dr. Glass performed a mental status examination of Complainant on September 11, 2013, and prepared a report (RX-3). Tr. at 158-59. Dr. Glass provided a diagnosis in his report[33] which indicated that Complainant "might benefit from some relatively brief group or individual therapy to help him realize how his behavior is seen by others." Tr. at 161. Complainant disagrees with those findings, noting that "[a]ny pilot who is going under a grounding or being ordered to see a psychiatrist is going to be under stress if he's about to lose his job." *Id.* at 162. Complainant asked Dr. Bettes to accept Dr. Nugent's opinion instead. Dr. Nugent submitted his opinion letter on August 23, 2013; he had no issues with Complainant's mental state. Tr. at 163-65; *see* RX-6.

RX 16 is Dr. Bettes' September 24, 2013 letter in which he concludes that Complainant was unfit for flying duties, a contention Complainant disputes. Tr. at 165. Dr. Bettes ignored Dr. Nugent's letter and "marched through [the 15D] process on the direction of [Respondent]," and without consulting Complainant's AME until October 2013. Tr. at 166-67. Dr. Bettes eventually accepted the continuing opinion of Dr. Nugent but then identified Dr. Green as the "tie-breaker." Tr. at 167. RX 5 is Dr. Leonard's August 24, 2013 letter that indicated that Complainant has no psychological issues relating to Complainant's qualifications as a pilot. Tr. at 168.

Dr. Green, who is board certified in psychology, evaluated Complainant in October 2013 and prepared a report. RX-4; *see* Tr. at 169. Dr. Green found Complainant psychologically stable and fit for duty. Tr. at 169-71. RX-23 is Dr. Bettes' October 30, 2013 letter reflecting that Complainant was determined to be fit for duty. Tr. at 171. RX-24 is an email from Respondent reflecting that it returned Complainant to duty that same day. Tr. at 172.

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[32] Tr. at 643.

[33] The parties agreed that this Tribunal could take official notice of the DSM-IV(R) or DSM-V. Tr. at 160.

Respondent played an audiotape between dispatcher Ms. Hayslett and Complainant. Tr. at 184 – 89; *see also* RX-10. Complainant then acknowledged that the Laredo to Memphis flight was delayed three hours, a significant delay for Respondent. Tr. at 191.

Sherrie Hayslett (Tr. at 199–223)

Ms. Hayslett is employed by Respondent as a dispatcher and primarily works the second shift at the Global Operations Center. Second shift is from 3:00 p.m. to 11 p.m. A dispatcher's duties include preparing the flight plan release, planning the payload and fuel required, providing weather information, and providing any maintenance information on the aircraft. This requires frequent communication with pilots, usually before the flight. A dispatcher cannot force a pilot to depart in to bad weather; the final authority to fly rests with the captain. Tr. at 199–201.

Ms. Hayslett knows Complainant professionally. She recalled having communication with him about a flight he operated from Laredo to Memphis in April 2013. She had three conversations with him. The first concerned the delay into Memphis. The second concerned communications that Complainant had with crew scheduling and the duty officer. The third concerned his flight plan. Tr. at 202.

Respondent played RX-10, an audiotape of a conversation that occurred between Ms. Hayslett and Complainant in April 2013. Tr. at 202-05. Ms. Hayslett asked Complainant to send her an ACARS,[34] which she assumed would be in the aircraft and not the hotel. Tr. at 205. ACARS is a communications device, a messaging system, with the company. Though ACARS is not available on the crew member's laptop, ACARS is a means for a dispatcher to speak directly to the crew in the cockpit. Tr. at 131. When he first called, Complainant made it clear that he was in the hotel collecting his luggage and she assumed that Complainant was on his way to the airport. Tr. at 205. She did not tell Complainant that he should stay at his hotel, nor does she have the authority to do that. Tr. at 206. She denied pressuring Complainant to depart and she was not aware of anyone else pressuring him to do so. *Id.*

A weather hold is an ATC program designed to hold traffic on the ground to control the amount of traffic in the airspace due to weather. She did not recall a published weather hold on this occasion, but "in all likelihood with the severe weather moving into the Memphis area, there was." Tr. at 206. In the case of a weather hold, typically a pilot cannot decide to stay at his hotel. Ms. Hayslett explained that a show time is a designated time for the crew to show at the airport, usually an hour before the flight at least. Tr. at 207. When Complainant told her that he would be late, she thought Complainant meant late into Memphis for the approach weather; that does not necessarily mean being late to the airport. *Id.*

Ms. Hayslett agreed that the weather moving into the Memphis area on that day was severe, which would delay other aircraft as well. Tr. at 217; *see* CX-4. She told Complainant that they were going to have weather issues. Tr. at 211; *see* CX-7. Complainant did not tell her that he was not going to leave the hotel until the weather had passed. Tr. at 211. She believed

[34] ACARS stands for Aircraft Communications Addressing and Reporting System. *See generally,* AC 20-140A (Apr. 7, 2010), *available at* *https*://www.faa.gov/documentLibrary/media/Advisory_Circular/AC%2020-140A.pdf.

there was some miscommunication between herself and Complainant as to where the delay would occur, either at the hotel or the airport. Tr. at 214-15.

Bobby Dunavant (Tr. at 224-41)

Mr. Dunavant has worked for Respondent for almost 28 years. He is the senior manager at the Global Operations Control, and has held that position since 2014. Prior to his role as senior manager, he worked at the GOC as a duty manager. He typically works from 2 p.m. until 7 a.m. He manages a staff of six managers. Dispatchers report to those managers, who in turn report to him. A dispatcher initiates a flight release from one point to another point. They work with the aircraft's captain to ensure a safe and legal operation of the airplane. The release includes fuel load, route, speed, any jumpseaters aboard, and identifies the crew members. A duty officer acts as a liaison between the flight crew and the dispatcher and crew scheduling. Crew scheduling gives the crews their pairings or duties for the week and makes sure that a crew is not over their operational limits. Duty officers communicate with the flight crew, normally over such issues as a question about a minimum equipment list item or about a crew's duty limits. Tr. at 224-27.

The telephone lines at the GOC record conversations. This includes lines used by dispatchers and duty officers. Tr. at 227. If there is bad weather in Memphis, the dispatcher works up a release with the captain. This typically includes additional fuel and an alternate airport in case the weather is bad and the airplane cannot reach its primary location due to the weather. Typically, the crew will depart from its origin, head toward its destination, and end up in a hold. If the FAA or ATC has a ground stop, the crew may sit where they are located until cleared for takeoff. As long as it is safe and legal to depart, Respondent asks them to depart. The pilot in command has the final authority on whether to depart. Tr. at 229-30. From a GOC perspective, Respondent expects the crew to show up at the airport, pre-flight the aircraft and be ready to go at its scheduled departure time. If for whatever reason the crew does not agree with the release, it will discuss the release with the dispatcher; the dispatcher's phone number is on the release. To his knowledge, no circumstance would justify a pilot staying at his hotel rather than showing up to prepare the aircraft for departure. Tr. at 230-31. The only time that Respondent would do that is if it was unsafe to travel from the hotel to the airport was closed and GOC would make that decision. Tr. at 232-33.

Mr. Dunavant identified Mark Crook as a former duty officer, but he is no longer working for the company. Mr. Dunavant thinks that Captain Crook is a fleet captain for someone else. Mr. Dunavant does not believe that a duty officer has the authority to allow a pilot to remain at his hotel, but the duty officer would talk it over with crew scheduling and GOC before allowing a pilot to do so. Tr. at 234-35. GOC does not use recordings from its telephone lines for disciplinary purposes. Tr. at 236. Only GOC management can access the tapes of those recordings. Tr. at 238.

Mark Crook (Tr. at 242-301)

Captain Crook worked for Respondent. He had just ended his role as a fleet captain for the MD-11 and returned to the line. He joined Respondent in April 1996. During his time at Respondent he has served as a second officer and first officer for the Boeing 727, first officer of the MD-11 for four years, and an MD-11 Captain for ten years. Tr. at 243.

A duty officer works in the GOC. Each pod comprises a group of eight to ten people with various skill sets with the goal of solving last minute problems quickly. Flight management is in a different pod and in a different building on the other side of the airport. Most of the time, the pilot initially calls the duty officer. Tr. at 243-44. Captain Crook knows that calls to and from a GOC telephone are recorded. He does not have access to the recording system nor does he have the ability to edit or delete a call that was recorded on Respondent's system. Tr. at 248.

Captain Crook was the duty officer on April 10, 2013 and recalls the conversation he had with Complainant that day. Tr. at 245. On April 10, 2013 a ramp agent at Laredo called Captain Crook advising that the crew for a flight scheduled to depart in ten minutes was not there. This call prompted Captain Crook to contact Complainant. At the time of the call, Captain Crook "had absolutely no details other than the crew wasn't at the ramp." Tr. at 248-49.

Captain Crook would not expect a pilot to stay in the crew's hotel in Laredo with a thunderstorm over Memphis because pilots encounter weather-related situations all of the time. From the time the crew arrives at the ramp, it takes most people about an hour to "pre-flight the jet, look over the flight release, and get the jet ready to go." Tr. at 249. There are some situations when a pilot may be asked not to report for work and stay in a hotel. For example, a pilot may not be asked to report if the jet needs maintenance and maintenance that will take three to five hours to repair the aircraft. Then Respondent will try to contact the crew and keep them in the hotel so they can rest. But weather is not the same as a mechanical delay. Tr. at 250. When a decision is made to keep the crew at a hotel, at least four people other than the crew, including management will make the call. He is not aware of any prior situation where the pilot alone made the decision to stay at the hotel because of weather at his destination. Tr. at 251.

Captain Crook's intent when calling Complainant was "just to find out what was going on." Tr. at 251. RX-10 is a copy of the transcript of his first call to Complainant. The statement in CX-8 where Complainant wrote "He directed me to take off and fly to Memphis" is not true. Tr. at 254. After his initial conversation with Complainant, he talked to Ms. Hayslett and she indicated that she had no idea that Complainant was still at the hotel. He seemed to recall that as he walked away from his conversation with Ms. Hayslett, she and Complainant were having a conversation. Tr. at 255, 262.

He next recalled a second conversation where he basically told Complainant that he needed to go to the ramp to look at the release and prepare to fly, and if he had safety concerns with the weather or anything else, to call him back and they would discuss it. GOC may not have recorded this conversation because Captain Crook may have used his cell phone. Tr. at 255. Particularly, if Complainant had initiated the call to Captain Crook's cell phone, the

conversation may not have been recorded. Captain Crook recalled telling him to report to the ramp, but denied pressuring Complainant to depart. Tr. at 256.

Following this second phone call with Complainant, he talked to Ms. Hayslett and she informed him that Complainant was at the ramp. RX-8 is an email that Captain Crook later wrote about this incident. By his comment that "In my two-plus years as DO, I have never had a captain take it upon himself to delay a flight without coordinating and coming to an agreement with a dispatcher," he meant by Complainant's absence at the ramp he delayed the flight by at least an hour. Tr. at 257. His concern was Complainant's nonappearance at the ramp, not his refusal to fly into bad weather. Tr. at 258.

On cross-examination, Captain Crook denied that he sent the email at RX-8 in anger. Tr. at 258. The next morning after this incident occurred, someone at GOC had sent him an email with a copy of the tape recorded conversation attached. Tr. at 260. He asked for any tapes between Complainant and himself. Tr. at 261. In listening to the recorded conversation between Complainant and Ms. Hayslett (JX-1), he did not perceive Complainant as belligerent in tone or directive to Ms. Hayslett. Tr. at 266–67. After denying receiving other taped conversations other than between himself and Complainant, Captain Crook was confronted with CX-8, third paragraph. In this email, Captain Crook wrote that he attached Ms. Hayslett's first conversation with Complainant, his conversation with Complainant, and then Ms. Hayslett's second conversation with Complainant. He thereafter acknowledged that he had received and listened to not only his own recording but those between Complainant and Ms. Hayslett before sending his email to Captain McDonald about the incident. Tr. at 268-69 and 276; RX-8. Captain Crook agreed that everyone at the GOC knew weather issues would cause Complainant to be late. Tr. at 270. Further, Captain Crook could not recall one way or the other if he had a second conversation with Complainant, "but I just told him he needed to go to the ramp and get the jet ready to go." Tr. at 273. When pressed, Captain Crook acknowledged that this part of his conversation with Complainant was not recorded. Tr. at 277-78. Captain Crook had no doubt that Complainant's delay of the Laredo departure stemmed from his concern about the weather; he had a problem with Complainant not reporting to the ramp. Tr. at 284-285. He explained:

> [A]s a duty officer I'm trying to do the right thing by him, but I'm also trying to make sure he's not digging a hole for himself. Not being at the ramp is just indefensible to all the managers sitting behind me.
>
> All I was really concerned about at the time, [Complainant], get to the ramp, get the jet ready to go, and then if you have concerns give me a call. Now they have nothing to say about him. Now there's no problem with the pilot and what's he supposed to do – he's at work, he's ready to go, and there's a weather concern. And I would back him to the hilt with that.
>
> But I have no defense of the GOC manager behind me with him not being at the ramp, especially since he didn't coordinate it through us. If he had coordinated through us and we had given him permission, he was good to go.

Tr. at 285.

When asked about the one hour he stated was needed to prepare the jet to depart, Captain Crook said he had no bases to assert that the extra time Complainant spent at the hotel resulted in a delayed departure of that aircraft. Tr. at 300.

Rob Fisher (Tr. at 308-421)

Captain Fisher has worked for Respondent for 26 years. He has served as a second officer and first officer on the Boeing 727. In 1995, he transitioned to first officer in the Airbus before making captain in 1998. He had been a line check airman and standards check airman during that timeframe. From 2000 to 2005 he served as regional chief pilot for the Subic Bay and Asia-Pacific Region. From 2007 to 2011 he served as a duty officer. From 2012 to 2014 he was a fleet captain for Airbus and from 2014 to 2015 he was the assistant systems chief pilot. Since 2015 he has been the system chief pilot. Tr. at 309.

In 2013, he supervised Complainant and recalled the incident involving Complainant in April 2013 relating to a flight from Laredo, Texas to Memphis, Tennessee. He recalled that Complainant stayed in his hotel rather than report to the airport one hour prior to his scheduled departure time. That night, a line of thunderstorms moved west to east that would affect the Memphis airport. In such circumstances, the pilot and dispatcher are expected to work out whether the flightcrew can safely fly. However, showing up to work on time is contractual. The requirement to report to the airport also appears in Respondent's flight operations manual. Respondent wants the pilots there to make preparations for flight in case the weather situation improves. "We never make a decision on our own to not show up at the airport." Tr. at 310-12.

Following the Laredo incident, Captain Fisher met with Complainant for about 15 minutes in a scheduled 19D meeting. JX-2 is the letter that he sent to Complainant to schedule the meeting. At the meeting, Complainant contended that he conveyed his intent to stay at the hotel to Ms. Hayslett, the dispatcher. Captain Fisher concluded that the two miscommunicated with each other, but reiterated to Complainant that a pilot shows up to work at the airport and then makes a decision about whether or not we take a plane. Tr. at 313-14. Captain Fisher did not describe the meeting as adversarial and he did not discipline Complainant. Tr. at 315, 318. During this meeting, Complainant mentioned that the duty officer, Captain Crook, pushed him to fly. Tr. at 315. Captain Fisher reviewed the tapes of the conversation between Captain Crook and Complainant. Captain Fisher concluded that while Captain Crook, the duty officer, was frustrated, he could not conclude whether Captain Crook pushed Complainant. Tr. at 315.

In 2013, Captain McDonald was the system chief pilot and Captain Fisher's boss. Captain Fisher spoke to Captain McDonald about the Laredo incident, but Captain McDonald did not instruct Captain Fisher to discipline Complainant. Tr. at 319. Following his meeting with Complainant, Captain Fisher called Captain McDonald to debrief, and followed that call up with an email (RX-9). Tr. at 319. Captain McDonald did not express being upset that Complainant was not disciplined. Tr. at 320.

Captain Fisher knew that Complainant had sent an email to Captain McDonald in August 2013 requesting that Mr. Smith, the Respondent's CEO, call him. At that time, Captain Fisher

was still Complainant's direct supervisor. He described the email asking the company CEO to call him and telling him that he was turning his phone off to go to sleep, as odd. Tr. at 321.

On August 9, 2013, Captain Fisher, Mr. Ondra, the director of aviation security, and Mr. Tice, a labor relations lawyer for Respondent, met with Complainant. At the time of this meeting Complainant was placed on NOQ. Captain McDonald made the decision to place Complainant on NOQ status. Tr. at 322. NOQ status takes pilots off of flight duty status for various reasons, including attending a meeting or addressing the pilot's fitness for duty. Tr. at 322-23. The meeting itself lasted less than an hour. The meeting concerned Complainant's interest in the tracking of packages in Respondent's system. Complainant mentioned that Auburn Calloway had converted to Islam and that Mr. Calloway may be communicating with Al Qaeda. Tr. at 324. Captain Fisher acknowledged that he was not a security expert and deferred those issues to Mr. Ondra. However, he thought it was strange that Complainant would reference a gentleman that had been in prison since 1994. Tr. at 324-25.

The difference between package tracking and flight tracking data is that the FAA releases the latter to the public, not Respondent. There are software applications that track actual flights, estimate times of arrival, airspeed, altitude and similar information. Respondent does not provide any information about its flights or the trucks that carry a given package. Tr. at 326. During this meeting Complainant did not raise any other safety concerns. At the end of the meeting, Captain Fisher informed Complainant of his removal from NOQ status and considered the matter closed. Tr. at 328. Later, Mr. Tice called Captain Fisher and told Captain Fisher to place Complainant back on NOQ based on a recommendation from Mr. Ondra. Neither Mr. Ondra nor Mr. Tice relayed Mr. Ondra's reasons for doing so. This frustrated Captain Fisher because he had reversed his decision that he had just communicated to Complainant, who had flown back home. Tr. at 328. Captain Fisher immediately called Captain McDonald and asked why this decision was made. Captain McDonald relayed that when Todd Ondra, an expert in aviation security, recommends a 15D, Respondent will defer to Mr. Ondra. So he then called Complainant and had to tell Complainant not only that he was placed back on NOQ but also directed Complainant to see an aeromedical advisor. Tr. at 329. He followed up this call with a letter dated August 16, 2014 referring Complainant to a 15D evaluation. Tr. at 334; JX-5.

This news upset Complainant. Captain Fisher told Complainant that the reason for the evaluation was because he knew too much and Captain Fisher regretted making that comment. Tr. at 330. At the time Captain Fisher made that call he did not know Mr. Ondra's reasoning. "If [Mr. Ondra] had concerns, since he is the director of aviation safety, … then my boss agrees, and that's the direction we're going to go in the interest of safety." Tr. at 331. Captain Fisher, as the fleet captain, that directed Complainant to have a 15D evaluation. He did not direct Complainant for a 15D evaluation because of Complainant's concerns about safety or security. Tr. at 331.

Respondent has ways for pilots to report safety concerns, through its website and a flight safety duty officer who is available 24 hours a day, seven days a week. A pilot can file an aviation safety report, a report that pilots can file when encountering a safety-related incident during the operation of the aircraft or prior to take off. Tr. at 332-33.

Under section 15D of the collective bargaining agreement, Respondent has the right, if it has a reasonable basis to question a pilot's fitness for duty, to direct the pilot to an aeromedical advisor. The aeromedical advisor is not an employee of Respondent, but works for a different company that provides the advisor's services. Once referred, the aeromedical advisor will make an assessment and may recommend further evaluation, but the medical aspects are not within Captain Cook's area of expertise. Tr. at 334-35. At the company's request, Captain Fisher provided the aeromedical advisor a statement explaining why Respondent recommended Complainant for a 15D evaluation. Mr. Tice helped him write the letter; RX-15. Tr. at 335-36. Captain Fisher did not think that he received copies of the medical report generated from the 15D evaluation, but did know that Complainant returned to flying. Tr. at 336.

On cross-examination, Captain Fisher stated that he involved Respondent's lawyers with Complainant's Laredo incident prior to sending his 19D letter to Complainant, in part, because a 19D investigation can turn into a 19E matter. A 19E is a disciplinary process. Captain McDonald ordered the investigation into the April 10, 2013 Laredo incident. Tr. at 341. Captain Fisher refused Complainant's request for legal counsel at that meeting on the advice of Mr. Tice, for the meeting was an investigation, not a disciplinary measure. Tr. at 342. CX-8 contains the correspondence denying Complainant's request. Tr. at 343. In Captain Fisher's letter to Complainant's counsel he wrote "pilots participating in disciplinary processes under section 19 of the FedEX/ALPA collective bargaining agreement are entitled to representation by ALPA. No outside attorneys are permitted to attend or otherwise participate in these processes." Tr. at 343; CX-8. Captain Fisher denied that it his intent to communicate to Complainant that the meeting was a disciplinary process. Instead, Captain Fisher explained that the meeting represented the investigative portion of the Section 19 process, not the disciplinary portion. Tr. at 345.

In preparation for the interview with Complainant, Captain Fisher admitted that he reviewed the records of three conversations Complainant had with the GOC: the two conversations Ms. Hayslett had with Complainant and Captain Crook's conversation with Complainant. Tr. at 347; *see also* RX-8. Ultimately, Captain Fisher concluded that Complainant "had a good faith belief that the dispatcher had approved his remaining in the hotel." Tr. at 350. Captain Fisher's question for Complainant did not concern operation the aircraft, but concerned his decision to stay at the hotel rather than show up at the airport. Tr. at 352. He conducted a 19D because he wanted to learn Complainant's version of events. Tr. at 355. During the May 1 meeting, Captain Fisher told Complainant that he would talk to Captain Crook concerning his conduct of allegedly pushing Complainant to fly. However, Captain Fisher maintained that in his estimation Captain Crook never tried to push Complainant to fly; he was inquiring as to why Complainant was not at the airport. Tr. at 356. Captain Fisher denied that he told Complainant that Captain McDonald wanted to discipline Complainant over the Laredo delay. Tr. at 360.

During the August 9, 2013 meeting, Complainant raised safety-related issues associated with the package tracking system. He also expressed concerns that terrorist groups like Al Qaeda could use that information to carry out terrorist attacks, and that Respondent was not doing enough to deter the terrorists. Tr. at 361-62.

Pilot status designation code "RMG" means removed from management. It has been used to take a pilot off his scheduled flight so that he can attend an important meeting or special project. Captain Fisher did not know why that designation was not used to ensure Complainant's attendance for the August 9, 2013 meeting. Instead Respondent placed Complainant on NOQ status on August 5, 2013 for the upcoming meeting. Tr. at 363-65. The NOQ designation can be used to remove pilots for a section 19D investigation. Tr. at 366. NOQ status triggers the removal of jumpseat privileges as a cautionary action. Tr. at 366. Captain Fisher maintained that the NOQ designation did not relate to the "Mayday Mark" issue and, at the time of that meeting, the company was not investigating Complainant. Tr. at 368-69. Captain Fisher had no concerns prior to the August 9, 2013 meeting that Complainant's behavior warranted a section 15D examination. Tr. at 369-70. After the August 9, 2013 meeting, Mr. Tice and Captain Fisher spoke briefly talk, and they released Complainant from NOQ status; Captain Fisher determined that Complainant had no fitness for duty issue. Tr. at 370. When Captain Fisher called Complainant back informing him that he was placed on NOQ, he knew he would have to have a tough conversation with Complainant because "[t]he reason we were placing him on NOQ is, we were directing him to see the company aeromedical advisor." Tr. at 371. At the time of that call, Captain Fisher was not completely convinced that placing Complainant back on NOQ was an appropriate action to take. Tr. at 402. Captain Fisher cited Mr. Ondra's recommended use of that provision to direct a 15D examination as the reason for returning Complainant to NOQ status. Tr. at 372. Mr. Ondra was not one of the persons identified in the collective bargaining agreement that could order a 15D examination, but Captain Fisher took ownership of that decision. Tr. at 375-76.

The aeromedical adviser sought JX-2 because he requested a justification for the 15D examination. Tr. at 377. Captain Fisher prepared the response with the assistance of Mr. Tice. While he could not speak for Mr. Tice, he did not consult with Mr. Ondra prior to writing the letter. Tr. at 377-78. In the letter to the aeromedical adviser (CX-25), he cited Complainant's August 4, 2013 email requesting Respondent's CEO contact Complainant, his reference to hearing rumors that Auburn Calloway (the pilot that attempted to hi-jack Flight 705) had converted to Islam, and Complainant's concerns that Respondent could be a target of Al Qaeda as reasons for the referral. Tr. at 386-95.

On re-direct examination, Captain Fisher explained that he would not use the RMG code if the date for a meeting remained uncertain as happened here. Tr. at 405. Mr. Ondra's recommendation played a great role in the decision to refer Complainant to the 15D examination. Tr. at 406. Complainant's concerns over Respondent's tracking data did not contribute to the 15D evaluation decision. Tr. at 407.

Upon the Tribunal's question, Captain Fisher agreed that Mr. Ondra's input played a decisive role in the letter sent to Complainant on August 16, 2013. Tr. at 410. Complainant was placed in a NOQ status after the August 9, 2013, at the request of security. As Complainant did not work for security, the request for the evaluation had to go through the system chief pilot, Captain McDonald. Tr. at 411. In his letter to the aeromedical examination, despite the statement that "[t]he company has a reasonable basis to question whether you have developed an impairment to your ability to perform the duties as a pilot," Captain Fisher acknowledged, at that point in time, security had not told him what the basis was and thus Captain Fisher did not know

the basis of the decision. He only knew that Mr. Ondra had made a recommendation to have a 15D performed. Tr. at 412. Concerning use of the NOQ versus RMG status, he did not make that decision. Tr. at 414.

Robert Tice (pp. 423–512)

Mr. Tice, Respondent's lead counsel in the labor relations law department, since 2010, deals with the administration of the pilots' collective bargaining agreement. He previously worked for Northwest Airlines in similar position from 1986 to 2006. Tr. at 424. JX-6 shows the 15D process. The provision gives Respondent the ability to place a safety check on a pilot, for a pilot only has an FAA exam every six months or so. This provision gives the company the "ability to find out if a pilot is fit but not to delve deeply into the details of a pilot's issues. That's for the company's aeromedical advisor to handle." Tr. at 426. There is no contractual process where security can ground a pilot and refer him to a medical evaluation; flight management would have to direct the pilot to a 15D. Tr. at 426. As lead counsel in the labor relations group, he would attend a meeting involving company management and pilots on two main kinds of occasions: a section 19E disciplinary hearing and a section 19D investigation process. Tr. at 427.

Mr. Tice first learned of Complainant in April 2013 because of the Laredo incident where he failed to report to work on time, but he had little involvement on that occasion. Tr. at 427. The next time he dealt with company business involving Complainant was in August 2013 when his boss had sent him an email (RX-13) that Complainant had sent to Captain McDonald. Tr. at 428. Ultimately he attended a meeting with Complainant, but he did not make the decision to place Complainant in a NOQ status. Complainant, Mr. Ondra, Captain Fisher and he attended the August 9, 2013 meeting. Tr. at 429. Complainant primarily directed his comments to Mr. Ondra, Respondent's managing director of corporate security at the time. Complainant provided background regarding his flying and military experience. Tr. at 432-33. He then expressed:

> …concern about terrorists perhaps being able to get information about [Respondent's] flight operations and put them on airplanes and use that flight information to potentially place explosives on the airplanes. And he was suggesting that that information should not be on the internet.
>
> Then he said that there were rumors that he had heard that a former FedEx pilot by the name of Auburn Calloway, who is serving a life sentence in prison, had perhaps converted to Islam and may be secretly communicating with Al Qaeda. And he suggested that there should be communications with somebody in the government to eavesdrop on him in his cell.

Tr. at 433.

Mr. Tice's described Complainant's behavior as odd, but he did not think that it merited him following up on the matter, because he had a security expert at the meeting. Tr. at 434.

Mr. Ondra did not stay through the entire meeting. After Mr. Ondra left, Mr. Tice raised the issue of the "Mayday Mark" postings on the Airline Central website. Tr. at 434. Captain McDonald had asked Mr. Tice to raise the issue with Complainant during the meeting. Tr. at 435. CX-21 are the postings by "Mayday Mark". Complainant denied that he was "Mayday Mark", and Mr. Tice accepted his word. At the end of the meeting Captain Fisher informed Complainant of his return to flight status. Tr. at 435-37. Later that day Mr. Ondra called him and expressed safety of flight concerns related to Complainant and wanted to know whether the collective bargaining agreement provided a means of having Complainant checked out. Mr. Ondra was particularly concerned about Complainant's comments about Auburn Calloway. Tr. at 437. Mr. Tice recollected that he called Captain Fisher immediately after his call with Mr. Ondra. Captain Fisher was not happy to hear about Mr. Ondra's concerns because he had just returned Complainant to flying status. Tr. at 438.

CX-8 is an email dated April 29, 2013 that Mr. Tice received from Captain Fisher in response to an April 29, 2013 email with a letter from Complainant's counsel attached. The privilege log at CX-10 indicates that he consulted with Captains McDonald and Fisher about how to respond to Complainant counsel's letter. Tr. at 447. Mr. Tice confirmed that he discussed this email with Mr. Ondra, Captain Fisher and Captain McDonald. Tr. at 451. Captain McDonald brought to Mr. Tice's attention his concern that Complainant posted on the Airline Pilot Central forum under the name "Mayday Mark". Based on Captain McDonald's request, Mr. Tice asked Complainant if he was "Mayday Mark" after the company received the August 4, 2013 email. Tr. at 451-52. Mr. Tice was sure that he relayed his conclusion that Complainant was not "Mayday Mark" to Captain McDonald. Tr. at 485.

Mr. Tice agreed that the standard reason for suspending a pilot's jumpseat privileges, as occurs with an NOQ designation, is that the person is under investigation for a significant matter, but added other reasons for an NOQ designation exist. Tr. at 456. The Vice President of Flight Operations, Mr. James Bowman, was the person that questioned whether Complainant was the appropriate person to be on a jumpseat. Tr. at 457-58. Respondent scheduled the NOQ designation for August 5, 2013 due to safety consideration and to ensure a meeting uninterrupted by scheduling issues. Tr. at 458. However, Respondent's answers to interrogatories concerning the identification of the persons involved in the decision to place Complainant on NOQ status on August 5, 2013 (CX-22), did not include Mr. Bowman's name. Tr. at 459. Its answer did include Mr. Ondra, but Mr. Tice expressed uncertainty as to whether Mr. Ondra actually participated. Tr. at 459-60. CX-19 contains a supplemental response to interrogatory no. 7, asking for the reason for Complainant's NOQ designation. The initial response referenced the 15D examination, which was incorrect for no 19D determination took place until August 9, 2013. In that new response Respondent cited an effort to facilitate a scheduled meeting Complainant requested as the reason for placing him on NOQ status on or about August 5, 2013. Mr. Tice admitted that he did not fully answer the question because he forgot to mention Mr. Bowman's email questioning whether Complainant should have jumpseat privileges. Tr. at 460-61. Mr. Tice said that it was possible, but he did not recall Captain McDonald, Captain Fisher, or Mr. Ondra expressing a concern about Complainant's mental health prior to Complainant's placement on NOQ status on August 5th; after his memory was refreshed, he did recall that Mr. Bowman had that concern. Tr. at 478.

Mr. Ondra did not attend the entire August 9, 2013 meeting, particularly the portion of the meeting that included a discussion about "Mayday Mark". Tr. at 486. Mr. Tice believed that during a pre-meeting attended by management personnel that day the attendees discussed "Mayday Mark" based on the top of the first page of Mr. Ondra's handwritten notes of the meeting, which mentioned "Mayday Mark." Tr. at 486 87; *see* JX-3.

Following the August 9, 2013 meeting with Complainant, Mr. Tice expressed no objection to Captain Fisher returning Complainant to flight duty. Tr. at 494-95. After the meeting Mr. Ondra called him and "expressed concerns that are on page 51 of [his] deposition transcript.[35] And then [Mr. Tice] communicated those concerns to [Captain] Fisher in a subsequent telephone conversation." Tr. at 496; *see also id* at 495. Mr. Tice recalls Mr. Ondra's primary emphasis as Complainant's comments about Auburn Calloway. Tr. at 496, 499-500. The Auburn Calloway incident had an enduring impact on Respondent's operations. Tr. at 505-06.

When a pilot is referred to a 15D evaluation, Respondent normally discloses the alleged reasonable basis to the pilot's union. However, when asked in writing by Complainant's initial counsel and then by his current counsel Respondent reasonable basis, Mr. Tice, acting on behalf of Respondent, did not answer either of those queries. Tr. at 501-02.

Prior to sending the 15D referral letter (JX-5), Respondent received a letter from Complainant's attorney on August 13, 2013. Tr. at 440; *see* JX-7. Respondent's reply to JX 7 is CX-26. JX 7 included a request to cancel the medical examination. In a subsequent letter (CX-27), Complainant's counsel requested that Respondent provide the company's "reasonable basis" for the 15D examination. Mr. Tice, acting on behalf of Respondent, did not respond to this request as he did not see any value in continuing a war of words with Complainant's counsel on that point. "The company had made the decision to have a 15D exam. We were going to follow through with it, regardless of what the outside attorney might think about it." Tr. at 443-44. Mr. Tice was not aware of a contractual requirement in section 15D to provide either the pilot's association, ALPA, or outside counsel with the company's basis for a 15D referral. Tr. at 444.

Todd Ondra (Tr. at 524-618)

Mr. Ondra has worked for Respondent for thirty-four years. In 1981 Respondent hired him as a part-time security officer and promoted him to security specialist in 1984. In 1986 he became a manager in Respondent's hub operation and served there for two years. In 1996 he became the managing director of the security department, and in 2011 he assumed his current position as aviation and regulatory security director. Tr. at 525-26.

"The security department in general provides a safe and secure work environment for our employees. So primarily it's three-tiered: to protect our employees, our customers' property, and our company's assets." Tr. at 526. The aviation security group primarily focuses on the members of the air crew. Respondent is a U.S. air carrier regulated heavily by TSA, which he views as a good thing. Tr. at 527. As part of its mission, the group also meets regularly with

[35] Mr. Tice's deposition is at CX-49 for identification. As this exhibit was not admitted into evidence, Mr. Tice's hearing testimony is all that will be considered.

other airlines to help ensure that they are sharing security related information. Respondent also partners with the intelligence and law enforcement communities. Mr. Ondra's day-to-day job is to ensure that Respondent does everything possible to keep the airline safe and secure. His group consists of about 50 team members. His direct boss is the vice president of international and aviation security, Mr. Terry Harris, who in-turn reports to Mr. Mark Allen, the senior vice president of international, who reports to Ms. Richards, Respondent's general counsel. Tr. at 528-30.

His department does not regularly work with the union, but would accept information provided by the union and will accept information from anyone if it will keep Respondent secure. There is a multitude of ways that Respondent encourages employees to report security and safety related matters to it primarily through the employee's managers. Respondent offers its employees means through human relations, an alert line and air crew security reports as well. Tr. at 532. Employees can file these without fear of retaliation; asking employees who fear retribution to report safety concerns does the company no good. Tr. at 533.

Mr. Ondra is familiar with Respondent's package tracking process. One can log onto fedex.com and it will provide pick up data, general information as it transits through Respondent's system at its major sort facilities, and the proof of delivery scan on that shipment. Tr. at 534. Internally, Respondent can see an additional number of limited scans. The tracking information available to customers is close to real time, but it does not include any information on the vehicle or plane on which the package is ultimately placed. Tr. at 535. Flight tracking is different. The FAA collects that information, but Respondent does not publish it. Tr. 535-36. Mr. Ondra does not believe that Respondent violates any law or regulation by providing this information to the public. Tr. at 539-40. Respondent takes many steps to deter terrorist activities by following its security program through TSA; in many cases its protocol exceeds what TSA requires. Tr. at 540. Respondent also has a work place violence prevention program. Tr. at 541.

Mr. Ondra knows Complainant. He participated in the meeting with Complainant, Mr. Tice and Captain Fisher on August 9, 2013. Tr. at 541. He did not recall ever meeting Complainant prior to that meeting. Mr. Ondra did have communications with Captain McDonald prior to this meeting. Captain McDonald or Captain Fisher explained to him that the meeting related to Complainant's security-related concerns. He was shown RX-14, containing an email that Complainant had sent. Mr. Ondra found the email strange for a number of reasons. For one, an employee has many avenues to report safety and security related concerns. Tr. at 542-44. "[F]or someone to send an email to their manager asking their manager to get hold of our chairman to get back with him on a security-related matter, when you have a multitude of ways to report these things, seemed very odd and strange." Tr. at 544. He also found it strange for Complainant to convey these concerns and then make himself unavailable to his manager by turning off his phone. Tr. at 544.

In that email, Complainant indicated that he previously spoke to Mr. Bill Henrikson. Mr. Henrikson, who retired in the 2000s, was vice president of security prior to Mr. Harris and Mr. Ondra's boss at the time. Mr. Ondra was not aligned with aviation security then. Tr. at 544-45.

At the time of the August 9, 2013 meeting, Mr. Ondra was not aware that Complainant had filed a whistleblower complaint with OSHA or that Complainant had raised concerns about pressure to fly in unsafe weather conditions. And he did not know that Complainant had served previously as a security representative for the union. Tr. at 546-47. The meeting itself lasted less than an hour. Complainant started by talking about his military background and then started talking about his time in Russia and Hungary with his father and something about being chased through Russia and Hungary, "[a]nd as a result of what they were trying to do, he ended up in prison in Hungary and was placed in prison by the secret police." Tr. at 547-48; *see also id. at* 549 and 577-78. Mr. Ondra described the anecdote as "one of the strangest stories I've heard." Tr. at 549-50; *see also id.* at 548.

Complainant transitioned to the package tracking information as well as tracking of packages and aircraft. Tr. at 548. Somewhere in the conversation Complainant talked about an event that occurred on one of Respondent's aircraft around 1994; when Auburn Calloway, an employee who was one of Respondent's pilots riding jumpseat at the time, attempted to take over one of Respondent's aircraft. Tr. at 548. Complainant relayed that he learned over the past six to twelve months that Auburn Calloway had converted to Islam, and believed that Mr. Calloway was possibly communicating with terrorist organizations from his jail cell. Complainant suggested that Respondent's security worked with the Department of Justice to place a listening device in Mr. Calloway's cell. Tr. at 548-49. Mr. Ondra found these comments strange as well and found it difficult to believe that any meaningful communication took place between the maximum security federal jail cell housing Mr. Calloway and terrorist organizations. Complainant's concerns about the package tracking data focused on its availability.[36] Tr. at 550. Mr. Ondra could not remember if Complainant said anything concerning combining package tracking data and flight tracking data. Tr. at 551. He made no insinuation whatsoever that Respondent had violated a law or regulation. Tr. at 552. Complainant was "very intense" during the meeting, "almost a little bit manic" when he discussed Hungary and Russia and Auburn Calloway. Tr. at 552-53.

Mr. Ondra did not stay for the entire meeting. Tr. at 553. The "Mayday Mark" matter played no role in his subsequent recommendations because "I'm not familiar with it." Tr. at 553. Following the August 9, 2013 meeting, he did have concerns, both in the information provided and the behavior he observed. Following the meeting, Mr. Ondra contacted Captain McDonald because of his concerns; "I just didn't feel right about what was discussed and shared and the demeanor that was displayed during that meeting." Tr. at 554. He did not talk to Mr. Tice or Captain Fisher prior to contacting Captain McDonald. During his call to Captain McDonald, Mr. Ondra expressed his concerns both for Complainant "and for his ability to operate an aircraft based on what I had just heard and witnessed." Tr. at 554. Mr. Ondra did not recommend a 15D evaluation, but he did recommend some kind of medical examination. He learned of a process for such circumstances, which he assumed was the 15D evaluation. Prior to this occasion, he had not recommended an evaluation for any other pilots. Tr. at 555. Once Mr. Ondra relayed his concerns to Captain McDonald, he did not further investigate Complainant's comments nor did

[36] Mr. Ondra thought that Complainant's comments about Auburn Calloway were odd because Mr. Calloway had been incarcerated for 20 years in a maximum security prison, which would make it difficult for terrorist organizations to communicate with him, and require the Department of Justice to install eavesdropping devices in his cell. Tr. at 581–82.

he have any further involvement with Complainant. Tr. at 556. Mr. Ondra did not recommend a medical evaluation for Complainant because he raised safety or security concerns, but because of his observations that occurred during the meeting. Tr. at 557.

On cross-examination, Mr. Ondra acknowledged that in an email he received on August 4, 2013 (RX-14) that Complainant told the recipients that he previously served as the prior security chairman at ALPA. Tr. at 559-60. Mr. Ondra admitted that he made no effort to look into Complainant's history of service or the scope of his duties as the security chairman. Tr. at 560-61. Mr. Ondra had no involvement in placing Complainant on NOQ status on August 5, 2013. Tr. at 564. When the Tribunal asked if Mr. Ondra had any concerns about Complainant's physical well-being after the August 9, 2013 he responded "I guess not so much his physical well-being. I did have questions and concerns about his ability to effectively operate an aircraft." Tr. at 566. It was his understanding that a mental health evaluation "would potentially be a part" of a 15D examination. Tr. at 568. He acknowledged that "based on the information that I provided [to Captain McDonald], I think that was probably the reason that that action was taken", that action being the 15D examination. Tr. at 570. Complainant's August 4, 2013 email "laid some foundation" for his recommendation, but the primary contributor stemmed from information Complainant shared at the meeting, according to Mr. Ondra.[37] Tr. at 572-73.

Mr. Ondra did not recall discussions with Captain Fisher or Mr. Tice about Complainant after the meeting, but he did talk to Captain McDonald. Tr. at 575-76. During his conversation immediately after this interview, Mr. Ondra told Captain McDonald that Complainant reported he had been chased around Hungary and Russia and he told Captain McDonald about the Auburn Calloway reference, which troubled Mr. Ondra. Tr. at 579-80. Mr. Ondra acknowledged that he never told Complainant that Auburn Calloway was in a maximum security prison and that the 1994 incident involving Auburn Calloway "is well known throughout the [Respondent] community, primarily well known within the crew force at [Respondent]." Tr. at 584, 616.

Mr. Ondra agreed that when he was at the meeting, the attendees did not discuss the subject of "Mayday Mark." Tr. at 584-85. JX-3 are his handwritten notes and the words "Mayday Mark" in his handwriting appear at the top of the page. Those notes did not refresh his recollection about discussing "Mayday Mark" during the meeting with Complainant. Tr. at 586.

Mr. Ondra did recall Complainant's comments concerning the possible use of tracking information published by Respondent by terrorists in potential attacks, and that Al Qaeda had sent packages through Respondent in October 2010 to test the system and timelines. However, Mr. Ondra noted that this was not new information. Tr. at 588; *see also* CX-13.[38] He understood

[37] Complainant's counsel later asked:

> Q: So would you agree with me today that on August – that your 15D recommendation was based on – or your medical evaluation recommendation was based exclusively on the events in the meeting of August 9th, as you testified previously?
>
> A: Yes, with – yes."

Tr. at 574.

[38] During this line of questioning, this Tribunal took official notice of 49 C.F.R. Part 175 and the tables in § 172.101, particularly concerning the prohibition of carrying certain types of explosives or other destructive devices on cargo only aircraft. Tr. at 594, 609.

Complainant's point to be that Respondent take certain actions to deter terrorists from introducing explosives on to Respondent's aircraft. Tr. at 601. Mr. Ondra denied having any further involvement in the 15D referral process between the August 9, 2013 meeting with Complainant and August 16, 2013 and he never recommended that Complainant be placed on NOQ status. Tr. at 606-07.

William McDonald (pp. 621-36)

Captain McDonald, the managing director of flight operations contract administration, has been on Respondent's master seniority list since his hiring in 1984. He has served as a second officer and captain on the Boeing 727, second and first officer on the McDonald-Douglas DC-10, first officer and captain on an Airbus, and captain for the MD-11 and Boeing 777. Prior to joining Respondent he flew in the Navy. While with Respondent, he has served in positions with the pilots' union. Tr. at 622-23. His first management position was as a flight operations duty officer and system chief pilot and held several management positions after that. Tr. 623-24. In 2013, he was the system chief pilot. His duties in that capacity are "to oversee the safe, legal and reliable operation of the flight operation and oversee the crew force." He has managed over 4,200 pilots. Tr. at 624.

Safety is Respondent's primary focus. Respondent maintains policies with respect to safety of operation of aircraft, found in the flight operations manual ("FOM"). RX-2 is an extract of a portion of Respondent's FOM. Section 2.03 addresses safety and crew member responsibility. Tr. at 626; *see also id.* at 630; RX-2, §§ 2.04, 2.10, 2.13 and 2.14. RX-2 is substantially similar to the FOM in effect in 2013. Tr. at 631-32.[39]

Within Respondent's organization, there are a number of venues available to pilots to report a safety issue; including the flight safety reporting system and the ASAP reporting system, direct contact with the flight operations duty officer, and contact with the fleet manager or anyone in the operational management chain to raise a safety concern. Tr. at 633. Respondent actively encourages employees to report any threat they perceive relating to safety or security. Tr. at 634.

Captain McDonald is familiar with section 15D of the collective bargaining agreement:

> The 15D is the company-mandated medical examination that's contained in the collective bargaining agreement. It provides for the company, if they have a reasonable basis for one of the – either the vice president, the system chief pilot, the regional chief pilot, or the assistant chief pilot, to send a pilot for a company-mandated medical evaluation if there is a reasonable basis for them to believe that his fitness for duty is questionable.

Tr. at 635.

A question as to a pilot's ability to operate an aircraft or their fitness for duty, could potentially impact operational safety. Tr. at 635. Captain McDonald has seen use of the 15D process in instances of cognitive behavioral concerns. Tr. at 636.

[39] Comparing RX-2 with RX-35 for identification.

D. Facts in Dispute

1. Complainant's Statement of Facts

Complainant maintains that he engaged in three instances of protected activity. The first two instances concerned his resistance to pressure from Respondent's duty officer, Captain Crook, to fly into hazardous weather conditions. Complainant's refusal resulted in a departure delay from the Laredo, Texas and triggered Respondent's retaliatory disciplinary investigation. Compl. Br. at 4-5. Complainant filed, but subsequently withdrew his AIR21 action on May 2, 2013, after Respondent terminated its disciplinary proceedings. Captain McDonald directed this investigation and Respondent's labor counsel, Mr. Tice, participated in that investigation. The investigation official, Captain Fisher, relayed to Complainant that Captain McDonald, was disappointed that no disciplinary action would be taken against Complainant. Compl. Br. at 7-8.

Three months later, Captain McDonald pursued Complainant, for he believed that Complainant was "Mayday Mark", a person communicating with fellow pilots on an internet blog about the Laredo incident. As part of an August 9, 2013 meeting with Complainant, Captain McDonald directed Mr. Tice to ask Complainant if he was "Mayday Mark." Compl. Br. at 8.

On August 4, 2013, Complainant sent Captain McDonald an email requesting to meet with Respondent's CEO Fred Smith to discuss security concerns. Complainant previously had raised these concerns with Respondent's Vice President of Corporate Security years earlier. Captain McDonald responded by placing Complainant on NOQ to facilitate a meeting with management, but he never requested a meeting with management; he requested a telephone call. Placing Complainant on NOQ grounded him and suspended his jumpseat privileges. Further, Respondent placed Complainant on NOQ UFN (until further noticed) thereby indefinitely grounding him and suspending his traveling privileges. Compl. Br. at 8-9.

Complainant argues that the presence of Respondent's labor attorney evidences Respondent's hostile intent, for Mr. Tice participated in these "main occasions" and meetings that amounted to disciplinary investigations. Further, Complainant asserts that Mr. Tice's testimony that the NOQ designation was for the purpose of grounding Complainant and that the directive came from the Vice President of Flight Operations, Mr. Bowman. Compl. Br. at 10.

The third instance of protected activity occurred on August 9, 2013 when Complainant communicated to Respondent that its "cargo practices encourage and incentivize the introduction of destructive devices into [Respondent's] aircraft for terrorist purposes." Compl. Br. at 12. Complainant had a deep understanding of the safety issues at Respondent having previously served as the security chairman for its pilots association. Complainant was particularly concerned with the publication of both package and aircraft tracking data. However, Respondent's former vice president of air and ground freight services had rejected Complainant's concerns. Thus, he discontinued his efforts on this topic until August 3-4, 2013

when he learned from media reports[40] of Al-Qaeda efforts to plant explosives in packages carried by US-flag cargo carriers and that, in September 2010, US "intelligence officials had intercepted packages shipped to Chicago that they considered to be part of a bombing test run." Compl. Br. at 12-13, citing CX-12. In light of this new information, Complainant resumed his efforts to attempt to urge Respondent to prevent and deter the introduction of undeclared[41] explosives into cargo aircraft. Compl. Br. at 14.

Following his August 4, 2013 email, Respondent's representatives organized a meeting with Complainant on August 9, 2013. Fleet Captain Fisher, Mr. Tice, and Mr. Ondra, Managing Director of Aviation and Regulatory Security, attended the meeting. During this meeting, they discussed specific bomb plots against Respondent that occurred in October 2010. Complainant again encouraged Respondent to limit release of aircraft and package data. Complainant received no response to his expressed concerns. However, Mr. Tice posed questions to Complainant concerning postings on an internet forum by an individual known as "Mayday Mark." Immediately following the meeting, Captain Fisher reinstated Complainant to flight duty. However, later that evening, Captain Fisher called Complainant informing him that he was placed back on NOQ status and directed Complainant to undergo a mandatory 15D examination. The rationale provided at that time was "he knew too much." Compl. Br. at 14-15.

On August 16, 2013, Captain Fisher issued a written order directing Complainant to submit to a 15D examination, stating that Complainant would be subject to disciplinary action if he failed to comply. Despite repeated demands from Complainant's counsel for the basis of this order, Respondent declined to provide the "reasonable basis". Compl. Br. at 16. A "reasonable basis" is required by Respondent's pilots' collective bargaining agreement. *See* JX-6 at *5.

Four months later, and in response to a OSHA investigation, Respondent provided three reasons for the 15D examination: Complainant's August 4 email "cryptically requested that the Chairman and CEO of [Respondent] give him a call to discuss 'something related to 9-11'"; Complainant's assertion that "he had been chased all over Russia in his youth"; and Complainant's assertions regarding a former employee currently in prison for attempting to hijack one of Respondent's planes and that former employee's alleged conversion to Islam. Complainant disavows each of these assertions. Compl. Br. at 16.

2. Respondent's Statement of Facts

In its brief, Respondent asserts that safety and security of its employees, aircraft and customer property is its number one priority. Mr. Ondra, the Managing Director of the Aviation Security Group, and his employees focus on the safety and security of Respondent's aircrew members and aircraft. Transportation Security Administration (TSA) regulates Respondent and subjects Respondent to its audits and inspections. Respondent encourages its employees to

[40] Complainant references several news articles about this topic. Compl. Br. at 12-14; *see also* CX-12, CX-13.

[41] Respondent is an air carrier authorized to carry certain declared hazardous materials. Among those items it will carry are certain types of Class 1.4 and 1.6 Explosives. *See* http://www.fedex.com/us/service-guide/ship-dg-hazmat/hazardous-materials/how-to-ship.html. *See generally,* 49 C.F.R. Parts 171, 172, and 175.

report safety and security concerns, and will not retaliate against an employee who reports such concerns. Respondent has a variety of means for its employees to report safety and security concerns, including relaying those concerns to any member of Flight Operations Management, Human Resources, filing ASAP reports or the Safety Hotline. Resp. Br. at 4-5.

Complainant is a Captain on the A300 aircraft and has 30 years of pilot experience, spending 20 of those years with Respondent. On April 10, 2013, he was scheduled to operate a flight from Laredo, Texas to Memphis, Tennessee. On this date, there was a line of thunderstorms from Houston to Chicago, but no weather issues in Laredo. Complainant did not report to the Laredo airport one hour prior to the scheduled departure time, but made the decision to delay the flight from his hotel. Dispatch never advised Complainant to stay at the hotel. When Complainant did not timely report to the Laredo ramp, Respondent's ground crew called the Duty Officer, Captain Crook, to inquire as to Complainant's whereabouts. Captain Crook contacted Complainant to determine Complainant's "game plan." Complainant conceded that Air Traffic Control had not instituted a weather hold, but he had made that decision. Captain Crook never pressured Complainant to take off or fly to Memphis; he was not concerned about Complainant's decision not to fly, but rather Complainant's failure to show up on time at the airport. Captain Crook advised Complainant to "get to the ramp, get the jet ready to go, and then if you have concerns give me a call," for Respondent expects that pilots report to the airport by their show time. It does so even in inclement weather, so the flight crew can conduct the pre-flight inspection and have the plane ready to depart to cause minimal delay in the departure. Dispatcher Hayslett, Mr. Dunavant, and Captains Crook, Fisher and McDonald all testified that they have never had an experience pilot unilaterally make the decision to stay at his or her hotel rather than report to the airport. Resp. Br. at 5-9

The day after Complainant failed to timely report to the Laredo airport, Captain Crook reported the incident to Captains Fisher and McDonald. Captain Fisher conducted a fact-finding interview of Complainant on May 1, 2013. Complainant acknowledged a miscommunication between himself and Dispatcher Hayslett. Captain Fisher concluded the meeting by reinforcing the requirement that crewmembers arrive at the airport by their show time. Captain Fisher did not discipline Complainant for his actions at Laredo. Captain McDonald was not upset by the results of that meeting, rather he described the outcome as "the resolution I wanted." Resp. Br. at 9-10.

In 2001 and 2002, Complainant led the security committee for Respondent's pilot association. During this time Complainant raised concerns with Flight Management and Security regarding the dissemination of package tracking data. Complainant also reported his concerns to the FAA. The FAA did not take any corrective action for Respondent's dissemination of package tracking data in its business. For the next 11 years, Complainant did not raise any concerns relating to the dissemination of tracking data. Resp. Br. at 11.

On August 4, 2013, Complainant sent an email to Captain McDonald asking to have Respondent's CEO call him about "something related to 9-11." However, he also wrote that he turns off his cell phone when he sleeps and was about to close his eyes and call it a day. Prior to this email, Complainant did not raise his concerns to anyone in Flight Management, Security, the Duty Officer, the Threat Awareness Coordinator, the Flight Safety Department, or a member of

the Human Resources department. Further, he did not file an ASAP, Aircrew Security Report, or contact the Workplace Violence Hotline or Safety Hotline. Captain Fisher, Mr. Ondra, Mr. Tice and Captain McDonald all described the email as odd and strange. Resp. Br. at 11-13.

With the intent to provide Complainant with an audience, Captain McDonald set up a meeting with Mr. Ondrea, Captain Fisher and Mr. Tice. To facilitate the meeting, Captain McDonald placed Complainant on NOQ status, as Captain McDonald had to accommodate the schedules of four individuals. Placing Complainant on NOQ cleared Complainant's flight schedule without affecting his pay. Captain McDonald did not use the RMG designation because that designation applies only when the company already has a specific date and time for the meeting or project. The meeting was ultimately scheduled and held on August 9, 2013 and lasted less than one hour. Resp. Br. at 14-15.

Complainant started the August 9, 2013 meeting by reviewing his employment history and union participation 11 years prior. Mr. Ondra recalled Complainant saying as a youth Complainant was in Russia and Hungary and "ended up in prison in Hungary and was placed in prison by the secret police." Complainant also addressed his concerns regarding Respondent's tracking data and suggested that Respondent could improve its security by ceasing to publish certain package tracking data to its customers. He also raised concerns about real-time flight tracking data. Resp. Br. at 15.

Respondent does not publish its flight tracking data to customers and it does not include truck or flight information to customers either. The FAA collects real-time flight information from all airlines operating within the United States and releases that information to third parties like Flightaware. Resp. Br. at 15.

Complainant told Mr. Ondra and the other meeting participants that he heard a rumor that Auburn Calloway had converted to Islam and that Mr. Calloway may be sharing information about Respondent to Al Qaeda. Mr. Calloway has been incarcerated in a maximum security prison since his conviction in 1995. Because of his concerns, Complainant recommended Respondent approach the United States Justice Department to place listening devices in Mr. Calloway's jail cell. Resp. Br. at 16.

Mr. Ondra found Complainant's behavior and comments regarding Mr. Calloway very strange. He contacted Captain McDonald to question Complainant's fitness to fly and recommended some sort of evaluation. Captain McDonald agreed and explained to Mr. Ondra that the collective bargaining agreement presented ("CBA") a specific provision for a medical review by a aeromedical advisor. Although Captain Fisher and Mr. Tice did not have the impression at the conclusion of the August 9 meeting that Complainant may be unfit to fly, they deferred to Mr. Ondra's subject matter expertise. On August 9, 2013, Captain McDonald instructed Captain Fisher to direct Complainant to Respondent's aeromedical advisor or a 15D evaluation. Resp. Br. at 16-17.

Dr. Bettes, who conducted the initial evaluation, asked Respondent for its basis for referral. Captain Fisher and Mr. Tice jointly prepared a response for Dr. Bettes based on information from Mr. Ondra. Dr. Bettes elected to have Dr. Glass, a psychiatrist, evaluate

Complainant. Dr. Glass determined that Complainant appeared lonely and "somewhat isolated" and "may be depressed, somewhat hypomanic…." Dr. Glass concluded that Complainant "might benefit from some relatively brief group or individual therapy…." Based on Dr. Glass's report, Dr. Bettes concluded that Complainant did not meet the FAA medical standards and therefore was unfit to fly. Pursuant to Section 15D.7 of the CBA, Complainant submitted a letter from his personal aviation medical examiner, Dr. Nugent in response, who stated that he noticed nothing "unusual or abnormal" with Complainant. Per the CBA, Dr. Bettes referred Complainant to a third, "tie-breaking" physician, Dr. Green, for an evaluation. Dr. Green "did not see any evidence of any abnormal thinking or mood symptoms…." Based on Dr. Nugent's and Dr. Green's reports, Dr. Bettes concluded that Complainant met the FAA medical standards and recommended his return to flight duties. Upon his return, Complainant successfully completed simulation training and returned to operating Respondent's aircraft. Resp. Br. at 17-18.

E. Summary of the Documentary Evidence

In support of his case, Complainant presents the following evidence, as summarized below:

Complainant Exhibits	Description
CX-1	Complainant's Resume [1 page]
CX-2	Complainant's DD-214 Military Record and Photograph [2 pages]
CX-3	Complainant's award of the Air Medal for period of April 23, 1987 March 2, 1988 [2 pages]
CX-4	Several hourly weather maps for Laredo, TX for April 10-11, 2013 [26 pages]
CX-5	Complainant's Verizon telephone records for April 8-10, 2013 [1 page]
CX-6	April 10, 2013 emails between Mark Crook and Robert Fisher [1 page]
CX-7	April 17, 2013 emails from Fisher to Cindy Sartain [1 page]
CX-8	April 29, 2013 email between Fisher and Katherine Walker, with attached April 29, 2013 letter from Complainant's attorney, and Complainant's OSHA complaint [8 pages]
CX-9	May 2, 2013, letter from OSHA to Complainant's counsel acknowledging withdrawal of OSHA complaint
CX-10	February 17, 2015 Defendant's Log of Privileged Documents [6 pages]
CX-11	August 4-5, 2013 email chain between Complainant, Bill McDonald, Todd Ondra, and Fisher [2 pages]
CX-12	*Early Flight May Have Been Dry Run for Plotters*, New York Times (November 1, 2010) [4 pages]
CX-13	*The Objectives of Operation Hemorrhage*, Inspire Magazine (November, 2010) [23 pages]
CX-14	September 20, 2001 letter from FedEx Pilots Association President Captain David Webb to Captain Bruce Cheever, subj: Public package tracking [1 page]
CX-15	October 18, 2001 letter from Complainant to FedEx Chief Pilot Jack Lewis, subj: FPA Security Committee Concerns [4 pages]
CX-16	February 26, 2002 letter from Complainant to FedEx VP of Corporate Security

Complainant Exhibits	Description
	William P. Henrikson with cc to Ondra, subj: Security Plans for Resumption of Employee & Offline Jumpseating [1 page]
CX-17	April 10, 2002 letter from FedEx Senior VP William Logue to Webb, with copies to Henrikson, Ondra, Complainant, etc., subj: Jumpseat/Security Issues [3 pages]
CX-18	August 5, 2013, email from Fisher to McDonald, RobbTice, Sartain placing Complainant on NOQ UFN [1 page]
CX-19	Respondent's Supplemental Answers to First Set of Interrogatories, October 29, 2014 [4 pages]
CX-20	August 7, 2013 emails between Tice, Sartain, Terry McTigue, Latasha Sago, subj: Complainant's – Meeting Date [2 pages]
CX-21	"MayDay Mark" postings July 27 – August 5, 2013 [25 pages]
CX-22	Respondent's Response to First Set of Interrogatories, October 29, 2014 [8 pages]
CX-23	OSHA investigation notes of Fisher Interview obtained through FOIA [6 pages]
CX-24	OSHA investigator's report dated July 15, 2014 [9 pages]
CX-25	August 21, 2013 emails between Fisher and Sartain, subj: Complainant's written statement [2pages]
CX-26	August 16, 2013 letter from Tice to Complainant's counsel [2pages]
CX-27	August 20, 2013 Complainant's counsel's letter to Tice and James Ferguson [6 pages] with cc: to Fisher, Ondra, McDonald, McTigue
CX-28	August 23, 2013 letter from Tice to Complainant's counsel[1 page]
CX-29	August 27, 2013 letter from Complainant's co-counsel to Tice [2 pages]
CX-30	Respondent's October 29, 2014 Responses to Complainant's First Requests for Admissions[7 pages]
CX-31	January 15, 2015 letter from Respondent's counsel clarifying response to request for admissions 6, 8-11, 13, interrogatories 3,4, and 7, and request for documents 1, 6, 7, 8, 10-20, 22-23, 25 and 27 [6 pages]
CX-32	December 4, 2013 letter from Respondent's counsel to OSHA investigator w/Attachments A–D [38 pages]
CX-33	Respondent's Privilege Log Related to its September 25, 2015 Document Production [3 pages]
CX-34	FedEx service of Complainant's subpoena for Calloway trial, dated March 13, 1995 [9 pages]
CX-35	Complainant's August 2013 Verizon telephone bill[1]
CX-36	U.S.D.C. for W.D. KY, March 31, 1998 Order Granting Defendant's Motion for Summary Decision in the case of Barnhart v. Federal Express Corporation[20 pages]
CX-37	Video of former FBI Director John Otto's presentation to the FPA in 2001
CX-38	Various letters written to Respondent's CEO from the 1980s [22 pages]
CX-39	Commercial Appeal, *FedEx Chairman Fred Smith Tells City Council Public safety is a Top Priority*, Commercial Appeal (April 21, 2009) [2 pages]
CX-40	Dr. William E. Green's October 23, 2013 medical report [6 pages]

Complainant Exhibits	Description
CX-41	Dr. Stephen D. Leonard's August 24, 2013 medical report [1 page]
CX-42	Copy of Complainant's Medical Certification First Class issued January 22, 2014 and Dr. Mark A. Nugent's April 17, 2014 medical report [4 pages total]
CX-43	*FAA BARR Program Update*, Federal Aviation Administration (last updated Nov. 6, 2015) [2 pages]
CX-44	Federal Register, *Access to Aircraft Situation Display to Industry (ASDI) and National Airspace System Status Information (NASSI) Data*, 78 Fed. Reg. 51804 (Aug. 23, 2013) [3 pages]
CX-45	*Unencrypted ADS-B Out Confounds Airline Blocking*, Airline Industry News (November 14, 2015) [3 pages]
CX-46	*Flight-tracking Blocking Efforts Under Way*, Airline Industry News (March 18, 2016) [3 pages]
CX-47	Law Firm Invoices [58 pages]

In support of its position, Respondent presents the following evidence, as summarized below:

Respondent Exhibits	Description
RX-1	Excerpts from Collective Bargaining Agreement; Sections 12,19, and 26 [49 pages]
RX-2	Section 2 of the Flight Operation Manual [42 pages]
RX-3	Dr. Glass's September 16, 2013 Report on Complainant [33 pages]
RX-4	Dr. Green's October 23, 2013 Report on Complainant [6 pages]
RX-5	Dr. Leonard's August 24, 2013 Report on Complainant [1 page]
RX-6	Dr. Nugent's August 23, 2013 Report on Complainant [1 page]
RX-7	August 22, 2013 email from aeromedical consultant Mr. Christopher Johnson to Complainant providing Plan of Action to return to work [2 pages]
RX-8	April 24, 2013 email to McDonald, Fisher, Mr. Michael Speer regarding Complainant's Flight 1317/11 LRD-MEM [1 page]
RX-9	May 1, 2013 email from Fisher to McDonald with cc: to Sartain and Mr. Mitch Mitheny regarding Complainant's 19D investigation [1 page]
RX-10	Transcript of April 10, 2013 audio recordings between Complainant and Ms. Hayslett and between Complainant and Captain Crook (See JX-1) [9 pages]
RX-11	Map of storm activity on April 10, 2013 between Laredo, TX and Memphis, TN [1 page]
RX-12	May 2, 2013 letter from OSHA Investigator Mr. Matthew Robinson confirming Complainant's withdrawal of AIR 21 complaint [1page]
RX-13	August 4, 2013 email from Complainant to McDonald, subj: Fred Smith [1 page]

Respondent Exhibits	Description
RX-14	August 5-6, 2013 email correspondence between Complaint and McDonald and between McDonald and Mr. John Maxwell, VP of Flight Operations Mr. Jim Bowman Ondra [2 pages]
RX-15	August 16, 2013 email correspondence between Fisher and Johnson, subj: Complainant's written statement [2 pages]
RX-16	September 24, 2013 letter from Dr. Bettes to Complainant, subj: Unfit for Flying Duties [1 page]
RX-17	October 2, 2013 letter from Dr. Bettes to Complainant, subj: 2nd Opinion Request [2 pages]
RX-18	October 12, 2013 email correspondence between Dr. Bettes and Complainant regarding Dr. Nugent and Dr. Green [1page]
RX-19	August 28, 2013 letter from Dr. Bettes to Dr. Cronson regarding referral for evaluation of Complainant [1page]
RX-20	August 30, 2013 letter from Dr. Bettes to Dr. Glass regarding referral for evaluation of Complainant [1page]
RX-21	August 30, 2013 email from Johnson to Complainant regarding Plan of Action [2 pages]
RX-22	October 15, 2013 letter from Dr. Bettes to Dr. Green regarding referral for evaluation of Complainant
RX-23	October 30, 2013 letter from Dr. Bettes regarding Complainant returning to work [1page]
RX-24	October 30, 2013 email from Ms. Jennifer Crisp of the Pilot Administration Center to Complainant acknowledging receipt of a return to work release for Complainant [1page]
RX-25	Complainant's training history [14 pages]
RX-26	Excerpts from Respondent's Code of Business Conduct and Ethics[11 pages]
RX-27	June 11, 2013 letter from Captain John Grones to Respondent's pilots and employees encouraging them to report concerns regarding safety and security [3 pages]
RX-28	September 24, 2014 email from Mr. Dave Bronczek, President and CEO of Respondent's subsidiary, to employees, subj: Important Safety & Security Reminder [2 pages]
RX-29	August 16, 2013 letter from Tice to Complainant's attorney with cc: to Fisher, Ondra, and McDonald [2 pages]
RX-30	August 23, 2013letter from Tice to Complainant's attorney with cc: to Fisher, Ondra, and McDonald [2 pages]
RX-31	December 4, 2013 letter from Respondent's counsel, Mr. David P. Knox, to OSHA investigator, [6 pages]
RX-32	June 12, 2015 Declaration of Ms. Mary Anne Miller, paralegal at Respondent, describing job titles of key employees related to this case [3 pages]
RX-33	April 21, 2016 Declaration of Mr. Charles Yannizzi, Flight Operations Threat Awareness Coordinator , stating that

Respondent Exhibits	Description
	Respondent regularly receives safety and security reports from pilots[2 pages]

The parties also present the following joint exhibits:

Joint Exhibits	Description
JX-1	Taped Conversation between Complainant and Captain Crook, and Complainant and Ms. Hayslett
JX 2	April 23, 2013 letter from Fisher to Complainant [1 page]
JX-3	Mr. Ondra's handwritten notes from meeting of August 9. 2013[5 pages]
JX-4	Ondra's typed meeting notes dated August 9, 2013 [2 pages]
JX-5	August 16, 2013 letter from Fisher to Complainant directing Complainant to submit to a Section 15D medical examination or be subject to disciplinary action[1page]
JX-6	FedEx Pilots Collective Bargaining Agreement, Section 15.A-G of ALPA [9 pages]
JX-7	August 13, 2013 letter from Complainant's Attorney to Tice and Ferguson with cc: to Fisher, Ondra, McDonald [4 pages]

III. ISSUES

- Did Complainant engage in protected activity?
- Did Respondent subject Complainant to an adverse action?
- Was the protected activity a contributing factor in the unfavorable personnel action?
- If so, would Respondent have taken the same adverse action in the absence of the protected activity?
- What remedies, if any, are warranted?

A. Complainant's Position

Complainant asserts that his protected activity contributed to Respondent's August 5, 2013 NOQ determination and that Respondent cannot demonstrate by clear and convincing evidence that it would have placed Complainant on NOQ in the absence of Complainant's protected activity. The temporal proximity of the April 2013 Laredo incident justifies an inference of causal connection. Compl. Br. at 2-3. Complainant claims the "Mayday Mark" connection was the sole topic of Respondent's management's pre-meeting caucus on August 9, 2013. Further, Respondent "failed to produce a single witness who could provide clear and convincing evidence that the August 5 NOQ was based on legitimate fitness for duty or mental health concerns." Compl. Br. at 18-19.

Next, Complainant's August 9 communications regarding Respondent's failure to deter terrorist activity due to its dissemination of aircraft and tracking data constitutes protected activity. Particularly, these communications relate to several regulations concerning Respondent's obligations to air carrier safety: 49 C.F.R. §§ 1544.103(a)(1); 1544.205(a) and (c)(1), and to Respondent's obligation to deterring terrorists from using Respondent's tracking data dissemination policies. In order to have engaged in protected activity, one need not cite to a specific aviation safety-related violation; his concerns need only touch on the subject matter. Compl. Br. at 20-22.

Complainant then maintains that his protected activity contributed to the August 9 NOQ imposition and the subsequent 15D examination order, and that Respondent cannot demonstrate, by clear and convincing evidence, that these adverse actions would have occurred in the absence of his protected activity. Complainant reiterates that temporal proximity alone is sufficient alone to create an adverse inference in his favor. According to Complainant, Respondent deceived him about the intent of the August 9 meeting by using Respondent's counsel, whose services Respondent reserves for disciplinary matters, to inquire about whether he was the "Mayday Mark" that had made comments on an internet blog about the Laredo incident. Compl. Br. at 28-29.

Complainant also characterizes the direct evidence of discriminatory animus in response to his August 9 comments as overwhelming, for Captain Fisher acknowledged that those comments contributed to his decision to require a 15D examination. Captain Fisher testified that Complainant's references to Al-Qaeda and the live tracking issues formed the basis of his determination to refer Complainant for a 15D evaluation. Compl. Br. at 29-30.

In addition, Respondent's failure to provide Complainant with any contemporaneous rationale for its adverse personnel action, combined with Respondent's management's disavowal of the rationales proffered to OSHA during its investigation, warrant an adverse inference and compel a summary judgement in his favor regarding liability. The rationale provided four months later were pretextual. Respondent had no fitness for duty concerns about Complainant prior to August 9, 2013. Compl. Reply Br. at 8. In fact, Respondent failed to meets its contractual obligation by refusing to discuss its reasonable basis for the 15.D referral, even after repeated requests from Complainant's counsel. Compl. Br. at 32.

Regarding the three proffered reasons given by Respondent in the OSHA investigation, Complainant's August 4 email clearly set forth his prior involvement as the pilot union's Security Committee Chair when he asked for a call from Respondent's CEO. Yet Respondent's management proceeded with willful ignorance of this information and declined to investigate Complainant's prior security activities. As to the "chased all over Russia" assertion, not a single witness had any recollection of Complainant making such a statement. No one at Respondent made any attempt to investigate Complainant's connection to Russia prior to subjecting him to a psychiatric examination.[42] As for Complainant's statements regarding Auburn Calloway, even Respondent's own witnesses acknowledged that they were "add-on" comments at the end of the

[42] Nor did anyone verify whether Complainant had, in fact, a prior history as the Security Committee Chairman or had prior dealings with the former Vice President of Corporate Security and Mr. Ondra's former boss, Mr. Henrickson. *See* Tr. at 481, 556, and 561-62.

meeting. Complainant's statements merely commented on the similarities between the tactics used by Calloway and Al Qaeda. Compl. Br. at 32-36.

Complainant attacks the contention that Mr. Ondra served as the lone decision-maker on the reinstatement of the NOQ status upon him and referral to a 15D evaluation. Respondent sought to hold out Mr. Ondra as the sole decision-maker because no evidence suggested that he had knowledge of Complainant's protected activity in Laredo. However, Flight Management had determined to target Complainant for a mental health examination prior to any involvement in the decision making process to refer him to a 15D evaluation. Compl. Br. at 37-38. Further, Respondent violated the collective bargaining agreement when Respondent's management directed Dr. Bettes to send Complainant to a psychiatrist by not providing Complainant a reasonable basis for doing so and allowing for an independent evaluation. Compl. Br. at 39-40.

Complainant seeks "compensatory damages for emotional distress, inconvenience and the like." Compl. Br. at 40. Respondent's conduct of forcing him to undergo a psychiatric evaluation and deliberately induced mental anguish upon him by its questioning of very personal matters forms the basis of his emotional distress. Consequently, he seeks $5 million "to properly compensate him for his mental anguish." Compl. Br. at 40-44. Complainant also seeks recovery of his attorney fees and expenses totaling roughly $263,968.95. Compl. Br. at 44. In addition, he seeks Orders directing Respondent to expunge all disciplinary proceedings, including medical and psychiatric evaluations concerning Complainant from Respondent's personnel files, directing Respondent to cease and desist from all discriminatory conduct toward him, directing Respondent to visibly post for ten years the OSHA Fact Sheet "Whistleblower Protection for Employees in the Aviation Industry" in every one of its break rooms nationwide and establish an appropriate monetary penalty in the event Respondent fails to comply with that Order, and any other relief this Tribunal deems appropriate. Compl. Br.at 49.

In his reply brief, Complainant agrees that Respondent correctly outlines the elements of a prima facie case, but argues that it omitted case precedent holding that an employer cannot satisfy the clear and convincing evidence standard where it resorts to shifting explanations for its adverse action, as occurred here. Respondent concedes that Complainant engaged in protected activity by refusing to fly on April 10, 2013. Compl. Reply Br. at 2 (citing Resp. Br. at 21 n.4.). Complainant also argues that the Tribunal should give less weight to statements made by Captains Fisher and McDonald. Compl. Reply Br. at 4. Moreover, Complainant's mandatory referral to the 15D evaluation, which commenced four days after the August 5, 2013 NOQ grounding, was unlawful retaliation in response to his communications regarding concerns about Respondent's dissemination of package and flight tracking data, a protected activity. Compl. Reply Br. at 8-12. As to recovery, Complainant reasserts his entitlement to damages for emotional distress, pointing to his "four-month ordeal during which his career teetered on the edge of destruction." Compl. Reply Br. at 19. Finally, Complainant argues that Respondent waived any objection to his attorney's fees as it raised that issue for the first time in its brief and could have litigated it at the hearing. Compl. Reply Br. at 19-20.

B. Respondent's Position

Respondent did not retaliate against Complainant and is entitled to a ruling in its favor. Complainant avers that he engaged in protected activity on April 10, 2013 when he refused to fly through a line of thunderstorms and then filed an AIR21 complainant on April 30, 2013. Complainant alleges that Respondent imposed NOQ on him on August 5, 2013 in retaliation of the Laredo protected activity. However even if Complainant can show causation, which Respondent does not concede, Respondent has demonstrated by clear and convincing evidence that it would have taken the same action absent Complainant's protected activity. Respondent disputes that the proximity between the April 10 Laredo flight and the August 5 NOQ decision creates an inference that the two events were connected. Complainant ignores the evidence that Flight Management had no problem with his refusal to fly through the inclement weather. Flight Management did take issue with his failure to report to the airport one hour before his scheduled departure as required. Resp. Br. at 21-22.

That the NOQ designation occurred the day after Complainant's August 4 email demonstrates no causal connection between the Laredo incident and the NOQ designation the following day, August 5, 2013. Captain McDonald placed Complainant in a NOQ status solely because of the August 4 email in an effort to schedule a meeting with Complainant. Respondent had to select a date and time to accommodate the schedules of four individuals and placing Complainant in NOQ status facilitated the coordination of this meeting. If anything, placing Complainant in NOQ status the day following his email demonstrates by clear and convincing evidence that it would have done so even in the absence of alleged Laredo flight protected activity. Therefore, Respondent is entitled to judgment on this portion of the claim. Resp. Br. at 22-25.

Complainant failed to establish at the hearing that he engaged in protected activity on August 9 by raising concerns about Respondent's dissemination of package and tracking data and Respondent proved that it would have taken the same action in the absent of Complainant's alleged protected activity. Complainant's belief that Respondent's practices of disseminating package and flight tracking information to its customers violates federal law relating to air safety is not subjectively or objectively reasonable. Respondent did not violate any FAA or federal safety law by publishing its package tracking data to customers. Moreover, Complainant was aware of this for a variety of reasons, most notably he discussed his concerns with Respondent's tracking data with the FAA in 2001 and 2002. In fact, the FAA did not take any action in response to Complainant's concerns. Next, Captain Fisher testified that he did not consider Complainant's concerns as a claim that Respondent had violated the law. Further, dissemination of package tracking data is a well-known industry-wide practice. If dissemination of this information was any type of violation, the FAA would have stopped it long ago. Having worked for Respondent as a pilot for more than 20 years, Complainant knew or should have known that Respondent's security practices are routinely inspected and audited by the FAA. Finally, Complainant did not raise his suggestion that Respondent failed to opt out of the ASDI program requiring publication during the August 9 meeting. This assertion only emerged during the latter stages of litigation. Therefore, it is not subjectively or objectively reasonable for Complainant to believe that Respondent violated a FAA or federal safety law. Resp. Br. at 25-28.

Respondent would have placed Complainant back on NOQ status and exercised its rights under 15D of the CBA even in the absence of his alleged protected activity. The hearing evidence established that Complainant's concerns over tracking data did not impact Respondent's decision to refer him for a medical evaluation. Respondent notes that crew members routinely report safety and security concerns, and have many avenues to do so, without being referred for 15D evaluations or otherwise subjected to retaliation. Here, Mr. Ondra had legitimate and serious concerns about Complainant's fitness for duty due to Complainant's behavior and comments regarding Auburn Calloway at the August 9 meeting. Mr. Ondra thought that Complainant was manic during the meeting, and described his comments as "very strange and odd." Due to these perceptions, Mr. Ondra recommended "that some kind of medical evaluation would be probably appropriate." Captain McDonald agreed and relayed that information to Captain Fisher and Mr. Tice. They respected Mr. Ondra's opinion and agreed that a 15D referral was reasonable and appropriate. Further, Respondent routinely uses the 15D evaluation process when it has a reasonable basis to question a crew member's fitness for duty. Resp. Br. at 29-30. Respondent believed that it was acting in the best interest of overall safety of the airline by employing the 15D evaluation process, as "airlines must constantly be alert so as to identify signals that "might indicate the possibility that a pilot might not be fit for duty." Resp. Br. at 31. Although Respondent provided a reasonable basis for its referral to the firm that conducted the 15D evaluation, it was not involved in the decision to refer Complainant to Dr. Glass; Dr. Bettes made the latter decision. Dr. Bettes deemed Complainant unfit to fly. "The simple fact that Dr. Bettes came to this conclusion based on Dr. Glass's report substantiates the initial referral by Fisher (and Ondra's concerns) and demonstrates that [Respondent] had a reasonable basis for the 15D referral." Resp. Br.at 31.

Respondent disputes Complainant's position that it violated section 15 of the CBA. It has no obligation to provide an employee's outside counsel the basis for a referral. If Complainant's union representative had requested that information, Respondent "would have provided it as a matter of good labor relations." Resp. Br.at 32.

Respondent took action in the form of a 15D evaluation because of Mr. Ondra's recommendation. Section 15.D.1 states if the company has a reasonable basis to question a pilot's ability to perform his duties, it may direct the pilot for an evaluation. Here, Captains McDonald and Fisher accepted Mr. Ondra's recommendation and then directed Complainant to contact the aeromedical advisor, thus its actions complied with Section 15.D. Moreover, Respondent's explanation of the basis of the referral to Harvey Watt, the firm performing the evaluation, did not violate Section 15. Resp. Br. at 32,

Harvey Watt complied with the 15D process. It reviewed Dr. Glass's report and concluded that Complainant was not fit for duty. Complainant disputed this finding and exercised his right to a second opinion. The second opinion disputed the original report. Per Section 15, Complainant was thereafter referred for a third "tie-breaking" evaluation. After reviewing the reports of Drs. Green and Nugent, Dr. Bettes reversed his earlier opinion finding Complainant was fit to fly. Therefore, at no point did Respondent fail to comply with the CBA. Given Mr. Ondra's legitimate concerns supported by the concurrence of Captain Fisher, Mr. Tice, and Captain McDonald, and Dr. Bettes' opinion based on Dr. Glass's evaluation,

Respondent has demonstrated that its referral of Complainant for a 15D evaluation was reasonable. Resp. Br. at 33.

Complainant has not suffered any loss of pay or seniority and damages cannot be speculative or inferred. Further, Complainant's claim for $5 million for emotional distress rests on the two month period in which he participated in the Section 15D process, yet Complainant did not testify that he suffered from any symptoms of emotional distress as result of this process. Nor did he testify that the medical evaluations conducted by the three doctors caused him any emotional distress. Resp. Br. at 19, 34.

IV. CONCLUSIONS OF LAW

To prevail on his whistleblower complaint under AIR 21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) he is a person protected by the Act; (2) he engaged in protected activity; (3) Respondent took an unfavorable personnel action against him; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, ALJ No. 2011-AIR-012, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)).[43] If Complainant establishes this *prima facie* case, the burden shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. *Palmer v. Canadian National Railway/Illinois Central Railroad Company,* ARB No. 16-035, ALJ No. 2014-FRS-154, slip. op at 52 (Sept. 30, 2016)(en banc);[44] *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

A. Credibility

In deciding the issues presented, this Tribunal considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, this Tribunal has taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative

[43] *See also Brune v. Horizon Air Industries, Inc.,* ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 15 (Jan. 31, 2006) (once Complainant reaches the hearing, "he must prove protected activity, adverse action, and causation by a preponderance of evidence, not merely establish a rebuttable presumption that the employer discriminated."); *Palmer v. Canadian National Railway/Illinois Central Railroad Company,* ARB No. 16-035, ALJ No. 2014-FRS-154, slip. op at 43-44 (Sept. 30, 2016); *Peck v. Safe Air Int'l, Inc.,* ARB No. 02-028 ALJ No. 2001-AIR-003, slip op. at 8-9 (Jan. 30, 2004).

[44] *See also id. at* USDOL Reporter at 60. "We think it may thus help cement this crucial aspect of [the test] to refer to [it] as the 'same-action defense,' not as the 'clear and convincing' defense." *Id.*, slip op. at 22; *see also id.* at USDOL Reporter at 23.

At the time this Tribunal wrote this decision there were two versions of *Palmer* on the OALJ DOL website; one is the slip opinion and the other is the USDOL Reporter. Therefore this opinion attempts to cite to both versions. The published opinions are the same but there is a difference in pagination. *Compare:*http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/FRS/16_035.FRSS.pdf#search=Palmer 2016 *with* http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/FRS/16_035.FRSP.pdf#search=Palmer 2016.

impact on the record contentions. *See Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19, slip op. at 4 (Sec'y Oct. 23, 1995).

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008, slip op. at 10 (July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (Jan. 31, 2006).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." BLACK'S LAW DICTIONARY 440 (4th ed. 1951). As the court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be "credible" in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe... Credible testimony is that which meets the test of plausibility.

Indiana Metal Products v. NLRB, 442 F.2d 46, 52 (7th Cir. 1971).

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Altemose Constr. Co. v. NLRB*, 514 F.2d 8, 14 n. 5 (3d Cir. 1975); *see also Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024, slip op. at 5-6 (Jan 31, 2007).

Moreover, based on the unique advantage of having heard the testimony firsthand, this Tribunal has observed the behavior, bearing, manner, and appearance of witnesses which have garnered impressions of the demeanor of those testifying. These observations and impressions also form part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, this Tribunal based its credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

This Tribunal finds that in general the witnesses were all equally credible. However, the Tribunal does give Mr. Ondra's testimony on the issue of Complainant's statements during the August 9, 2013 meeting very little weight. His recollection of Complainant stating that he was chased throughout Russia and Hungary and that Complainant reported spending time in prison in Hungary is simply not credible. This Tribunal finds it significant that no other meeting participant recalls Complainant stating such and this Tribunal finds it inconceivable that such a unique story would not be recalled by a single witness. Tr. at 325, 433, 496-97. Even upon seeing Mr. Ondra's notes from the meeting, Captain Fisher could not recall any references by Complainant about Russia. *See* JX-3; Tr. at 379-81. Further, Complainant's DD214, his

military awards, and his testimony about his time surveying Russian aircraft corroborates the recollection of the other witnesses to this meeting. *See* EX 2-3; Tr. at 499. Complainant also credibly testified that his military service involved pursuing Russian aircraft over the North Atlantic. Tr. at 33, 91. How Mr. Ondra transposed Complainant's military service events with the pursuit of Complainant and his father in Russia and Hungary is a mystery to this Tribunal. Second, Mr. Ondra denied that the subject of "Mayday Mark" arose during management's August 9, 2013 pre-meeting. As discussed below, this assertion is not credible. For these reasons, the Tribunal accords limited weight to Mr. Ondra's testimony.

Captain McDonald's testimony concerning the purpose of the 15D evaluation also deserves little weight. He denied discussing with Mr. Ondra that the purpose of the evaluation was to obtain a psychological evaluation. Tr. at 670. This testimony contravenes the evidence and common sense. First, there is no evidence in the record that Complainant had any sort of physical malady, which suggests that the 15D evaluation related to a psychological, not a physical, issue. Second, Captain McDonald admitted that Mr. Ondra expressed concerns to him about Complainant's fitness for duty and mental state following the August 9, 2013 meeting. Captain McDonald testified that he trusted Mr. Ondra's judgment and specifically supported Mr. Ondra's opinion that Complainant should undergo some sort of evaluation. Further, Captain McDonald cited Complainant's emails in raising his own reservations about Complainant's "situational awareness," which reaffirmed his initial concerns. Tr. at 644-45. For example, upon receiving Complainant's August 4, 2013 email, Captain McDonald found it "a bit unusual and curious." Tr. at 640. Therefore, although Captain McDonald may not have made the final call regarding the 15D evaluation, he certainly had knowledge of Mr. Ondra's concerns about Complainant's mental state, which in turn validated his own concerns. Third, Mr. Ondra's contemporaneous notes about his conversation with Captain McDonald clearly convey an intent to obtain a psychological evaluation, most notably the reference to an aeromedical advisor at the top of the first page of his notes. *See* JX-3. One can call it whatever one wishes, but Respondent's management desired to subject Complainant to a psychological evaluation and a 15D evaluation represented the first step of that process. Finally, Respondent itself, when drafting its "reasonable basis" for referring Complainant for a 15D evaluation, only referenced mental health issues. *See* CX-25. It is disingenuous to argue that Respondent made this referral for any other purpose than to seek a psychological evaluation. Due to the disparity between Captain McDonald's testimony and the weight of the record evidence, this Tribunal finds his testimony on this issue not credible.

B. Complainant's *Prima Facie* Case

1. Whether the Parties are Subject to the Act

AIR 21 applies only to air carriers, or contractors or subcontractors of air carriers. 49 U.S.C. § 42121(a). Respondent is an air carrier that conducts its operations under 14 C.F.R. Part 121 and the Complainant works as a captain for Respondent. Further, Respondent concedes that it is subject to the Act. *See* Tr. at 7. Thus, the parties are subject to Act and Complainant has established this element.

2. Whether the Complainant Engaged in Protected Activity

Under the Act, no air carrier, or contractor or subcontractor of an air carrier, may discriminate against an employee because the employee:

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a)(1)-(4).

The Board has explained, "As a matter of law, an employee engages in protected activity any time [h]e provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable." *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-009, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C.A. § 42121(a)) (emphasizing, "an employee need not prove an *actual* FAA violation to satisfy the protected activity" provided that the employee's report concerns a federal law related to air carrier safety and the employee's belief that the violation occurred is subjectively and objectively reasonable.) (emphasis in original)).[45]

Thus, the "complainant must prove that he reasonably believed in the existence of a violation," and the reasonableness of this belief has both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, ALJ No. 2013-AIR-016, slip op. at 5 (Jan. 21, 2016). Regarding the former, "To prove subjective belief, a complainant must prove that he held the belief in good faith." *Id.* Regarding the latter, the Board explained, "To determine whether a subjective belief is objectively reasonable, one assesses a complainant's belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.* (evaluating the reasonableness of belief of the *Burdette* complainant, a pilot, against that of a pilot with similar training and experience) (internal quotation marks omitted).

[45] Moreover, that "management agrees with an employee's assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee's disclosure was objectively reasonable." *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 5-6 (Nov. 5, 2013); *see also Sewade*, ARB No. 13-098 at 8 ("When an employee makes a protected complaint, the employer's response (positive or negative) does not change that AIR 21 protected activity has occurred").

However, the Board observed, "mere words do not create an FAA violation when the parties' actual conduct does not violate FAA regulations." *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 6 (June 30, 2010). Though the complainant "need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety)." *Malmanger*, ARB No. 08-071 at 9.

Similarly, "once an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity." *Id.* at 8 (internal quotation marks omitted) (holding that the complainant did not engage in protected activity since he knew that his concerns had already been resolved at the time he complained to management and "did not reasonably believe that safety violations existed at the time he made his complaint"). *Id.* at 10.[46]

The communication of safety related issues to "other authorities" can constitute a protected activity only if the employee has a subjectively and objectively reasonable belief that a violation occurred. *Sewarde,* ARB No. 13-098, at 7-8(citing 49 U.S.C. § 42121(a)). Further, the Act does not require Complainant to have actually communicated with the FAA prior to sending the email in order for this action to constitute a protected activity. Title 49 U.S.C. § 42121(a)(1) extends protection to those who are *about to provide* information relating to any violation of the FAA.

Discussion of Protected Activity

Here Complainant alleges that, on three occasions, he engaged in protected activity: 1) his refusal to depart Laredo, Texas for Memphis, Tennessee because of hazardous weather conditions on April 10, 2013; 2) his April 29, 2013 OSHA complaint; and 3) his communication to Respondent during the August 9, 2013 meeting that Respondent's cargo practices encourage and incentivize the introduction of explosives on to its aircraft by terrorists. Compl. Br. at 2, 12.

In the Tribunal's 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), it ruled that Complainant's refusal to depart Laredo, Texas on April 10, 2013 and his April 29, 2013 OSHA complaint constituted protected activities. The reasoning contained in that Order is hereby incorporated into this decision.[47] However, the issue of whether Complainant's communications on August 9, 2013 constituted protected activity must still be addressed.

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 the dissemination of aircraft and package tracking information to the public. Mr. Ondra agreed that Complainant's concerns were rational. Tr. at 601. Respondent argues that the package tracking

[46] *See also Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-063, slip op. at 9 (June 30, 2008); *Williams v. U.S. Dep't of Labor*, 157 Fed. App'x 564, 570 (4th Cir. 2005); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-020, slip op. at 1 (Nov. 12, 1996).

[47] *See* 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 15-17.

information it disseminates does not disclose the whereabouts of the package and that the release of the aircraft tracking data to certain third parties is beyond Respondent's control. Resp. Br. at 15, 27.

To be protected activity, the information provided or is attempted to be provided has to relate to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable. *Sewarde, supra.* Although a package believed to contain an explosive and later placed on an aircraft seems to indicate a security related matter, Complainant has not established that he subjectively and objectively believed a violation of a federal law related to air carrier safety to have occcured. Complainant may well be correct that the use of 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.

Respondent, as a cargo-only air carrier, accepts and transports explosives as part of its normal business activity,[48] and carrying properly declared explosives is not a violation of air carrier safety. *See* 49 C.F.R. Parts 171, 172, 175 and § 1544.205. As a captain for an all-cargo air carrier for decades, Complainant is fully aware that Respondent routinely carries hazardous materials (also called Dangerous Goods) [49] and each flight that carries such must be accompanied by a hazardous material manifest called a Notice to Pilot in Command (NOPIC). 49 C.F.R. § 175.33. This document describes the hazardous material onboard and its stowed location on the aircraft. *See* 49 C.F.R. §§ 175.33, 175.75, and 175.78. Therefore, the transportation of explosives on an aircraft in and of itself is not a violation of any federal law or regulation. Instead, only the transportation of improperly declared hazardous material or amounts in excess of that authorized, or undeclared hazardous material that would be a violation. Further, as part of Respondent's pre-flight operations, the flight crew conducts a DG inspection process.[50]

There is a second issue raised under the facts in this case. Do the actions of an all-cargo air carrier that pertain to security fall under the rubric of air carrier safety as referenced in the Act? At first blush, this would seem obvious. However, the Act itself is silent on what is meant by the term "air carrier safety". For an answer, this Tribunal looks to legislation enacted subsequent to the Act, which specifically included the word "security" when setting forth those activities that are protected in other transportation related acts. For example, the Federal Rail Safety Act, 49 U.S.C. § 20109(a)(1) prohibits a railroad carrier engaged in interstate or foreign commerce from taking an adverse action against an employee if such action is "due, in whole or in part, to the employee's" objective and subjective reasonable belief that the information provided "constitutes a violation of any Federal law, rule, or regulation relating to railroad safety *or security*, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be

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[48] *See* http://images.fedex.com/us/services/pdf/Service_Guide_2017.pdf, at 118, 137, 139, 158.

[49] Hazardous material under 49 C.F.R. is called Dangerous Goods (DG) when using the International Civil Aviation Organization's (ICAO) International Air Transportation Association (IATA) Dangerous Goods Regulations. *See generally*, http://www.iata.org/whatwedo/cargo/dgr/Pages/index.aspx . Respondent follows the IATA regulations. *See* http://www.fedex.com/us/service-guide/ship-dg-hazmat/dangerous-goods/index.html. It is authorized to do so per 49 C.F.R. §§ 171.22 – 171.26.

[50] RX-2 (FOM, appendix J [RX-091]).

used for railroad safety *or security*." Similarly the Surface Transportation Assistance Act, 49 U.S.C. § 31105(a)(1) prohibits the discharge of an employee because the employee:

> (A)(i) has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety *or security* regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (A)(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety *or security* regulation, standard, or order;
>
> (B) the employee refuses to operate a vehicle because -
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, *or security*; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety *or security* condition;

(emphasis added).

Unlike the aforementioned statutes, Congress did not include the term "security" in 49 U.S.C. § 42121. Thus, this Tribunal must address whether the Act extends to aviation security matters. To answer this question, this Tribunal has looked carefully at the Act itself. 49 U.S.C. § 42121(a)(1) extends its protections to "information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety *under this subtitle or any other law of the United States*." (emphasis added). The agencies implementing regulations essentially recite this portion of the statute but clarify that the subtitle referenced is subtitle VII of title 49 United States Code. 29 C.F.R. § 1979.102(b). Part A to Subtitle VII is entitled "Air Commerce and Safety." Within Part A is Subpart iii entitled "Safety." Two relevant chapters make up part of Subpart iii, Chapter 447 entitled "Safety Regulation" and Chapter 449 entitled "Security." Chapter 449 contains §§ 44901 to 44946. 49 U.S.C. § 44901(f) requires that "[a] system must be in operation to screen, inspect, or otherwise ensure the security of all cargo that is to be transported in all-cargo aircraft in air transportation and intrastate air transportation…."[51] Oversight of implementing this portion of Title 49 U.S.C. rests with the Transportation Security Administration ("TSA"). 49 U.S.C. § 114(d)(1).[52] As one drills down into the subtitle there is

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[51] The section goes on to provide "as soon as practicable after the date of enactment of the Aviation and Transportation Security Act", Pub. L. 107-71 (Nov. 19, 2001), which was enacted shortly after the September 11, 2001 attacks. This Act also created the Transportation Security Agency and transferred much of the aviation security functions from the FAA to the TSA.

[52] 49 U.S.C. § 114(d)(1) provides:

> **(d)** Functions. The Under Secretary shall be responsible for security in all modes of transportation, including--
>
> > **(1)** carrying out chapter 449 [49 U.S.C. § 44901 et seq.], relating to civil aviation security, and related research and development activities; and
> >
> > **(2)** security responsibilities over other modes of transportation that are exercised by the Department of Transportation.

no question that, by virtue of the near identical language contained in the Act and the implementing regulations, the latter of which puts security matters under the auspices of the TSA, issues pertaining to aviation security of an all-cargo air carrier and disclosures that relate to aviation security of that air carrier are covered under the Act.

Having found that the Act covers aviation security matters, the question now becomes whether Complainant objectively and subjectively believed that reports about the disclosure of package tracking and flight tracking data were violations of aviation security laws or any other federal law.

This Tribunal is not convinced that Complainant reasonably believed that disclosing package tracking and flight data was a violation of any law.[53] From a subjective standpoint, Complainant clearly knew as far back as 2001 and 2002 that Respondent had not removed access to the public of certain package tracking data. Tr. at 90; *see also* CX-15. However, no evidence suggests that any federal agency took action against Respondent for doing so between then and his August 2013 email. Complainant himself cited to reported incidents in 2010, three years prior to his claims, which indicate that U.S. intelligence agencies knew of Al Qaeda's attempts to use Respondent's tracking system for terroristic reasons. *See* CX-12; CX-13. Surely, given this revelation, had the intelligence community believed the disclosure of package and flight data disclosure compromised air safety, the FAA, TSA, or some other federal agency would have alerted Respondent that such disclosure constituted a violation, and Respondent would have been required to address the disclosures shortly thereafter. No evidence in the record suggests that this occurred. More telling, 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. Tr. at 142-44; 534-535; *see also* CX-44.

Complainant raised the issue about how to improve safety of Respondent's aircraft and personnel. But raising a legitimate concern that improves air safety is not the same as raising an issue about a *violation* of an aviation safety or security law or regulation. Mr. Ondra testified that Respondent was aware of the reports that terrorists had attempted to ship undeclared explosive devices on its aircraft and, as Complainant notes in his brief, these incidents were well publicized in 2010.[54] Tr. at 588-93. Mr. Ondra also testified that Respondent was not violating any federal safety law by publishing the information. Tr. at 526-27, 539.

Complainant described his August 2013 communication as a resumption of "his efforts to make [Respondent] fulfill its legal obligations to prevent and deter the introduction of explosive devices into cargo aircraft." Compl. Br. at 14. However, Complainant has failed to articulate how Respondent failed to fulfill its obligations in the first place. Instead, Complainant avers only that a pair of news articles prompted him to alert Respondent's management to the dangers of a terrorist attack on its aircraft. Complainant, and even this Tribunal, might think that there

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[53] Further, Respondent established in its case that an employee could raise a safety and security related matter in a variety of ways. *See* Resp. Br. at 11-12 for a list of those tools available to Complainant. As a 20-year plus captain for Respondent, it is eminently reasonable to conclude that Complainant knows how to raise a safety concern through such channels.

[54] Compl. Br. at 13, n.7.

are ways to improve Respondent's security practices to prevent and deter the introduction of undeclared explosives on to a cargo aircraft, but that does not mean that Respondent was violating any law or regulation about how they were currently conducting its business activities. More to the point, Complainant does not convincingly prove that he believed Respondent violated such a law or regulation. In fact, Complainant himself acknowledged that, in his email, he did not explain that he was reporting a violation of an FAA law or regulation. Tr. at 149.

In an objective sense, making package tracking information and flight tracking information available is well known to the general public, and especially to a pilot of Complainant's stature and experience. *See* CXs-1-3. Surely if such practices represented a violation of FAA or TSA regulations, those agencies charged with aviation safety and security oversight would have addressed the matter at some point over a fifteen-year period since the September 11 attacks, or at least since the highly-publicized 2010 reports referenced by Complainant at CX-12 and CX-13. Based on the foregoing, Complainant has not shown that he had a subjectively or objectively reasonable belief that his August 5, 2013 email and the subsequent August 9, 2013 meeting with Respondent's management constituted protected activities.

Complainant has the burden to establish whether or not his actions were protected activities. Complainant has shown by a preponderance of evidence that his actions at Laredo, Texas on April 13, 2013 and his filing of his OSHA complaint on April 29, 2013 were protected activities. However, Complainant has not demonstrated by a preponderance of evidence that his August 5 and 9, 2013 communications concerning improving Respondent's security of its aircraft were protected activities.

3. Adverse Action

The Act provides, "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee" engaged in protected activity. 49 U.S.C. § 42121(a). In *Vannoy v. Celanese Corp.*, the Board observed, "An adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis." ARB No. 11-044, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, slip op. at 14 (Sept. 13, 2011) (explaining that use of the "tangible consequences standard," rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error). However, the Board clarified, "that *Burlington*'s adverse action standard, while persuasive, is not controlling in AIR 21 cases," but that it is "a particularly helpful interpretive tool." *Menendez*, ARB Nos. 09-002, 09-003 at 15.

The Board has held "that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions." *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated, "Under this standard, the term adverse actions refers to unfavorable employment actions that are

more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it "would deter a reasonable employee from engaging in protected activity." *Id.* at 20.[55] Accordingly, the Board views "the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline." *Williams*, ARB No. 09-018 at 10-11. The Board further observed that "even *paid* administrative leave may be considered an adverse action under certain circumstances." *Vannoy*, ARB No. 11-044 at 14(emphasis in original) (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ Case No. 1995-ERA-078, slip op. at 4-5 (Apr. 20, 1998) (holding that "although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus."). However, this does not mean that every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.

Discussion of Adverse Action

This Tribunal ruled in its Order Granting in Part Summary Decision that Complainant was subject to an adverse actions when Respondent originally placed Complainant on NOQ status on August 5, 2013, placed him on NOQ status again on August 9, 2013, and compelled Complainant to submit to a 15D evaluation. This Decision again incorporates the Order Granting in Part Summary Decision into this Decision.[56] Thus Complainant has established this element.

4. Contributing Factor Analysis

Finally, Complainant must demonstrate that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). The Board has held that a contributing factor is "any factor which, alone or in

[55] *See also Williams*, ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases:

> To settle any lingering confusion in AIR 21 cases, we now clarify that the term "adverse actions" refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term "discriminate" is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress.

[56] *See* 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 20-22.

connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09-092, ALJ No. 2008-STA-052, slip op. at 6 (Jan. 31, 2011). The Board has observed, "that the level of causation that a complainant needs to show is extremely low" and that an ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons." *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ No. 2014-FRS-154, at USDOL/OALJ Rptr, page 15 (Sept. 30, 2016). Therefore, the complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity." *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 8 (May 31, 2013)(internal quotation marks omitted). Put another way, "did the protected activity play a role, *any* role whatsoever, in the adverse action?" *Palmer*, ARB No. 16-035, at USDOL Rptr, page 21.

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7(Feb. 29, 2012). Though "[t]emporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of making a *prima facie* showing of knowledge and causation," and "may support an inference of retaliation, the inference is not necessarily dispositive." *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-012, slip op. at 7 (Dec. 31, 2007). "Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (Apr. 28, 2006). "The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity." *Palmer*, ARB No. 16-035, at USDOL Rptr, page 56.

Discussion of Contributing Factor Analysis

There are two protected activities in this case: Complainant's refusal to fly on April 10, 2013 and his OSHA Complainant filed April 29, 2013 – a complaint he later withdrew.

There are three adverse actions that are established in this case: the initial NOQ on August 5, 2013, the second NOQ on August 9, 2013, and the imposition of the 15D evaluation process.

All three of the adverse actions revolve around Complainant's communications that occurred on August 5, 2013 via email and August 9, 2013 at an in-person meeting with Respondent's management. Complainant argues that the "temporal proximity" between the April 10, 2013 Laredo flight and the August 2013 adverse actions creates an inference that link the two events. Compl. Br. at 17-18. This contention ignores the intervening events that occurred on August 5 and 9, in response to Complainant's August 4 email that prompted the NOQs and 15D evaluation process.

The evidence before this Tribunal shows that no Respondent member had an issue with Complainant's refusal to fly through the severe weather on April 10, 2013.[57] The issue for Respondent's management personnel was Complainant's failure to arrive at the airport one hour prior to his departure time at Laredo.[58] Respondent is in a business where minutes matter. Time is a perishable commodity, so one would expect that Respondent's personnel would be attuned to minimizing any delays associated with weather. However, the evidence before this Tribunal establishes Complainant's obligation to report to the airport one hour prior to departure to prepare the aircraft for flight. Complainant concedes that he was not at his assigned place of duty because he opted to stay at the hotel. Tr. at 130. Complainant has not presented any evidence that he had permission or authority to do this. This action differs from his protected activity of refusing to fly. In particular, Respondent's flight operations manual mandates that its pilots arrive one hour before departure to perform interior checks of the airplane. Tr. at 311, 712; *see also* RX-1. If anything, Complainant's failure to comply with this procedure undermines air safety, rather than strengthens it through any sort of whistleblowing, because his absence prevented him from ensuring that the plane was prepared for takeoff in case the weather improved. Moreover, Respondent has a right to enforce its policies about requiring a pilot to show at his appointed place of duty. As a consequence of Complainant's absence, Respondent conducted an investigation and Captain Fisher determined that there was a miscommunication between the Complainant and Respondent's GOC members. But Captain Fisher also admonished Complainant not to do that again. Tr. at 352-53, 638.

There is little, if any, evidence that the adverse actions described above relate to Complainant's actions back in April 2013. The only potential evidence of some sort of link is the allegation that Captain McDonald was angry that Complainant was not disciplined for his conduct at Laredo, a tenuous argument at best.[59] The overwhelming evidence about the adverse actions that took place in August 2013 pertains to Complainant's August 4, 2013 email and the perception of events that occurred during the August 9, 2013 meeting. Tr. at 322, 361, 391-393, 429, and 432-434; *see also* CX-11, RX-14. While this Tribunal does not find that the April 2013 incident was a contributing factor to the August 2013 adverse action, it is troubled by how Respondent handled that matter.

Respondent initially placed Complainant on NOQ status as a direct result of his August 4, 2013 email to Captain McDonald and to ensure his presence at a meeting set for a couple of days later. The mechanism the Respondent used to ensure Complainant's presence for this meeting is of little note to this Tribunal, although Complainant raised it as an issue.[60] This Tribunal sees no evidence that Respondent's use of NOQ status represented an attempt to punish or harass Complainant. Though this Tribunal deems NOQ status as an adverse action because of

[57] *See* Tr. at 257-58, 284-86, 310-14, 320, and 677.
[58] *See* Tr.at 130, 262-63, 284-85, 310-15, 320, 352-53, 637, 677-78 and 712.
[59] Captain McDonald specifically denied any displeasure and indeed expressed his satisfaction with the results of the May 1, 2013 meeting concerning the April 10, 2013 incident. Tr. at 638. Captain Fisher similarly testified that Captain MacDonald did not instruct him to discipline Complainant. Tr. at 319.
[60] This Tribunal will not second guess the ministerial mechanism used by Respondent to ensure Complainant's presence at this meeting, especially when Complainant has presented no evidence Respondent used this protocol for improper means; Respondent also paid him while on NOQ. Tr. at 149, 642.

the ancillary consequences of the status, the reason for this action had nothing to do with a protected activity, but solely to coordinate a meeting.[61] This Tribunal acknowledges that Complainant did not ask for a meeting with Respondent's management, but wanted to discuss a matter with Respondent's CEO. However, it is quite reasonable that Complainant's chain of command would want to evaluate Complainant's concerns to determine whether they merit the attention of the CEO and that such a process may have taken an undetermined amount of time.[62] Complainant's error appears to be that he assumed that his close association with upper management in the business a decade prior translated to greater access in his current situation.

Immediately prior to the August 9, 2013 meeting with Complainant, Respondent's representatives gathered for a pre-meeting. During this 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. Tr. at 452, 485; *see also* RX-29, RX-31. In fact, Mr. Tice brought copies of "Mayday Mark's" postings to the meeting and presented them to Complainant. Tr. at 94 and 453; *see generally* CX-21. Mr. Ondra left the meeting prior to the discussion of "Mayday Mark". Tr. 434, 553, 586-87. Because Mr. Ondra departed before the group broached the subject of "Mayday Mark," he could not have learned of this subject during the meeting, but may have learned of it during the pre-meeting. Mr. Ondra's notes that make reference to "Mayday Mark" corroborate this version of events. JX-3. This suggests that Respondent's management discussed "Mayday Mark" early in Mr. Ondra's notetaking and before the meeting began.[63] However, despite his own notes reflecting otherwise, Mr. Ondra denied that the subject of "Mayday Mark" was discussed prior to the meeting with Complainant. Tr. at 584. This further undercuts his credibility.

Following the meeting, Mr. Ondra contacted Captain McDonald and expressed concerns about his observations from the meeting.[64] Captain McDonald was not present for this meeting.[65] The marked difference between Mr. Ondra's recollection of what transpired during the meeting as compared to that of the other persons who actually participated in the entire meeting troubles this Tribunal the most. Further, Mr. Ondra had left the meeting prior to learning that Complainant was not "Mayday Mark" and it appears that Mr. Ondra did not convey this fact to Captain McDonald during their conversation. Because Captain McDonald was not aware of this fact at the time he directed Captain Fisher to place Complainant back on NOQ

[61] Complainant himself acknowledged that the August 4, 2013 email was not a protected activity. Tr. at 149.

[62] Captain McDonald explained that the "NOQ status is open-ended. When I have a – when I'm trying to set something up when I don't know how long it's going to take, the NOQ status would let crew scheduling know that he's unavailable at this period of time until such time as, in this case, the meeting was complete and until he is returned to line operation status, until the NOQ is removed." Tr. at 642-43.

[63] Mr. Tice, Respondent's labor attorney, also noticed that Mr. Ondra's notes reflect "Mayday Mark" at the top of CX-3. *See* Tr. at 487.

[64] Mr. Ondra called Mr. Tice later in the day. Mr. Tice expressed his view of Complainant as an unusual person, but he "didn't have any safety of flight concerns." Tr. at 437. However, Mr. Ondra did and he wanted to know if the collective bargaining agreement provided for a way to have Complainant checked out. *Id.*

[65] Complainant, Captain Fisher, Mr. Tice, and Mr. Ondra attended the meeting. *See also* Tr. at 95.

status, it would seem that he made this decision based on incomplete information.[66] Indeed, Mr. Ondra did not recall conveying any mention of "Mayday Mark" to Captain McDonald, only anecdotes shared by Complainant such as references to his time in Russia and Auburn Calloway, formed the basis of his recommendation to evaluate him. Tr. at 571-72, 579-80. Unfortunately, these facts when, communicated to Captain McDonald, likely had a cascading effect on events resulting in the 15D evaluation discussed later. At the time of this decision and his call to Complainant, Captain Fisher, a person that actually participated in the entire August 9 meeting with Complainant, was not completely convinced that placing Complainant back on NOQ was an appropriate action to take. Tr. at 402. Yet his boss, Captain McDonald, who did not have complete knowledge of what transpired at the meeting, had made the decision despite Captain Fisher's reservations. Tr. at 329-30.

Under the collective bargaining agreement ("CBA"), the Vice President of Flight Operations, the System Chief Pilot, a Regional Chief Pilot, or a Chief Pilot, but not Security personnel possesses the authority to direct a 15D evaluation. *See* JX-6 (¶ 15.D.1). In August 2013, Captain McDonald was the System Chief Pilot and Captain Fisher's boss who in turn was Complainant's boss. Tr. at 319. Yet all the evidence in the case suggests that, despite the CBA, Captain McDonald represented the deciding official in name only because he merely deferred to the recommendation of Mr. Ondra, whose recollection of events simply is not supported by the weight of the record evidence. *See* Tr. at 645. Captain McDonald, as the deciding official on the issue of directing a 15D evaluation, relied upon information about Complainant that was simply wrong. No credible evidence suggests Complainant made bizarre claims of being chased by Russians as a youth, or being imprisoned in Hungary, as alleged by Mr. Ondra.[67] When this Tribunal asked Complainant, he credibly testified that he never lived outside the United States. Tr. at 195-196. To aggravate matters, Mr. Ondra conducted no investigation into the veracity of any of Complainant's claims or his background. Tr. at 602-03. He testified that he based his concerns about Complainant's mental health solely on Complainant's comments during the August 9, 2013 meeting and the August 4, 2013 email that preceded it. Tr. at 571-72. Captain McDonald recalled the substance of what Mr. Ondra communicated to him that prompted the road to a 15D evaluation:

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[66] Captain McDonald may not have known that Complainant was not "Mayday Mark." According to Mr. Tice, the concern about "Mayday Mark" was not his reporting of the Laredo incident, but that that this pilot may have suffered a stroke or seizure. Tr. at 436, 482; *see also id* at 482-84. During the meeting, Captain Fisher realized that Complainant was not "Mayday Mark" because "Mayday Mark's" flight physical happened in November while Complainant's flight physical occurred in January. Tr. at 95. Mr. Tice confidently believes he relayed the information that Complainant and "Mayday Mark" were not the same person to Captain McDonald according to testimony, but the record is silent as to when that occurred. *See* Tr. at 485.

[67] Mr. Tice had no recollection of Complainant making reference to Russia or Russians, but had a vague recollection, about a reference to the North Atlantic. Tr. at 496-499. Captain Fisher could not recall if Complainant alluded to Russians chasing him or time spent in prison as a youth. Tr. at 325, 379-81. It strikes this Tribunal as unusual that other witnesses could not recall such statements, if they were ever made, given their unique nature. These are not the vanilla types of events or stories one could easily forget, and the fact that Mr. Tice and Captain Fisher could not recall them enhances this Tribunal's belief that Complainant did not make these representations. It is far more likely and plausible that Complainant's testimony referenced his military experience and this Tribunal so finds.

> He was concerned about his mental state, and that there were some -- a number of times where he was concerned about the issues that he had raised, specifically relating to Auburn Calloway, the potential passing of operational information to Al Qaeda, and the desire to have his cell wiretapped.

Tr. at 644.

This testimony ignores the statement about being "chased by Russians," in fact Captain McDonald testified that he had no collection of Mr. Ondra invoking Russia, and focused on the events of incidents that occurred two decades ago. Tr. at 683. In this day and age, raising the issue of terrorists and their potential nefarious activities does not equate to presenting as unfit for duty. Further, fitness for duty is not within the expertise of security personnel, and Respondent presented no evidence that Mr. Ondra had any particularized expertise in that area. After reviewing the "Mayday Mark" postings, Captain McDonald asked Mr. Tice to query Complainant about this issue. Tr. at 701. This issue was settled at the August 9, 2013 meeting. But Captain McDonald testified that he had his "initial concerns about [Complainant's] situational awareness, as portrayed in his e-mails." Tr. at 645. And after speaking with Mr. Ondra, a man whose judgment he trusts, he accepted Mr. Ondra's recommendation to send Complainant to a company-mandated medical evaluation.[68] Tr. at 645-46. The term "situational awareness" strikes this Tribunal as about as vague a term as one could provide in explaining his rationale. Respondent provided no explanation or elaboration whatsoever what Captain McDonald meant by this vague term and probably for good reason. Indeed, Respondent presented Captain McDonald's testimony to explain the flight operations manual and the 15D evaluation process in general, rather than information specific to Complainant. This Tribunal agrees that one could consider it odd to have someone ask the CEO to call him. However, this line of thought ignores the evidence of the informal culture fostered by Respondent's CEO, especially during Respondent's formative years – years in which it employed Complainant.[69]

Respondent attempts to cloak its decision to require Respondent to undergo a 15D evaluation as standard practice, arguing that it "routinely utilizes the 15D process when it has a reasonable basis to question a crew member's fitness for duty" and it "was acting in what it believed was the best interest of the overall safety of the airline." Resp. Br. at 31. This Tribunal does give some deference to Respondent's actions because of its belief that it acted in the best interest of safety in air commerce. However, it does not give deference for its actions insofar as it led to the conclusion that found Complainant unfit for duty. Complainant time and again

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[68] Captain Fisher explained in an August 16, 2013 email:

> It may very well be that [Complainant] is medically fit for flight duty. However, as you know, [Respondent] and all other U.S. airlines are required to conduct their air operations to the highest degree of safety in the public interest. Mr. Ondra has extensive experience in security matters. Largely at Mr. Ondra's urging, [Respondent] Flight Management has determined that in the interest of flight safety, [Complainant] should be referred to the [Respondent's] aeromedical advisor for an evaluation of his fitness for duty.

RX-15.

[69] For example, Complainant recounted Mr. Smith's involvement with the families of the pilots injured during the Calloway incident in 1994 and Mr. Smith's preference for Complainant to call him by his first name, Fred. *See* Tr. at 97-98.

asked Respondent to articulate the "reasonable basis" for its decision to subject Complainant to this process, a very reasonable request. *See* CX-27; CX-29. Yet Respondent ignored these requests because Complainant's lawyer, as opposed to a union lawyer, inquired.[70] The optics of this policy reflect a disingenuous approach, enabling Respondent to avoid having to explain its actions.[71] Had Respondent been required to do so, it might have actually stumbled across the weakness of its position.

Captain McDonald further exacerbated this perception. During the hearing, Captain McDonald denied that he discussed with Mr. Ondra his plan to refer Complainant for a psychological evaluation. Tr. at 669-70. The Tribunal finds his explanation unconvincing. He claimed that the aeromedical advisor who he sent Complainant to would make that determination. However, and as pointed out during cross-examination, Mr. Ondra's contemporaneous handwritten notes from the pre-meeting tell a different story, which read: "Per B. McDonald Off line, send to aeromedical to see warrants a psychological examination." JX-3; Tr. at 669. The Tribunal notes that although Mr. Ondra testified at the hearing to Complainant's manner as "a little bit manic," three years after the meeting took place, his contemporaneous handwritten notes do not corroborate this characterization, nor do they appear to comment on Complainant's disposition during the hearing at all. As such, this Tribunal places little weight on Mr. Ondra's testimony regarding Complainant's temperament during the meeting. Moreover, Captain McDonald did not send Complainant for a physical evaluation and there is no evidence in the record that warranted a physical evaluation. Even more telling, Captain McDonald contradicted his own testimony that he did not discuss a psychological examination with Mr. Ondra when he stated that "We discussed the possibility of having a medical evaluation. Mr. Ondra wanted some type of mental psychological evaluation." Tr .644-45. Finally, Complainant testified that Dr. Bettes admitted to Complainant that Respondent instructed him perform a psychiatric evaluation. Tr. at 109. Therefore, for all practical purposes, the request for the aeromedical evaluation represented a means to Respondent's ends for Complainant to undergo a psychological evaluation.

Captain Fisher, with the assistance of Mr. Tice, drafted a document setting forth the reasons for the 15D evaluation, at Dr. Bettes' request. Tr. at 377; RX-15. Captain Fisher did not speak to Mr. Ondra about the rationale provided. Tr. at 377-78. In the document, Captain Fisher cited Complainant's request for an email correspondence with Respondent CEO Fred Smith, his reference to Auburn Calloway, his 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. *See* JX-5, RX-15. However, Captain Fisher did not disclose all of Respondent's reasons for seeking a psychological evaluation. At the hearing,

[70] Mr. Tice testified that Respondent has a practice of providing the basis for its 15D referrals to the union that represents the pilots, "When they ask." Tr. at 444.

[71] Mr. Tice seems to indicate that Respondent does not have an established procedure for handling outside counsel when he testified that, "we had a back-and-forth about the proper way to have a grievance on file." Tr. at 443. In the end, Mr. Tice justified his decision not to provide the reasonable basis to Complainant's counsel because he "did not see any value in continuing a war of words with [Complainant's counsel] at that point. The company had made the decision to have a 15D exam. We were going to follow through with it, regardless of what the outside attorney might think about it." Tr. at 443-444.

Captain Fisher acknowledged that he told Complainant during an August 9 telephone call with Complainant in which he placed Complainant back on NOQ, that the reason was "he knew too much." *See* Tr. at 113, 328-29, 396. However, he described it as "a regrettable comment" made at the end of a very long day and exhausting day. Tr. at 396.

Based upon the reasonable bases letter written by Captain Fisher and Mr. Tice, a letter with no input from either Captain McDonald or Mr. Ondra, Respondent instructed Complainant to report to Dr. Bettes for a 15D evaluation. *See* RX-5.

Respondent argues that the reasonableness of its decision to subject Complainant to a psychological evaluation[72] is established by Dr. Glass's findings. As such, a careful review of those findings is warranted. Dr. Glass subjected Complainant to a Minnesota Multiphasic Personality Inventory-2 and issued an Axis I "diagnosis" of "Rule-out Depression."[73] Dr. Glass opined that Complainant "might benefit from some relatively brief" therapy and concludes with the following:

> While I suspect that he could technically continue flying, his personality issues and behavior are such that I suspect that others will not want to fly with him, and he is so inappropriate that he may create problems for himself and the company, while he feels he is helping others.

[72] The FAA provides detailed requirements for psychiatric evaluations for pilots. They must be performed by a board-certified psychiatrist and the report must include *at a minimum* the following:

- A review of all available records, including academic records, records of prior psychiatric hospitalizations, and records of periods of observation or treatment (e.g., psychiatrist, psychologist, social worker, counselor, or neuropsychologist treatment notes). Records must be in sufficient detail to permit a clear evaluation of the nature and extent of any previous mental disorders
- A thorough clinical interview to include a detailed history regarding: psychosocial or developmental problems; academic and employment performance; legal issues; substance use/abuse (including treatment and quality of recovery); aviation background and experience; medical conditions, and **all** medication used; and behavioral observations during the interview.
- A mental status examination.
- An integrated summary of findings with an explicit diagnostic statement, and the psychiatrist's opinion(s) and recommendation(s) for treatment, medication, therapy, counseling, rehabilitation, or monitoring should be explicitly stated. Opinions regarding clinically or aeromedically significant findings and the potential impact on aviation safety must be consistent with the Federal Aviation Regulations.

See https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/dec_cons/disease_prot/psycheval/

[73] For Axis II, Dr. Glass opined: "Not specified, but probably an issue." Similarly this does not seem like a diagnosis and, even if considered one, it is a very inartful one. Moreover, Axis II concerns identification of personality disorders, mental retardation, and may also be used for noting prominent maladaptive personality features. *See* DSM-IV TR (2000), at 28.

RX-3.

First, the term "rule-out" is a loose term of art used by some in the medical profession; there is no "rule out" modifier in the DIAGNOSTIC STATISTICAL MANUAL (DSM-5).[74] This term refers to a suggested diagnosis, not a definitive one, and must be "ruled out". *See* F.A. Davis, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 2057 (21st ed. 2009)(defining "rule out"; "In medicine, to eliminate one diagnostic possibility from the list of causes of a patient's presenting signs and symptoms."); *see also* http://www.medicinenet.com/script/main/art.asp?articlekey=33831 (Rule out: "Term used in medicine, meaning to eliminate or exclude something from consideration.)[75] The more correct term would be provisional, which "can be used when there is a strong presumption that the full criteria will ultimately be met for a disorder but not enough information is available to make a firm diagnosis." DSM-5, at 23. Further, a formal diagnosis could include modifying terms such as not otherwise specified (NOS), unspecified, or diagnosis deferred. DSM-5, at 23.[76] Given the aforementioned definition of "rule-out," Dr. Glass may suspect that Complainant might have depression but he has *not* rendered an opinion that he *is* clinically depressed.

Next, Dr. Glass opines that Claimant *might* benefit from *some* relatively *brief* therapy. At a minimum, given all the qualifiers to this opinion, it causes one to question Dr. Glass's level of confidence in this assertion. Further, this Tribunal would dare say that any mental health profession would opine that any individual *might* benefit from *some* brief therapy. Of note, Dr. Glass did not recommend any sort of medication.

Finally, Dr. Glass acknowledges that Complainant "could technically continue flying", but he posits that others will not want to fly with him. There exists an easy way to discover if that is, in fact, true. An air carrier or the pilots' union for that air carrier commonly have a pilot "avoid list", in which a pilot requests not to fly with another crewmember for one reason or another. *See generally, Caban v. Delta Airlines, Inc.*, 2011 U.S. Dist. LEXIS 159160, slip op. at *36 (N.D. Ga. Aug. 8, 2011). Respondent presents no evidence or even hints at the notion that Complainant had any sort of problem with other crewmembers. Had this been so, surely Respondent would have raised the issue at some point in this litigation.

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[74] *See* DIAGNOSTIC STATISTICAL MANUAL OF MENTAL DISORDERS - 5 (2013).

[75] *See Carrasco v. Astrue*, 2011 U.S. Dist. LEXIS 12637, slip. op. at *12 (C.D. Cal. Feb. 8, 2011)("A 'rule-out' diagnosis is by no means a diagnosis. In the medical context, a 'rule-out' diagnosis means there is evidence that the criteria for a diagnosis *may* be met, but more information is needed in or to rule it out.")(emphasis in original); *Langford v. Astrue*, 2008 U.S. Dist. LEXIS 39294, slip op. at *12 n. 5 (E.D. Cal. May 13, 2008)("Rule-out diagnoses merely indicate that additional testing or observation are required in order to establish the true diagnosis."); *Simpson v. Commissioner*, 2001 U.S. Dist. LEXIS 4395, slip op. at *26 (D. Or. Feb. 8, 2001)("'Rule-out' simply means that a particular diagnosis is neither ruled in nor ruled out by the examining physician."). *See also U.S. v. Grape*, 549 F.3d 591, 593 n. 2 (3rd Cir. 2008)("A 'rule-out' diagnosis, according to [the doctor's testimony] means there is 'evidence that [the patient] may meet the criteria for that diagnosis, but [the doctors] need more information to rule it out.' In other words, there is reason to suspect the presence of a 'rule-out' … disorder, but the doctor would not be comfortable giving such a diagnosis at that time.").

[76] Furthermore, the DSM-5 which came into effect in 2013, no longer uses the multi-axial system. However, this Tribunal notes that both Dr. Glass and Dr. Green used such in their medical reports. *See* DSM-5, *supra*, at 16.

The mental health requirements for issuance of an airman's first class medical are set forth in 14 C.F.R. § 67.107. Possession of a first class airman certificate is required to exercise the privileges of an airline transport pilot certificate, the certificate Complainant held, and must be current for Complainant to fly Respondent's aircraft. 14 C.F.R. § 61.23(a)(1); Tr. at 196.

The requirements provide four mental health standards for issuance of a first class medical certificate. The pilot cannot have an established medical history or clinical diagnosis, if any, of the following: a personality disorder that is severe enough to have repeatedly manifested itself by overt acts; a psychosis; a bipolar disorder; or substance dependence. 14 C.F.R. § 67.107(a). The Aviation Medical Examiners (AME) Guide (2017)[77] sets forth additional guidance concerning psychiatric conditions. The AME guide does state that, in some instances, minor depression may warrant denial or deferral of issuance of an airman's medical certificate. *Id.* at 156. However, assuming *arguendo* that Complainant had been actually diagnosed with minor depression, the AME guide also provides that if it is stable, resolved, with no associated disturbance of thought, no recurrent episodes, and did not include use of psychotropic medications, the AME could issue a pilot his certificate. *Id.* at 172. Here, Dr. Glass did not formally diagnose Complainant with depression. The absence of a formal diagnosis calls into question Respondent's assertion that Dr. Glass's report supports Dr. Bettes' determination of Complainant's fitness for duty, as well as its reasonable basis for the 15D referral. Resp. Br. at 31. This argument also ignores that doctors both before and after Dr. Glass' evaluation concluded that Complainant had no fitness for duty issues. *See* RX-4 (Report of Dr. Green, a board-certified psychiatrist, opining "Axis I: None"); RX-5 (Report of Dr. Leonard, an AME for 31 years, finding "no psychological issue that should be of any concern regarding [Complainant's] medical qualification as a pilot"); RX-6 (Report of Dr. Nugent, an FAA Senior Aviation Medical Examiner, finding his examination entirely unremarkable, with no concerns regarding his fitness for duty during a July 9, 2013 examination).

In short, this case is the poster child for overreliance on a security recommendation without questioning the underlying rationale. Particularly, Captain McDonald's blind trust of Mr. Ondra's judgment was misplaced. Mr. Ondra did not represent the paradigm of thoroughness one would expect of a security department official before placing the very livelihood of an experienced pilot in jeopardy.[78] Unquestionably, an air carrier's security department has an obligation to protect the company, but the company has an obligation not to blindly follow recommendations merely because the company's security itself is questioned.

[77] Available at https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/media/guide.pdf.

[78] Captain McDonald's ignorance of the facts does not automatically exonerate Respondent. Had the evidence established that Mr. Ondra possessed an intent to retaliate, and his discussion with Captain McDonald influenced him to place Complainant back on NOQ status and assign Complainant to undergo the 15D evaluation, Respondent could have been found to have had discriminatory intent and liable to Complainant. *See Staub v. Proctor Hospital*, 562 U.S. 411, 422, 131 S. Ct. 1186, 1194 (2011). Mere knowledge of Complainant's protected acts is not enough to establish Respondent's liability, but had Complainant shown intent on the part of Mr. Ondra to cause Captain McDonald to impose the NOQ and subject him to a 15D examination, that may have sufficed to overcome Captain McDonald's lack of knowledge of Complainant's protected activities.

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. Respondent referenced the Germanwings incident[79] in support of its argument for deference in the manner it proceeded. The cases differ in several important respects. Namely, no evidence exists that suggests Complainant or his treating physician withheld information from Respondent about his mental health. Sending someone for a mental health evaluation merely because his statements are odd or because one "knew too much" is a slippery slope that must be guarded against. Respondent treads on thin ice by offering such a flimsy justification for referring Complainant to a mental evaluation in this case. Complainant was well justified to raise his concerns and object to Respondent's actions.

Based upon the information communicated to Captain McDonald, the Tribunal finds that he had non-retaliatory reasons to question the fitness of Complainant. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16035, 2016 WL 5868560, at *33 (Sept. 30, 2016). Respondent's Director of Security had represented to him that Complainant made strange statements and exhibited odd behavior. In the world of aviation, any responsible operator must err on the side of safety; there is just too much at stake at 30,000 feet traveling at 500 miles per hour to do otherwise. While Captain McDonald's deference to the information provided by Mr. Ondra to him was not at all unreasonable, the inaccurate information unfortunately had a profound impact on Complainant.

However, absent retaliatory conduct stemming from protected activity on the part of Respondent, its treatment of Complainant does not fall under this Tribunal's purview. As the Courts have stated, "federal courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions." *Gunderson v. BNSF Ry.*, 2017 U.S. App., slip op. at 16 LEXIS 4258 (8th Cir. Minn. Mar. 10, 2017); *Kuduk v. BNSF Ry,* 768 F.2d 786, 792 (8th Cir. 2014); *see also Ransom v. CSC Consulting, Inc.* 217 F.3d 467, 471 (7th Cir. 2000); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988). Here, Respondent's treatment of Complainant resembles more of an over-reaction in response to Complainant's demonstrated knowledge of security issues than a disciplinary matter rooted in protected activity. For example, various individuals testified to the sensitivity within Respondent's business culture about Auburn Calloway, a former employee who attempted to hijack one of Respondent's planes and permanently disabled the flight crew. Even the mere mention of this man raised concern. Mr. Ondra described it as one of the most traumatizing incidents in Respondent's history. Tr. at 602. Mr. Tice acknowledged that the incident had an enduring impact on Respondent's operations. Tr. at 505. Against this backdrop, Complainant suggested the similarity in tactics used by Mr. Calloway in 1994 and Al Qaeda in 2010, which surely elevated Respondent's concern. Complainant argues Respondent's actions demonstrated animus. *See* Compl. Reply Br. at 15-16. However, this Tribunal finds this more of an over-reaction to his comments in a hyper-vigilant atmosphere, than any type of animus towards Complainant. Respondent's adverse actions stemmed from the events from August 2013, which this Tribunal deemed not to be

[79] Germanwings Flight 9525, a Lufthansa A320, was intentionally crashed into the French Alps by a first officer. Though the first officer made the company aware of his condition, his physicians did not alert aviation authorities of his treatment for fear of running afoul of Germany's strict privacy laws *See generally, Clark, Nicola, Germanwings Crash Inquiry Urges Stricter Oversight of Pilots' Mental Health,* N.Y. TIMES (Mar. 13, 2016), available at https://www.nytimes.com/2016/03/14/world/europe/germanwings-crash-inquiry-urges-stricter-oversight-of-pilots-mental-health.html

protected activity.[80] Moreover, Complainant has not demonstrated any link between his April 2013 protected activity related to the Laredo incident and those same adverse actions.

Complainant references the temporal proximity of the April 2013 incident with the August 2013 events. Compl. Br. at 17. This Tribunal does not find in this case the temporal proximity by itself sufficient to demonstrate that his protected activities were a contributing factor to the adverse actions he suffered. The intervening events, namely Complainant's August 4 email and the comments he made during the August 9 meeting, which did not constitute protected activities, persuade this Tribunal that the April 2013 incident was not in any way a contributing factor to the adverse actions that occurred in August 2013 and thereafter.

This Tribunal has taken the time to recount these facts because Respondent's actions are deeply troubling, particularly its decision to withhold its reasonable basis for the 15D evaluation from Complainant. Despite these questionable practices, this Tribunal does not find that the underlying protected activities were a contributing factor to the adverse actions, or were at all related to a protected activity. The hard truth is Respondent cannot be found liable under this Act for a poor management decision that impacted the life of one of its pilots.

5. Conclusion: Complainant's *Prima Facie* Case

Complainant and Employer are subject to the Act. Complainant established by a preponderance of evidence that he conducted protected activity in April 2013, but failed to establish that his actions in August 2013 were protected activities. Complainant established by a preponderance of evidence that he was subject to adverse actions, to wit: his initial placement on NOQ status on August 5, 2013, his subsequent placement on NOQ status again on August 9, 2013, and Respondent's compelling Complainant to undergo the 15D evaluation process. However, Complainant has not established that the April 2013 protected activities were a contributing factor to the August 2013 adverse actions. Therefore, Complainant has not met his burden establishing his *prima facia* case. Accordingly, Complainant's complaint must fail.

V. CONCLUSION

This Tribunal finds that the Complainant is an employee protected by the Act and the Respondent is an air carrier. Complainant has established that he engaged in protected activity, and that he was subject to an adverse action. However, Complainant has failed to establish that the protected activity was a contributing factor to the adverse action. Accordingly, I hereby dismiss Complainant's complaint with prejudice.

[80] *See* pgs. 49-53, *supra*.

ORDER

The Complaint is hereby **DISMISSED.**

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

TAB 3

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 09 May 2016

Case No.: 2014-AIR-00022

In the Matter of

MARK ESTABROOK
Complainant

v.

FEDERAL EXPRESS CORPORATION
Respondent

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure.[1] Implementing regulations are at 29 C.F.R. Part 1979. Per 49 U.S.C. § 42121(b)(2)(A), and as implemented by 29 C.F.R. § 1979.100(b), the hearing in this matter is to commence expeditiously, except upon a showing of good cause.

I. PROCEDURAL BACKGROUND

Complainant filed the instant AIR 21 complaint on October 3, 2013. The Occupational Safety and Health Administration ("OSHA") issued the Secretary's Findings on July 15, 2014, and dismissed the complaint. Complainant appealed the Secretary's Findings by letter dated August 12, 2014.

This matter was originally referred to Administrative Law Judge John Sellers, III for adjudication. By Notice of Hearing and Pre-Hearing Order dated October 2, 2014, Judge Sellers originally set this matter for hearing on February 24, 2015. By letter dated November 17, 2014, Complainant moved to Compel Requests for Admissions, Interrogatories, and Requests for Documents. After the parties submitted a joint request to continue the hearing, Judge Sellers

[1] Pub. L. 106-181, tit. V, § 519(a), Apr. 5, 2000, 114 Stat. 145. *See* 49 U.S.C. § 42121.

issued an Order Continuing Hearing on February 2, 2015. On February 18, 2015, Complainant submitted another Motion to Compel Requests for Admissions, Interrogatories, and Requests for Documents. On March 25, 2015, Complainant submitted a Motion for Partial Summary Decision. By on May 28, 2015, Judge Sellers issued an Order Regarding Discovery and Scheduling. On June 12, 2015, Respondent submitted a Memorandum of Law and attached a copy of its privilege log and documents for *in camera* review, and Judge Sellers issued an Order Following *in Camera* Review on July 20, 2015. On July 24, 2015, Complainant submitted a Notice of Amended Motion and Memorandum to Compel Requests for Admissions, Interrogatories, and Requests for Documents.

On August 12, 2015, Judge Sellers issued a Notice of Hearing and Pre-Hearing Order, and rescheduled the hearing for November 2, 2015. By Order issued August 19, 2015, Judge Sellers issued an Order to Produce Documents or Show Cause. By Order issued September 10, 2015, Judge Sellers cancelled the November 2, 2015 hearing to allow the parties to complete the ordered discovery. After the parties submitted filings via email, by Order issued October 8, 2015, Judge Sellers disallowed the filing of informal motions by the parties, and instructed them to adhere to the Rules of Practice and Procedure before the Office of Administrative Law Judges ("OALJ"). On October 27, 2015, Complainant submitted a Third Motion to Compel. Respondent submitted its opposition to Complainant's Motion to Compel on November 10, 2015. By Order issued December 23, 2015, Judge Sellers denied Complainant's Third Motion to Compel and directed Respondent to provide documents for *in camera* review. Respondent submitted documents pursuant to the December 23, 2015 Order on January 21, 2016. Judge Sellers issued an Order Following Second *in Camera* Review on February 2, 2016.

Also on February 2, 2016, Judge Sellers reassigned this matter to me by Order of Reassignment. This Tribunal issued a Notice of Assignment and Conference Call on February 8, 2016. Complainant submitted his Position Statement in Response to the February 8, 2016 Order on February 16, 2016, and Respondent submitted its Position Statement in Response on February 18, 2016. By Notice of Hearing and Pre-Hearing Order issued March 10, 2016, this Tribunal set this matter for hearing on June 6, 2016 in Memphis, Tennessee.

On April 21, 2016, both Complainant and Respondent submitted respective Motions for Summary Decision with supporting argument and exhibits. On April 25, 2016, Respondent submitted a Revised Declaration of Dr. Thomas Bettes. On April 29, 2016, Complainant and Respondent submitted respective Responses in Opposition to the opposing party's Motion for Summary Decision.

II. FACTUAL BACKGROUND

Respondent "is an airline in the express transportation and delivery business." Resp't Mot. at 2. Respondent's pilots are currently represented by the Airline Pilots Association ("ALPA") and were previously represented by the FedEx Pilots Association ("FPA"). *Id.* at 2, 5; RX B at 58. Pursuant to the Collective Bargaining Agreement ("CBA"), Harvey Watt & Company serves as Respondent's aeromedical advisor. Resp't Mot. at 3. Provision 15D of the CBA governs the company's decision to refer a pilot for medical evaluation. Resp't Mot. at 3; Complainant Mot. at 10.

Complainant began working for Respondent in 1989 as a pilot and Respondent currently employs him as a Captain of A300 planes. Resp't Mot. at 4. In approximately 2001 through 2002, Complainant served as the head of the FPA security committee, during which time he raised concerns regarding the publication of real-time flight tracking data of FedEx[2] planes by FedEx to the Federal Aviation Administration ("FAA"). *Id.* at 5; Complainant Mot. at 4-5, 15-16.

During the relevant period, Complainant reported to Fleet Captain Rob Fisher, who reported to System Chief Pilot William McDonald; McDonald's "management chain included a Vice President of Flight Operations, Senior Vice President of Flight Operations, Executive Vice President of Air Operations and the CEO of FedEx, Dave Bronczek." Resp't Mot. at 4. Fred Smith is the CEO and Chairman of the Board of Respondent's parent company. *Id.* at 4 n.3.

In April 2013, as captain of a flight, prior to departure, from Laredo, Texas to Memphis, Tennessee, Complainant determined that it was unsafe to fly through storms and decided that the flight needed to be delayed. *Id.* at 6-7; Complainant Mot. at 3. Complainant filed his first AIR 21 complaint on April 29, 2013. Resp't Mot. at 7; Complainant Mot. at 3. On May 1, 2013, Complainant met with Fisher to discuss the Laredo incident. Resp't Mot. at 7. Complainant withdrew the April 2013 complaint and it was administratively closed by OSHA on May 2, 2013. *Id.* at 8; Complainant Mot. at 3.

Subsequently, on August 4, 2013, Complainant emailed McDonald and asked to speak to Respondent's management. Resp't Mot. at 8; Complainant Mot. at 3, 7, 16, 26. McDonald arranged a meeting for Complainant with Fleet Captain Rob Fisher, Labor Relations Counsel Robb Tice and Managing Director of Aviation and Regulatory Security Todd Ondra. Resp't Mot. at 8; Resp't Opp'n at 5; Complainant Mot. at 7. McDonald placed Complainant on NOQ status[3] on August 5, 2013. Resp't Mot. at 8; Complainant Mot. at 7, 26. The meeting occurred on August 9, 2013, during which Complainant expressed concerns regarding the disclosure of real-time flight tracking information. Resp't Mot. at 8-9; Complainant Mot. at 3, 7-8, 16. The topic of "Mayday Mark" was also raised during this meeting[4]; Complainant stated that he was not "Mayday Mark." Resp't Mot. at 10; Complainant Mot. at 8.

After the August 9, 2013 meeting, Fisher and Tice returned Complainant to active flight status, but Ondra recommended that Complainant be referred for evaluation, thereby initiating the CBA provision 15D process. Resp't Mot. at 10; Complainant Mot. at 9, 26. Consequently, on the same day as the August 9, 2016 meeting, Fisher again placed Complainant on NOQ status and issued an order referring Complainant to Harvey Watt & Company on August 16, 2013. Resp't Mot. at 10; Complainant Mot. at 9. Harvey Watt & Company referred Complainant to Dr. George Glass, who evaluated Complainant. Resp't Mot. at 11. After Glass' evaluation,

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[2] This Tribunal infers that Complainant is referring to Federal Express aircraft.

[3] Complainant explains that NOQ flight status stands for "Not Operationally Qualified" (Complainant Mot. at 2), and Respondent notes that this is a form of leave with pay (Resp't Mot. at 19).

[4] According to Respondent, "Mayday Mark" refers to an anonymous individual who had posted comments on a FedEx pilot blog," and made references to the fact that he suffered a stroke. Resp't Mot. at 9-10; *see also* Complainant Mot. at 9.

aeromedical advisor Thomas Bettes determined that Complainant was not fit for flight duty. *Id.* Complainant submitted an evaluation from his own physician. *Id.* at 11. Pursuant to the terms of the CBA, Complainant was then referred to a third physician, who determined that Complainant was fit to fly. *Id.* Complainant filed the instant AIR 21 complaint on October 3, 2013 during the CBA provision 15D process. *Id.* Complainant was returned to active flight status, effective October 30, 2013, and Complainant "was made whole for any used sick time." *Id.*

III. STIPULATIONS AND ISSUES

The parties do not contest OSHA's findings that Respondent is an air carrier within the meaning of the Act, or that Complainant is an employee within the meaning of the Act. The parties contest the following issues: whether Complainant's complaint was timely filed; whether he engaged in protected activity; whether he suffered adverse action; whether the protected activity and adverse action are causally related; and whether Respondent would have taken the same action absent protected activity. In addition, Respondent argues that Complainant's claim is moot because he merely seeks damages for alleged emotional distress and attorneys' fees.

IV. THE PARTIES' ARGUMENTS AND SUPPORTING EVIDENCE

A. Respondent's Position and Evidence

Respondent contends that Complainant's claim is moot because he merely seeks damages for alleged emotional distress and attorneys' fees. Resp't Mot. at 12. Respondent argues that Complainant's alleged damages for emotional distress are undercut by his own testimony, and that an interest in attorney's fees is insufficient to support an Article III case or controversy where none exists on the merits of the underlying claim. *Id.* at 12-13.

In the alternative, Respondent alleges that Complainant's claim must be dismissed for several reasons. *Id.* at 14. As an initial matter, Respondent argues that any part of the current claim arising out of the April and May 2013 "Laredo Incident"[5] is not subject to review, as Complainant withdrew his April 30, 2013 AIR 21 complaint related to that incident on May 2, 2013, the Department of Labor closed the case, and Complainant did not timely appeal that closure. *Id.* at 15. Respondent also argues that the October 3, 2013 complaint is untimely since he filed it 155 days after the alleged retaliation of the May 1, 2013 meeting. *Id.* at 16. Citing provision 19D of the CBA, Respondent further argues that even if the retaliation claim relating to the May 1, 2013 meeting were timely filed, Complainant did not suffer an adverse employment action and Respondent would have taken the same action absent any protected activity. *Id.* at 16-18.

Respondent contends that Complainant's "concerns over real-time flight tracking data was not protected activity" since Complainant "conceded that every airline shares this data with the FAA [Federal Aviation Administration] at the FAA's request." *Id.* at 18-19. Respondent alleges that Complainant "did not raise concerns about the screening of packages prior to loading

[5] This refers to Complainant's decision not to fly in what he considered unsafe conditions in April 2013. "For purposes of its Motion only, [Respondent] does not dispute that Complainant's alleged refusal to depart in unsafe conditions and his first AIR 21 [complaint] are protected activities." *Id.* at 18.

them on planes and never claimed that FedEx was violating FAA or other federal laws relating to screening procedures." *Id.* at 19. Complainant's attempts to "improve" Respondent's "security measures by approaching the FAA and persuading them to stop publishing this data to third parties, including public websites," does not constitute a complaint regarding "a *violation* of an FAA order or regulation, or a *violation* of any federal law relating to air carrier safety." *Id.* (emphasis in original).

Furthermore, Respondent asserts that the August 5, 2013 decision to place Complainant on NOQ status is not an adverse employment decision; even assuming it were, Complainant cannot demonstrate that any protected activity contributed to that decision, and Respondent would have made that same decision absent protected activity. *Id.* at 19-21. Respondent also argues that the CBA provision 15D medical evaluation was not an adverse employment action since Complainant "voluntarily agreed to submit to medical exams when requested," and the CBA "explicitly gives permission to flight management to refer a pilot for a 15D exam if they have a *reasonable basis* for questioning the pilot's fitness for duty." *Id.* at 21 (emphasis in original). In addition, even if the 15D evaluation were adverse action, Complainant cannot demonstrate causal nexus, and Respondent had legitimate, nondiscriminatory reasons for its decision, citing instances of "strange behavior" on Complainant's part. *Id.* at 21-22. Finally, Respondent argues that the fact that Complainant only had one opportunity to participate in flight simulator exercises prior to his evaluation for return to active flight status does not constitute adverse action, particularly since Complainant passed the evaluation and returned to active flight status. *Id.* at 23.

In support of its Motion for Summary Decision, Respondent submits the following evidence:

- Respondent's "Code of Business Conduct and Ethics" (RX A)[6];
- Excerpts from the deposition of Complainant (RX B);
- Excerpts from the deposition of Todd Ondra (RX C);
- Excerpts from the deposition of William ("Bill") Mcdonald (RX D);
- Excerpts from the deposition of Rob Fisher (RX E);
- Excerpts from the deposition of Robert ("Robb") Tice (RX F);
- Declaration of Charles Yanizzi (RX G);
- CBA §§ 15 and 19 (RX H);
- Transcript of telephone calls for the Laredo Incident (RX I);
- OSHA's May 2, 2013 letter closing Complainant's first AIR 21 complaint (RX J);
- Complainant's second AIR 21 complaint, filed October 3, 2013 (RX K);
- OSHA's July 14, 2014 Findings (RX L);
- Complainant's Notice of Appeal (RX M);
- Emails dated August 16, 2013 between Robb Fisher and Christopher Johnson, Aeromedical Consultant of Harvey W. Watt & Co. (RX N);
- Supplemental Answer to Interrogatory No. 7 (RX O).

In its Opposition, Respondent reiterates that "making recommendations to *improve* safety" does not constitute "point[ing] out *violations* of FAA or other federal regulations."

[6] "RX" refers to Respondent's exhibits.

Resp't Opp'n at 1 (emphasis in original). Regarding the publication of real-time tracking data, Respondent clarifies that Complainant "takes issue with the disclosure of real-time flight tracking data to the FAA, including the plane's position, heading, altitude, and airspeed," though Complainant "concedes that the FAA requires this data from all U.S. airlines," and that "[t]his data is distinguishable from the package tracking data"; the latter "is limited and 'historical' data (not in real-time), and it only includes package scans such as delivery and pick-up scans." *Id.* at 3-4. Respondent emphasized that it "does not publish any flight information or flight tracking data with its package tracking data." *Id.* at 4. For these reasons, Complainant did not engage in protected activity when reporting concerns over real-time flight tracking data. *Id.* at 16.

Regarding the Laredo incident, Respondent maintains that Fleet Captain Rob Fisher set up a meeting with Complainant on May 1, 2013 due to Complainant's late arrival at the Laredo airport, and that this meeting was "specifically designated as a 19D 'investigatory' meeting," which, under the CBA, "is not disciplinary or punitive, but rather is designed to investigate and understand a pilot's performance and conduct"; moreover, pursuant to Respondent's policy, outside counsel do not participate in these meetings. *Id.* at 3.

Respondent asserts that it maintains a Security Department and complies with all FAA and TSA (Transportation Safety Administration) regulations, and that it "utilizes 15D medical examinations to ensure that its pilots are safe to operate its planes." *Id.* at 1-2. Respondent also reiterates that despite alleging emotional distress, Complainant conceded that he never had mental or emotional health issues. *Id.* at 2. Respondent also disputes Complainant's characterization of Fisher and Ondra's rationales in deciding to refer Complainant for a 15D evaluation. *Id.* at 7-10, 18-19. Respondent reiterates that Complainant voluntarily complied with the 15D evaluation procedures, and that Respondent "paid [Complainant] during the process as if he was operating his normal line of flying, and covered his expenses." *Id.* at 17. Respondent further asserts, "He was not disciplined and the referral process had no effect on his seniority." *Id.*

Concerning the alleged adverse action of placing Complainant on NOQ status, Respondent argues that it is not a materially adverse change that would have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id.* at 12. Respondent observes that Complainant was paid for his time on NOQ, and argues that loss of jump seating privileges is not a material adverse change, particularly since Respondent paid for his travel to and from Memphis. *Id.* Respondent further argues that Complainant was not dissuaded from filing a charge of discrimination since he filed his AIR 21 complaint in October after being placed on NOQ status in August. *Id.* at 13.

Regarding causation, Respondent contends that Complainant's belief that he was placed on NOQ status in August for the Laredo incident, which occurred three months prior, is speculation, as there is no evidence to suggest that McDonald was upset with Complainant's refusal to fly. *Id.* at 13, 19. Respondent contends, "McDonald simply wanted [Complainant] to come to work by his required show time." *Id.* at 20. Respondent asserts that this gap in time is insufficient to create a causal link, and regardless, Complainant's August 4, 2013 email, in which he "demanded an audience with Fred Smith," "is an intervening event that breaks the causal link." *Id.* at 14. Respondent alleges that McDonald placed Complainant on NOQ status in

response to his August 4, 2013 email for purely logistical purposes in order "[t]o facilitate the meeting with Fisher, Ondra and Tice . . . without causing a conflict with [Complainant's] work schedule." *Id.* at 15. Respondent contends that "it is undisputed that [Complainant] was scheduled to operate a trip to Panama the week of the meeting. But for placing him on NOQ, the meeting could not have occurred when it did." *Id.* Thus, Complainant cannot establish that placing him on NOQ prior to the meeting was pretext. *Id.*

As to Respondent's burden should Complainant establish a *prima facie* case, Respondent alleges that it had legitimate, nondiscriminatory reasons for its decision. *Id.* at 20. Respondent argues, "Certain actions and comments by [Complainant] were extremely strange," citing his request to have Fred Smith call him directly and Complainant's comments that Auburn Calloway, "a former pilot who had been incarcerated for approximately 20 years, may be sharing secrets with Al Qaeda and that FedEx should work with the Justice Department to place listening devices in his prison cell." *Id.* As a result, Ondra recommended that Complainant undergo an evaluation. *Id.* at 20-21. Respondent argues that it "would rather be safe and send a pilot for an evaluation if there were any suspicions relating to the pilot's fitness for duty than risk a tragedy like the Germanwings or Calloway tragedies," and Respondent "regularly refers pilots for 15D evaluations for a variety of reasons." *Id.* at 21. Moreover, Respondent asserts that it did not interfere with the 15D process, but that it "complied with the procedural safeguards contained in 15D and did not violate [Complainant's] rights." *Id.* at 23.

B. Complainant's Position and Evidence

Complainant argues that he engaged in three separate actions that constitute protected activity under the Act, for which he suffered adverse personnel actions, including placement on NOQ status and a compulsory mental health examination. Complainant Mot. at 2. Complainant's three instances of alleged protected activity are as follows: (1) his refusal to fly into hazardous weather conditions in Laredo; (2) the filing of his first AIR 21 complaint on April 29, 2013; and (3) "Complainant's communication to the Respondent, during a meeting on August 9, 2013, that FedEx's existing cargo practices encourage and incentivize the introduction of destructive devices into FedEx aircraft for criminal and terrorist purposes. *Id.* at 3. Prior to 2013, Complainant served as the FedEx Pilot Association's ("FPA") Security Committee chairman, and in 2001, Complainant "communicated his concerns about real-time tracking data to Captain Bruce Cheever, VP of FedEx Express Flight Operations"; Complainant continued to advocate for his concerns regarding these issues through April 2002, but "discontinued his efforts to promote FedEx's compliance with safe cargo practices" due to lack of a response from Respondent. *Id.* at 4-5. Subsequently, after reading media reports on August 3 and 4, 2013 that "confirmed the immediacy of the threat to safety posed by the public dissemination of real-time flight tracking data," Complainant requested a teleconference, via email dated August 4, 2013, with Fred Smith, CEO of Respondent, to discuss "those terrorist-related issues that he had previously raised." *Id.* at 4-7. On August 9, 2013, Complainant attended a meeting with Fleet Captain Rob Fisher, Labor Relations Counsel Robb Tice, and Managing Director of Aviation and Regulatory Security Todd Ondra. *Id.* at 7.

Concerning the first instance of alleged protected activity, Complainant argues that he held a reasonable belief that his report related "to safety standards and regulations established by

the FAA." *Id.* at 12-14. Regarding the second instance, Complainant argues that filing an AIR 21 complaint constitutes protected activity. *Id.* at 15. Regarding the third instance, Complainant alleges that Respondent's policy of publishing live tracking information "violated its obligations under federal law relating to air carrier safety because the Respondent's policy had the effect of facilitating and maximizing the criminal destruction of cargo, aircraft, and human lives," such that Complainant's communications during his meeting with management relate to air carrier safety. *Id.* at 15-16, 20. Complainant further alleges that Respondent had knowledge of all three instances of protected activity. *Id.* at 21-24.

Complainant asserts that he was subjected to adverse action when he was placed on NOQ status, specifically NOQ status Until Further Notice ("UFN"), as a result of which, his jumpseat privileges were suspended, in addition to the mandatory 15D mental examination. *Id.* at 26-28. Complainant also asserts that the August 16, 2013 email from Fleet Captain Rob Fisher and statements from management during the August 9, 2013 meeting, as evidenced by deposition testimony, demonstrate that Complainant's protected activity contributed to the decision to compel him to submit to a 15D examination. *Id.* at 30-31. Moreover, William McDonald's testimony shows that Complainant's placement on NOQ status on August 5, 2013 was related directly to the Laredo incident. *Id.* at 32. Complainant also argues that there is temporal proximity between his protected activity and the adverse actions, ranging from the same day to less than four months, and that Respondent's explanations for its actions were pretext. *Id.* at 33-36. In support of his pretext argument, Complainant cites Todd Ondra and Robert Tice's respective deposition testimony to assert that Respondent had no concerns regarding Complainant's mental health as of August 5, 2013. *Id.* at 36. In addition, Complainant cites his own background of prior service in military intelligence, and observes that several of Respondent's witnesses do not credibly testify concerning alleged statements by Complainant that purportedly formed the basis for requiring him to submit to a 15D examination. *Id.* at 37-39.

In support of his Motion for Summary Decision, Complainant submits the following evidence:

- Declaration of Complainant with accompanying exhibits:
  - National Oceanic and Atmospheric Administration's Hourly/Sub-Hourly Observational Data for April 10-11, 2013 (Complainant Decl., Ex. A);
  - Electronic AIR 21 Complaint, filed April 29, 2013 (Complainant Decl., Ex. B);
  - OSHA's May 2, 2013 letter closing Complainant's first AIR 21 complaint (Complainant Decl., Ex. C);
  - Letter dated September 20, 2001 from Captain David Webb to Bruce Cheever (Complainant Decl., Ex. D);
  - Letter and accompanying attachment dated October 18, 2001 from Complainant to Captain Jack Lewis (Complainant Decl., Ex. E);
  - Letter from William Logue to Captain David Webb, dated April 10, 2002 (Complainant Decl., Ex. F);
  - New York Times article dated November 1, 2010 (Complainant Decl., Ex. G);
  - Emails dated August 4 and 7, 2013 between Complainant and William McDonald (Complainant Decl., Ex. H);

  - Email dated August 5, 2013 from Rob Fisher to Pilot Administration Center ("PAC"), copying William McDonald (Complainant Decl., Ex. I);
  - Letter dated August 16, 2013 from Airbus Fleet Captain Rob Fisher to Complainant (Complainant Decl., Ex. J);
  - "Order Granting Defendant's Motion for Summary Judgment" in unrelated matter of *Claude Barnhart v. Federal Express Corp.*, filed in U.S. District Court for the Western District of Tennessee (Complainant Decl., Ex. K);
- Declaration of Lee Seham with accompanying exhibits:
  - "Order Denying Respondent's Motion for Summary Decision and Granting in Part Complainant's Cross Motion for Summary Decision" in unrelated matter of *Hall v. Southwest Airlines Co.*, 2014-AIR-00025 (OALJ Jan. 8, 2015) (Seham Decl., Ex. A);
  - "Settlement Agreement" in unrelated matter of *Hall v. Southwest Airlines Co.*, 2014-AIR-00025 (OALJ Jan. 8, 2015) (Seham Decl., Ex. B);
  - Complainant's October 3, 2013 AIR 21 complaint, Complainant's April 29, 2013 AIR 21 complaint, OSHA's May 2, 2013 letter closing Complainant's first AIR 21 complaint, letter dated August 23, 2013 from FAA Senior Aviation Medical Examiner Mark Nugent, M.D., and letter dated August 24, 2013 from Stephen Leonard, M.D. (Seham Decl., Ex. C);
  - Respondent's Responses to Complainant's First Set of Interrogatories (Seham Decl., Ex. D);
  - Respondent's Responses to Complainant's First Requests for Admissions (Seham Decl., Ex. E);
  - Respondent's Supplemental Responses to Complainant's First Set of Interrogatories (Seham Decl., Ex. F);
  - Respondent's Supplemental Responses to Complainant's First Requests for Admissions (Seham Decl., Ex. G);
  - Documents produced by Respondent, including: letter dated April 23, 2013 from Captain Rob Fisher to Complainant; emails dated April 10 and 24, 2013 between Mark Crook, William McDonald, Rob Fisher, and Cindy Sartain; letter dated April 29, 2013 from Alan Armstrong, legal counsel to Complainant, to Captain Rob Fisher; Complainant's April 29, 2013 AIR 21 complaint; various handwritten notes; and August 9, 2013 "recap" of Complainant's AOD-Flight Hearing (Seham Decl., Ex. H);
  - Respondent's Privilege Log (Seham Decl., Ex. I);
  - Letter dated January 15, 2015 from Respondent regarding discovery requests (Seham Decl., Ex. J);
  - Various emails regarding discovery requests (Seham Decl., Ex. K);
  - OSHA investigator's notes from interview with Fleet Captain Robb Fisher on April 30, 2014 (Seham Decl., Ex. L);
  - OSHA investigator's July 15, 2014 Memorandum (Seham Decl., Ex. M);
  - Respondent's December 4, 2013 Position Statement to OSHA investigator, with accompanying attachments (Seham Decl., Ex. N);
- Declaration and Revised Declaration of Dr. Thomas Bettes;
- Deposition of Robert Fisher;
- Deposition of Complainant;

- Deposition of Todd Ondra;
- Deposition of William McDonald;
- Deposition of Robert Tice;
- Various "Supporting Exhibits from Depositions."[7]

In Opposition to Respondent's Motion, Complainant advocates that this Tribunal apply the Board's definition of adverse action as articulated in *Williams v. American Airlines*, ARB No. 09-019 (Dec. 29, 2010) and *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003 (Dec. 21, 2012) to support a finding that Complainant suffered adverse action that "makes this a live case regardless of whether or not he suffered wage-related damages." Complainant Opp'n at 3-4. Moreover, Complainant argues, "Non-economic damage claims based on emotional distress are not susceptible to resolution at the summary judgment phase because the court's decision is inherently a 'subjective one.'" *Id.* at 5.

Regarding the Laredo incident, Complainant clarifies that he "does not seek, in this action, relief for Respondent's retaliatory disciplinary interrogation of [Complainant] in the aftermath of the Laredo incident." *Id.* at 6. Complainant elaborates, "Rather, the adverse action for which the Complainant seeks relief all commenced no earlier than August 5, 2013, *i.e.*, the original NOQ designation, the reinstatement of NOQ status on August 9, the 15D referral, and subsequent interference that a causal relation exists between the two." *Id.* at 7. Specifically, Complainant alleges that he was denied legal representation at the May 1, 2013 meeting, and that the "disciplinary intent of the Respondent's investigation" resulted in a "chilling of protected activity." *Id.* Complainant maintains that McDonald was disappointed that Complainant "evaded discipline" after the Laredo incident." *Id.* at 8. However, "Complainant readily concedes that, due to the expiration of the statutory limitations period, he cannot obtain remedial relief based on the Respondent's retaliatory interrogation of him on May 1, 2013." *Id.*

Regarding the alleged protected activity concerning the publication of live tracking data, Complainant argues that communication of concerns "that 'touch' on the subject matter of federal aviation standard," constitutes protected activity, as "[n]o specific reference to a specific order, regulation, or statute is required." *Id.* at 9. Complainant asserts that federal law requires that air carriers deter the carriage of unauthorized explosives, and that on August 9, 2013, Complainant "communicated to the Respondent's representatives that Respondent's release of real-time tracking data failed to conform with [sic] this federal aviation standard," and that Ondra testified that these concerns were rational. *Id.* at 9. In support of this argument, and citing news articles, Complainant alleges:

> Respondent appears to suggest that the dissemination of the flight tracking data "at the FAA's request" somehow rules out the possibility of non-conformance with federal aviation standards. The FAA is merely an agency, it is not the law.

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[7] Despite providing a general index of exhibits, Complainant's counsel failed to provide an index, of any sort, to identify the numerous "Supporting Exhibits from Depositions"; this is particularly problematic since the date written on many of the exhibit labels is illegible. Consequently, it is difficult to ascertain to which deposition the various exhibits belong. In all future submissions to this Tribunal, Complainant's counsel is directed to provide an index that is sufficiently detailed for identification purposes for all exhibits submitted, including exhibits with multiple and distinct attachments.

> Its regulatory interpretations may be entitled to consideration, but not to servile and unquestioning acceptance. Indeed, in recent years both the National Transportation Safety Board and the Department of Transportation's Office of the Inspector General have found the FAA to be, at best, an inconstant enforcer of federal aviation standards.

Id.

Concerning Complainant's placement on NOQ status for an indefinite time period prior to the August 4, 2013 meeting, Complainant contends that this was adverse action because "the NOQ designation grounds a pilot and strips him of his jumpseat privileges." *Id.* at 10. With regard to the 15D evaluation, Complainant argues that Respondent's reference to Complainant's comments concerning, *inter alia*, Auburn Calloway are disingenuous since Respondent used Complainant's "supposedly exaggerated concerns regarding Calloway as justification for psychiatric evaluation, while in the very next paragraph raising the Calloway bête noire in defense of taking all measures to prevent the recurrence of 'a tragedy like the Calloway incident." *Id.* at 12 (citing Resp't Opp'n at 21).

Ultimately, Complainant argues that the purpose of summary decision cannot be undermined merely "by a party's presentation of two or more conflicting versions of events." *Id.* at 13. Thus, Complainant asserts that he is entitled to summary decision based on the undisputed facts. *Id.*

V. LEGAL STANDARD

An administrative law judge may grant summary decision in favor of a party where there is no genuine dispute as to any material fact.[8] 29 C.F.R. § 18.72(a). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Administrative Review Board ("the Board" or "ARB") has explained, "Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense." *Lee*, ARB No. 10-021 at 4. Thus, the factfinder "must not judge witness credibility or weigh evidence." *Daniels v. United Parcal Serv., Inc.*, 701 F.3d 620, 627 (10th Cir. 2012).

The Board has directed, "The first step is to determine whether there is any genuine issue of a material fact," but that "[d]etermining whether there is an issue of material fact requires several steps." *Lee*, ARB No. 10-021 at 4 (citing *Anderson*, 477 U.S. at 248). After examining the elements of the complainant's claims, the factfinder must "sift the material facts from the immaterial." *Id.* After assessing materiality, the factfinder examines the parties' arguments and evidence to determine whether a genuine dispute exists as to the material facts. *Id.* The parties may submit evidence (such as documents or affidavits) in support of their positions. *See* 29

[8] Summary decision in proceedings before the office of administrative law judges is derived from Rule 56 of the Federal Rules of Civil Procedure. *Lee v. Parker-Hannifin Corp., Advanced Prod. Business Unit*, ARB No. 10-021, slip op. at 5 n.8 (Feb. 29, 2012).

C.F.R. § 18.72(c)(4). The procedural regulations provide that the factfinder "need consider only the cited materials, but the judge may also consider other materials in the record." 29 C.F.R. § 18.72(c)(3).

The moving party bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). The movant must support its assertions that a fact cannot be genuinely disputed by: citing to particular parts of materials in the record, including, *inter alia*, depositions, documents, affidavits or declarations, admissions, interrogatory answers, or other materials; or, showing that the materials cited do not establish the presence of a genuine dispute. 29 C.F.R. § 18.72(c)(1). "The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim." *Lee*, ARB No. 10-021 at 5 (citing *Holland v. Ambassador Limousine/Ritz Transp.*, ARB No. 07-013, slip op. at 1 (Oct. 31, 2008)). In opposing summary decision, the non-moving party must similarly follow the procedure set forth at § 18.72(c)(1) to support its assertions that a fact is genuinely disputed. The non-moving party may also show, by affidavit or declaration, that, for specified reasons, it cannot present facts essential to justify its opposition. 29 C.F.R. § 18.72(d).

In adjudicating a motion for summary decision, the factfinder must view all facts and inferences in the light most favorable to the non-moving party. *See Celotex Corp.*, 477 U.S. at 323; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 (1986); *Jaramillo v. Colo. Judicial Dep't.*, 427 F.3d 1303, 1307 (10th Cir. 2005) (*en banc*) (*per curiam*). All ambiguities are resolved, and all reasonable inferences are drawn, in favor of the nonmovant. *Nationwide Life Ins. Co. v. Bankers Leasing Ass'n*, 182 F.3d 157, 160 (2d Cir. 1999). If a party fails to properly support an assertion of fact or address another party's assertion of fact as required by § 18.72(c), the factfinder may grant an opportunity to properly address the fact, consider the fact undisputed for purposes of the motion, grant summary decision if the movant is entitled to it, or issue any other appropriate order. 29 C.F.R. § 18.72(e).

VI. DISCUSSION

This Order first addresses Respondent's argument that Complainant's claim is moot because he merely seeks damages for alleged emotional distress and attorneys' fees. This Order then addresses whether any genuine disputes as to material fact exist with regard to Complainant's *prima facie* case. This Tribunal will reach the issue of whether Respondent would have taken the same unfavorable action in the absence of protected activity if either party fails to demonstrate that it is entitled to judgment as a matter of law with regard to Complainant's *prima facie* showing.

A. Whether Complainant's Claim is Moot

As noted by Complainant in his submissions, the Board has directly addressed the issue of mootness in *Lucia v. American Airlines, Inc.*, ARB Case Nos. 10-014, 10-015, 10-016 (Sept. 16, 2011). In *Lucia*, subsequent to the ALJ's decision, respondent "repaid the complainant's sick pay that it had docked and removed disciplinary letters from the complainants' personnel files in

accordance with an arbitration award in the complainant's favor that was entered after the ALJ issued the D. & O.'s." *Id.* at 4-5. The Board observed:

> Under Article III of the Constitution, the jurisdiction of federal courts extends only to actual cases and controversies. . . . Although administrative proceedings are not bound by the constitutional requirement of a case or controversy, the Board has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot. . . . Allegations become moot when a party has already been made whole for damage it claims to have suffered. . . . As long as the parties have a personal stake in the outcome of the lawsuit, and [the Board] can afford some kind of meaningful relief to a prevailing party, a case is not moot. . . . The remedy does not have to satisfy a complainant's every expectation: The availability of a partial remedy is sufficient to prevent a case from being moot.

Id. at 5 (internal citations omitted) (internal quotation marks omitted). The Board reasoned that the complainants in *Lucia* "retain a live dispute with American Airlines over whether American Airlines retaliated against them because they engaged in protected activity," and if the complainants prevail, "even if American Airlines has already repaid their backpay, they may be entitled to compensatory damages under AIR 21, which could possibly include damages for pain and suffering." *Id.* Compensatory damages may include "emotional distress, inconvenience and the like if deemed appropriate." *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, slip op. at 9 (Dec. 30, 2004). The Board held, "Because the ALJ could grant relief to the complainants if they prevailed on the merits, the case is not moot." *Lucia*, ARB No. 10-014 at 5. The Board further observed that the ALJ could also award attorney's fees if the complainants prevailed. *Id.*

Here, it is undisputed that Complainant was placed on paid leave and that his "sick bank was refilled for this four-month duration of NOQ." Complainant Dep. at 140; *see also* Resp't Mot. at 11. However, the relief Complainant requests is more extensive and includes: "an Order directing FedEx to rescind its directive for [Complainant] to undergo any further mental health evaluation or treatment"; "an Order directing FedEx to suppress, remove and expunge all disciplinary proceedings, medical and psychiatric evaluations and treatment histories concerning [Complainant] from FedEx personnel files" and "of all references to psychiatric evaluation and treatment in all government records"; "an Order directing FedEx to cease and desist from all discriminatory conduct toward [Complainant]"; "an Order awarding [Complainant] the costs of this action, including payment of reasonable attorney's fees"; "an Order granting such additional relief" that is "proper and just;" and "an Order granting full compensatory damages including compensation for pain, suffering and emotional distress due to this adverse action." RX K, October 3, 2013 OSHA Complaint at 7. Thus, Respondent's characterization of the relief Complainant seeks (*see* Resp't Mot. at 12) is too narrow and is therefore inaccurate. In light of the relief requested by Complainant and the Board's holding in *Lucia*, Respondent has not demonstrated that it is entitled to judgment as a matter of law that Complainant's claim is moot, as this Tribunal could grant relief to Complainant if he were to prevail on the merits.

Moreover, Respondent's allegation that Complainant's own testimony undercuts his request for emotional distress damages (*see* Resp't Mot. at 12-13) is inappropriate at this stage of

the proceedings. Complainant accurately points out the Board's holding in *Evans v. Miami Valley Hospital*, in which the Board observed that a determination concerning non-economic damages "is subjective based on the facts and circumstances of each claim." ARB Nos. 07-118, 07-121, slip op. at 22 (Jun. 30, 2009). In upholding the ALJ's award of compensatory damages in *Negron*, the Board noted that the "ALJ found Negron's testimony regarding his losses credible." ARB No. 04-021 at 9. In so reasoning, the Board's precedent makes clear that findings regarding non-economic compensatory damages may necessarily involve credibility determinations and weighing evidence, which is expressly proscribed at the summary decision stage. *See generally Lee* and *Daniels*, *supra*.

For these reasons, Respondent has not demonstrated that it is entitled to judgment as a matter of law that Complainant's claims are moot.

B. Complainant's *Prima Face* Case

To prevail on his whistleblower complaint under AIR 21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) he engaged in activity protected; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). If Complainant establishes this *prima facie* case, the burden shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

1. Protected Activity

Under the Act, no air carrier, or contractor or subcontractor of an air carrier, may discriminate against an employee because the employee:

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a)(1)-(4).

The Board has explained, "As a matter law, an employee engages in protected activity any time [h]e provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable." *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C.A. § 42121(a)) (emphasizing, "an employee need not prove an *actual* FAA violation to satisfy the protected activity" provided that the employee's report concerns a federal law related to air carrier safety and the employee's belief that the violation occurred is subjectively and objectively reasonable") (emphasis in original)).[9] However, the Board observed, "mere words do not create an FAA violation when the parties' actual conduct does not violate FAA regulations." *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, slip op. at 6 (June 30, 2010). Though the complainant "need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety)." *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009). The "complainant must prove that he reasonably believed in the existence of a violation," and the reasonableness of this belief has both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). Regarding the former, "To prove subjective belief, a complainant must prove that he held the belief in good faith." *Id.* Regarding the latter, the Board explained, "To determine whether a subjective belief is objectively reasonable, one assesses a complainant's belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.* (evaluating the reasonableness of belief of the *Burdette* complainant, a pilot, against that of a pilot with similar training and experience) (internal quotation marks omitted).

As plead in his October 3, 2013 AIR 21 complaint and as summarized in his Motion to Dismiss, Complainant alleges that he engaged in three instances of protected activity: (1) his refusal to fly into hazardous weather conditions in Laredo; (2) the filing of his first AIR 21 complaint on April 29, 2013; and (3) "Complainant's communication to the Respondent, during a meeting on August 9, 2013, that FedEx's existing cargo practices encourage and incentivize the introduction of destructive devices into FedEx aircraft for criminal and terrorist purposes. Complainant Mot. at 3; *see also* RX K at 2-5. These three instances of alleged protected activity are analyzed below.

a. The Laredo Incident and the April 29, 2013 AIR Complaint

The parties do not dispute that Complainant decided to delay the departure of a flight from Laredo, Texas to Memphis, Tennessee after determining that it would be unsafe to fly through storms in the flight path. Resp't Mot. at 6; RX K at 2; Complainant Mot. at 3. The parties also do not dispute that Complainant filed his first AIR 21 complaint on April 29, 2013.

[9] Moreover, that "management agrees with an employee's assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee's disclosure was objectively reasonable." *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, slip op. at 5-6 (Nov. 5, 2013); *see also Sewade*, ARB No. 13-098 at 8 ("When an employee makes a protected complaint, the employer's response (positive or negative) does not change that AIR 21 protected activity has occurred").

Resp't Mot. at 7; Complainant Mot. at 3. Moreover, Respondent concedes, "For purposes of this Motion only, [Respondent] does not dispute that Complainant's alleged refusal to depart in unsafe conditions and his first AIR 21 [complaint] are protected activities." Resp't Mot. at 18. Respondent further stated, "Notably, FedEx management never challenged [Complainant] on his decision not to fly in unsafe conditions." *Id.* at 18 n.77.

Respondent's concession for purposes of its Motion establishes that there are no genuine issues of material fact regarding whether Complainant's refusal to fly and the filing of his original AIR 21 complaint are protected activities. Moreover, Respondent's concessions that Complainant's April 2013 refusal to fly and filing of the April 2013 AIR 21 complaint are supported by Board precedent. For example, in *Luden v. Continental Airlines, Inc.*, citing 14 C.F.R. § 1.1 (2011), which provides that the pilot in command has final authority and responsibility for the operation and safety of the flight," the Board upheld the ALJ's determination that a pilot's refusal to fly a plane, which he believed had flown through severe turbulence, before the plane was inspected, was "reasonable and dealt directly and specifically with aircraft safety." ARB No. 10-026, slip op. at 8 n.26 (Jan. 31, 2012). In addition, filing a complaint or charge of employer retaliation, including claims under the Act, because of safety, is considered protected activity. *See, e.g.*, *Powers v. Paper, Allied-Indus., Chemical & Energy Workers Int'l Union*, ARB No. 04-111, slip op. at 11 (Aug. 31, 2007) (explaining, "In fact, it is possible that serving a discovery request potentially could constitute protected activity if the request was part of a whistleblower complaint") (citing 29 C.F.R. § 1979.102); *see generally McCuistion v. TVA*, 1989-ERA-6 (Sec'y No. 13, 1991).

Respondent's additional argument that the April 29, 2013 AIR 21 complaint is not subject to review because Complainant did not appeal OSHA's findings before they became the final decision of the Secretary (*see* Resp't Mot. at 15) is without merit. It is undisputed that Complainant voluntarily withdrew the April 2013 AIR 21 complaint. Section 1979.111 governs withdrawal of complaints and provides:

> At any time prior to the filing of objections to the findings or preliminary order, a complainant may withdraw his or her complaint under the Act by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether the withdrawal will be approved.

29 C.F.R. § 1979.111. In comments to the final rule, the Department explained, "OSHA believes that § 1979.111 does permit a complainant to freely withdraw his or her complaint *without prejudice*." 68 Fed. Reg. 14100, 14106 (Mar. 21, 2003) (emphasis added). Thus, consideration of the circumstances giving rise to Complainant's April 2013 AIR 21 complaint is not barred for the reason cited by Respondent.[10]

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[10] Moreover, this Tribunal again observes Complainant's clarification that he "does not seek, in this action, relief for Respondent's retaliatory disciplinary interrogation of [Complainant] in the aftermath of the Laredo incident," and Complainant's concession "that, due to the expiration of the statutory limitations period, he cannot obtain remedial relief based on the Respondent's retaliatory interrogation of him on May 1, 2013." Complainant Opp'n at 6, 8. Complainant does allege a causal connection between the Laredo protected activity and his placement on NOQ status, in addition to the 15D evaluation; this argument will be addressed below in the discussion of the adverse action and causation elements.

Accordingly, Complainant is entitled to judgment as a matter of law that he engaged in protected activity when he communicated his concerns to Respondent regarding his decision to delay the Laredo flight, and also when he filed the April 2013 AIR 21 complaint.

b. Flight Tracking Data and Safe Cargo Practices Concerns

While the subject matter of Complainant's concerns clearly relates to air carrier safety, there is a genuine dispute of material fact as to whether his belief was objectively reasonable for several reasons: the evidence of record, particularly Complainant's own testimony, suggests that FedEx's publishing of tracking data is required by the FAA; it is unclear whether Complainant was concerned with the publishing of airplane tracking data, live package tracking data, or both; and neither party pointed to any FAA authority or formal FedEx policy in support of its respective position regarding airplane tracking data and package tracking data.[11] To properly analyze Complainant's arguments regarding the third instance of alleged protected activity, it is necessary to provide a detailed summary of his specific allegations.

In his October 2013 AIR 21 complaint, Complainant pleaded as follows:

> On August 9, 2013, [Complainant] sought to bring to FedEx's attention that its policy of *publishing live tracking information relating to packages and aircraft in transit* violated its obligations under federal law relating to air carrier safety in that the Respondent's policy had the effect of facilitating and maximizing the criminal destruction of cargo, aircraft, and human lives, by granting terrorists the ability to carefully select the timing of detonation.

RX K at 3 (emphasis added). Complainant alleged that he first brought this to Respondent's attention in his capacity as Security Chairman for ALPA in 2001 and/or 2002, and again brought this to Respondent's attention in 2013 after reading "various media reports concerning how al-Qaeda in the Arabian Peninsula had developed a strategy of planting explosives in packages carried by US-flag cargo carriers"; he further alleged that in October 2010, "such explosive devices were discovered on both FedEx and UPS planes." *Id.* Specifically, Complainant cited 49 C.F.R. §§ 1544.101,[12] 1544.103(a)(1)[13] and (b),[14] 1544.205(a),[15] and 1544.205(c)(1).[16]

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[11] As will be discussed in greater detail below, of particular importance in resolving disputes of material fact in this matter would be evidence to establish whether package tracking data is merely historical, or whether it is real-time and directly linked to a particular flight, as distinguished from a mere shipping invoice.

[12] Generally, this Section provides that aircraft operators "must adopt and carry out a security program that meets the requirements of § 1544.103."

[13] This Section provides: "Each security program must: (1) Provide 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."

[14] This Section provides: "Each aircraft operator having a security program must: (1) Maintain an original copy of the security program at its corporate office. (2) Have accessible a complete copy, or the pertinent portions of its security program, or appropriate implementing instructions, at each airport served. An electronic version of the program is adequate. (3) Make a copy of the security program available for inspection upon request of TSA. (4) Restrict the distribution, disclosure, and availability of

During his deposition, Complainant testified that he currently believes "today, that we should stop *publishing real-time aircraft tracking* because it incentivizes the placement of bombs on our airplanes." Complainant Dep. at 68 (emphasis added). He elaborated that "what FedEx does now is they *publish the history of where your package is online* if you put in the airbill number." *Id.* (emphasis added). Complainant further testified, "*FedEx, through an agreement with the FAA* every time an airplane takes off at FedEx, the electronics, the electronic tracking system in the airplane sends that data to the FAA. The FAA in concert with FedEx distributes that data . . . to third parties." *Id.* at 69 (emphasis added). Regarding FedEx's policy of providing information regarding their flights to the FAA, Complainant also testified, "I would assume it's part of the air traffic control system agreement that *every air carrier agrees to* when they enter into business in the United States." *Id.* at 71 (emphasis added). Regarding FedEx's publication of package tracking data, Complainant stated, "I'm not an expert on that particular package tracking reporting system . . . , but generally speaking *I believe it's a history*." *Id.* (emphasis added). In response to the question, "Does FedEx's website show specific plane information like a flight number," Complainant responded, "Not that I'm aware." *Id.* at 72. Regarding his concerns with "real-time tracking" that he expressed during the August 9, 2013 meeting, Complainant stated, "I had a concern that *we weren't doing enough to improve our security* for the airplanes." *Id.* at 150-51 (emphasis added). Regarding real-time flight tracking information, Complainant further explained that FedEx and the FAA "act in concert. The company publishes; the FAA receives and disseminates." *Id.* at 162.

In his Declaration, Complainant asserted that in September 2001, he communicated "concerns about *real-time tracking data* to Captain Bruce Cheever, VP of FedEx Express Flight Operations," and authored a letter to Captain Cheever under FPA President David Webb's signature.[17] Complainant Decl. at 2 (emphasis added). In this letter, Complainant wrote, "[T]he FedEx website allows customers to track their package by simply inputting an airbill number into the system or asking customer service agents on the telephone and at walk-up counters to provide the exact location of their package." Complainant Decl., Ex. D. He further requested that "FedEx management . . . temporarily suspend that portion of our package tracking software that deals with the flight segment." *Id.* In an attachment to his October 18, 2001 letter to FedEx Captain Jack Lewis, Complainant wrote, "When will management remove *flight tracking data* from public access?" Complainant Decl., Ex. E (emphasis added).

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information contained in the security program to persons with a need-to-know as described in part 1520 of this chapter. (5) Refer requests for such information by other persons to TSA."

[15] This Section provides: "Each aircraft operator operating under a full program, a full all-cargo program, or a twelve-five program in an all-cargo operation, must use the procedures, facilities, and equipment described in its security program to prevent or deter the carriage of any unauthorized persons, and any unauthorized explosives, incendiaries, and other destructive substances or items in cargo onboard an aircraft."

[16] This Section provides: "Each aircraft operator operating under a full program or a full all-cargo program must use the procedures in its security program to control cargo that it accepts for transport on an aircraft in a manner that: (1) Prevents the carriage of any unauthorized person, and any unauthorized explosive, incendiary, and other destructive substance or item in cargo onboard an aircraft."

[17] This Tribunal cites Complainant's concerns as expressed in 2001 since he testified that the concerns he expressed in 2013 were essentially the same as those he communicated in 2001. *See, e.g.*, Complainant Dep. at 68:12-19.

In support of his Motion for Summary Decision, Complainant argues that "FedEx's existing cargo practices encourage and incentivize the introduction of destructive devices into FedEx aircraft for criminal and terrorist purposes." Complainant Motion at 3. In his Opposition to Respondent's Motion for Summary Decision, Complainant contends that "Respondent's release of *real-time tracking data* failed to conform with [sic] this federal aviation standard," and that Ondra testified that these concerns were rational. Complainant Opp'n at 9 (emphasis added). Of note, Complainant further contends, "The FAA is merely an agency, it is not the law. Its regulatory interpretations may be entitled to consideration, but not to servile and unquestioning acceptance." *Id.* In support of that argument, Complainant cites news articles in attempt to demonstrate that other federal agencies "have found the FAA to be, at best, an inconstant enforcer of federal aviation standards." *Id.*

As cited above, it is well-established that an AIR 21 complainant "need not prove an actual violation"; however, "the complainant's belief that a violation occurred must be objectively reasonable." *See Hindsman*, ARB No. 09-023 at 5. In analyzing the reasonableness of the complainant's belief, the Board has observed that "mere words do not create an FAA violation when the parties' actual conduct does not violate FAA regulations. *Id.* at 6. In *Hindsman*, the complainant, a lead flight attendant, "saw a suspicious portable oxygen device [POC] in one compartment" onboard a flight, but the gate agent and captain told her that the device was permitted onboard; the complainant also consulted her flight attendant manual and "learned that the device was a POC listed in her manual as approved for flight by the Federal Aviation Administration." *Id.* at 2. Two days later, the *Hindsman* complainant reported to the air carrier's safety director that "before she found out the POC was flight-approved, Delta was going to dispatch the flight knowing that a potentially explosive device was on board"; this report also formed the substance of her subsequent AIR 21 complaint. *Id.* at 2-3. The Board held that "once she discovered that the POC was FAA-permitted, she could not have had a reasonable belief that flying with it on board violated air safety regulations," such that she did not engage in protected activity; thus, the ALJ "properly dismissed her complaint as a matter of law." *Id.* at 5.

Here, a careful review of Complainant's complaint, 2001 letters to FedEx management, Complainant's Declaration, and particularly his sworn deposition testimony, suggests that Complainant may be conflating real-time flight tracking data with historical package tracking data. Of note, he testified that he was not sure whether package tracking data was merely historical, *i.e.* it may not be, and may never have been, provided in real time.[18] Moreover, regardless of the type of data, Complainant's own sworn statements suggest that the FAA actually requires this data from FedEx, which would make FedEx incapable of violating FAA regulations on this basis as a matter of law.[19] Neither party has pointed to formal FAA or FedEx policy to distinguish these types of data and whether real-time data is published for package

[18] The reasonableness of Complainant's belief would be impacted should his safety concerns relate solely to the publication of package tracking data if there were no genuine dispute of material fact that the published data were merely historical tracking information.

[19] To the extent that Complainant's safety concerns relate to a belief that practices required by the FAA violate air carrier safety regulations of other federal agencies, that is a question of legislative policy, irrelevant to, and inappropriate for resolution in, this forum.

tracking.[20] For this reason, when viewing the facts in the light most favorable to the Complainant or Respondent for purposes of their respective Motions for Summary Decision, there exist genuine disputes of material fact regarding the objective reasonableness of Complainant's belief.

Furthermore, to the extent that Complainant's counsel rests his case on the argument that the media has portrayed the FAA as "an inconstant enforcer of federal aviation standards," such that its "interpretations may be entitled to consideration" because it "is merely an agency, it is not the law" (*see* Complainant Opp'n at 9), this Tribunal is singularly unpersuaded. The FAA was created by 85 P.L. 726, 72 Stat. 731 "to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes." The FAA is expressly endowed with rulemaking authority pursuant to the Administrative Procedure Act, and the FAA may adopt, amend or repeal regulations; rulemaking documents are published in the Federal Register. *See generally* 14 C.F.R. §11.25. Moreover, AIR 21 clearly recognizes orders, regulations, or standards of the FAA as federal law relating to air carrier safety. Complainant's attacks on the FAA's regulatory authority are misplaced and meritless.

2. Adverse Action

Here, Complainant concedes that the May 1, 2013 meeting as an instance of adverse action is barred by the ninety-day statute of limitations under the Act.[21] Complainant alleges that he was subjected to adverse action when he was placed on NOQ status, *i.e.* paid leave, on August 5, 2013, when NOQ status was reinstated on August 9, 2013, and when he was improperly compelled to submit to a 15D evaluation. Complainant further alleges that NOQ status resulted in the loss of conditions or privileges of his employment, as it grounded him as a pilot and made him ineligible for jumpseat privileges.

The Act provides, "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to

[20] For example, as part of the FAA's Next Generation Air Transportation System, after January 1, 2020, aircraft operating in most controlled airspace, as defined in 14 C.F.R. § 91.225 will be required to have a fully-operational Automatic Dependent Surveillance – Broadcast ("ADS-B") system that includes a certified "position source," which refers to "equipment installed onboard an aircraft used to process and provide aircraft position (for example, latitude, longitude, and velocity) information," pursuant to the requirements of 14 C.F.R. § 91.227. In addition, 14 C.F.R. § 91.215 governs current policy regarding ATC transponder and altitude reporting equipment and use, which may also undercut the reasonableness of Complainant's belief, should his safety concerns relate solely to the publication of live flight tracking data. Further, this Tribunal has been unable to locate a regulation that places an affirmative duty on an air carrier to provide publically available real-time flight tracking and altitude data.

[21] As the Board stated in *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 6 n.9 (Jan. 31, 2006), "Complaints are or are not 'timely filed.' Claims, *i.e.*, adverse actions, are or are not 'actionable.' And even if not actionable, they may be used as background evidence to support actionable claims." The Board further explained that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 10 (quoting *National R.R. Passenger Corp. v. Morgan*, 536U.S. 101, 113 (2002) (internal quotation marks omitted).

compensation, terms, conditions, or privileges of employment because the employee" engaged in protected activity. 49 U.S.C. § 42121(a). In *Vannoy v. Celanese Corp.*, the Board observed, "An adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis." ARB No. 09-118, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, slip op. at 14 (Sept. 13, 2011) (explaining that use of the "tangible consequences standard," rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error). However, the Board has clarified, "*Burlington*'s adverse action standard, while persuasive, is not controlling in AIR 21 cases," but that it is "a particularly helpful interpretive tool." *Menendez*, ARB Nos. 09-002, 09-003 at 15.

The Board has held "that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions." *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated, "Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it "would deter a reasonable employee from engaging in protected activity." *Id.* at 20.[22] Accordingly, the Board views "the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline." *Williams*, ARB No. 09-018 at 10-11. The Board further observed that "even *paid* administrative leave may be considered an adverse action under certain circumstances." *Id.* at 14 (emphasis in original) (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998) (holding that "although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus)). In addition, with regard to an employer's decision to compel a complainant to undergo a psychiatric examination, the Board has upheld the ALJ's determination that this constitutes adverse action that changes the conditions of a complainant's employment. *See Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, slip op. at 3, 6 (Nov. 30, 2005) (explaining that because respondent took complainant "out of service as a pilot and placed him on paid status pending the results of the examination" in accordance with the collective

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[22] *See also Williams*, ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases: "To settle any lingering confusion in AIR 21 cases, we now clarify that the term "adverse actions" refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term "discriminate" is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress").

bargaining agreement, these "were adverse actions that changed the conditions of his employment").

In light of the foregoing, Respondent's reliance on the facts that Complainant was paid while on NOQ status and that his sick leave was replenished seems more consistent with the "tangible consequences standard"; in so arguing, Respondent has not considered that adverse employment actions "can extend beyond tangibility and ultimate employment actions." *Menendez*, *supra*. Moreover, the Board has expressly held that paid administrative leave may constitute adverse employment 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 also 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. Moreover, reinstatement of NOQ status coupled with an order to submit to a 15D evaluation, as in *Robinson*, *supra*, essentially amounts to "[e]mployer warnings about performance issues," which could be construed as "manifestly more serious employment actions than the trivial actions the Court listed in *Burlington Northern*." *See Williams*, ARB No. 09-018 at 14 (explaining, "Even under *Burlington Northern*, we believe that the supervisor's warning and threatening counseling session in this case constitutes a materially adverse action (more than trivial). . . . Such warnings are usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them"). Thus, no genuine dispute of material fact exists regarding the 15D evaluation as an adverse employment action.

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.

3. Contributing Factor Analysis

Finally, Complainant must demonstrate that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). The Board has held that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, slip op. at 5 (Jan. 31, 2011). The Board has observed, "The 'contributing factor' standard was employed to remove any requirement on a whistleblower to prove that protected activity was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, slip op. at 22 (Mar. 20, 2015) (internal quotation marks omitted). Therefore, the complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity." *Hutton v. Union Pacific R.R.*, ARB No. 11-091, slip op. at 8 (May 31, 2013).

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6-7(Feb. 29, 2012). Though "[t]emporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of making a *prima facie* showing of knowledge and causation," and "may support an inference of retaliation, the inference is not necessarily dispositive." *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 7 (Dec. 31, 2007); *see also Powers*, ARB No. 13-034, slip op. at 23 (explaining that at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). "Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006). This is consistent with the Board's reasoning in *Powers*:

> While, as *Fordham* explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation as long as the evidence is relevant to that element of proof. 29 C.F.R. § 18.401. Thus, the *Fordham* majority properly acknowledged that "an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well the credibility of the complainant's causation evidence."

Powers, ARB No. 13-034 at 22 (quoting *Fordham v. Fannie Mae*, ARB No. 12-061, slip op. at 23 (Oct. 9, 2014).

In support of their respective arguments regarding this element, both Complainant and Respondent heavily rely on the deposition testimony of the witnesses involved in this matter, and the various interpretations of these witnesses' statements and opinions as to some witnesses' animus towards Complainant. *See, e.g.*, Complainant Mot. at 32-35 (arguing that McDonald's testimony shows that the decision to impose NOQ status was related to the Laredo incident, and that Ondra and Tice's respective deposition testimony establishes pretext because they had no concerns regarding Complainant's mental health as of August 5, 2013); *see also* Resp't Mot. at 15, 20-22 and Resp't Opp'n at 20-21 (relying on deposition testimony of Complainant, in addition to statements of other witnesses or witnesses' alleged rationales for making employment decisions to refute Complainant's causation evidence).

It is well-established that the adjudicator cannot weigh evidence or make credibility determinations at the summary decision stage, and thus, the parties' primary reliance on conflicting testimony regarding causation necessarily renders analysis of this element inappropriate at this stage of the proceedings. Moreover, in *Negron*, the Board underscored the importance of weighing the testimony of witnesses in evaluating a complaint arising under the Act:

> In weighing the testimony of witnesses, the ALJ as fact finder has had an opportunity to consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. The ARB gives great deference to an ALJ's credibility findings that rest explicitly on an evaluation of the demeanor of witnesses.

Negron, ARB No. 04-021 at 5 (internal citations omitted) (internal quotation marks omitted). For these reasons, and in light of the type of evidence primarily relied upon by both parties, a determination as to the causation element cannot be reached on summary decision, as the parties ask this Tribunal to make credibility determinations and weigh of evidence.

C. Whether Respondent Would Have Taken the Same Unfavorable Action Absent Complainant's Protected Activity

Assuming Complainant establishes a *prima facie* case, the Act provides, "Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C.A. § 42121(b)(2)(B)(iv). "Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, slip op. at 11 (May 26, 2010). The Board further explained, "Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability." *Id.*

However, where an employer proffers shifting explanations for its adverse action, or engages in disparate treatment of similarly situated employees, the employer's "explanations do not clearly and convincingly indicate that it would have" taken the same unfavorable action absent the protected activity. *See Negron*, ARB No. 04-021 at 8; *see also Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070 and 08-074 (Sept. 30, 2009). "An employer's shifting explanations for its adverse action may be considered evidence of pretext, that is, a false cover for a discriminatory reason." *Douglas*, ARB Nos. 08-070 and 08-074, slip op. at 16. Disparate treatment may also constitute evidence of pretext where similarly situated employees, employees involved in or accused of the same or similar conduct, are disciplined in different ways. *Id.* at 17; *see also Clemmons*, ARB No. 08-067, slip op. at 11 (finding that the administrative law judge's credibility determinations and "factual findings regarding temporal proximity, pretext, and shifting defenses . . . thus preclude any determination that [the employer] could establish by clear and convincing evidence that it would have fired [the complainant] absent his protected activity").

In support of their respective arguments on Respondent's same action defense, the parties primarily rely on the same forms of evidence, namely deposition testimony for evidence of witnesses' motivations and subjective beliefs in taking employment actions (*see* Complainant

Mot. at 35-39; *see also* Resp't Mot. at 20-23), as cited in support of their causation arguments. Thus, as with analysis of the causation element, analysis of Respondent's same action defense necessarily requires important credibility determinations, *see Negron*, *supra*, and weighing of the evidence that is inappropriate on summary decision.

VII. CONCLUSION

With regard to protected activity, for purposes of these Motions, the parties do not dispute that Complainant engaged in protected activity when he refused to fly out of Laredo and when he filed the April 2013 AIR 21 complaint.

When viewing the facts and all reasonable inferences in the light most favorable to either party for purposes of considering their respective Motions, genuine disputes of material fact exist as to whether Complainant had a reasonable belief that publishing live tracking data constituted a violation. Therefore, the parties' Motions for Summary Decision on this element are **DENIED**.

When viewing all facts and reasonable inferences in the light most favorable to either party for purposes of their respective Motions, Complainant is entitled to judgment as a matter of law that he was subjected to adverse actions when placed on NOQ status, when NOQ status was reinstated, and when he was compelled to submit to a 15D evaluation. Therefore, Complainant's Motion for Summary Decision is **GRANTED** as to this element of his claim.

There are genuine disputes of material fact as to the remaining issues, causation and Respondent's same decision defense, in this matter. Because the parties primarily relied on evidence that would require this Tribunal to weigh evidence and make credibility determinations, this Tribunal cannot render a determination on causation or Respondent's same action defense on summary decision. Therefore, the reminder of Complainant's Motion for Summary Decision is **DENIED**, and the remainder of Respondent's Motion for Summary Decision is also **DENIED.**

In sum, Respondent's Motion for Summary Decision is **DENIED**. Complainant's Motion for Summary Decision is **GRANTED IN PART AND DENIED IN PART**.

SO ORDERED.

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Administrative Law Judge

Cherry Hill, New Jersey

SERVICE SHEET

Case Name: **ESTABROOK_MARK_v_FEDERAL_EXPRESS_CORP_**

Case Number: **2014AIR00022**

Document Title: **ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION AND DENYING RES**

I hereby certify that a copy of the above-referenced document was sent to the following this 9th day of May, 2016:

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, a true and correct copy of the foregoing Record Excerpts were served via electronic filing with the Clerk of Court and all registered ECF users.

Dated: December 16, 2019

/s/ Lee R. A. Seham