

APPENDIX

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**EXCERPTS OF THE
TRANSCRIPT OF
THE PROCEEDINGS**

1 Q Well, if you could read up from the bottom,
2 there's an e-mail from William McDonald to you dated August
3 5th, 2013 at 2:11 p.m.

4 A Yes.

5 Q And you recall receiving that e-mail from William
6 McDonald at that time?

7 A Yes.

8 Q And you recall responding to Mr. McDonald via e-
9 mail of August 6th, 2013 at 6:58?

10 A Yes, I understand the sequence.

11 Q And could you -- you responded, "Thanks, Bill. I
12 have placed a call to Rob this afternoon and left a message.
13 I really wanted to fly that trip to Panama, so I wish we
14 could have talked before I got removed. But, having said
15 that, I understand why you did what you did. If you could
16 arrange a conference phone call with the head of security
17 and Fred, I think this could take less than 15 minutes."
18 Could you explain what you're trying to accomplish here?

19 A Initially, I was still thinking that this NOQ
20 business could be resolved with a simple phone call to Bill.
21 And I was scheduled to fly a really nice Panama trip that
22 had like a three- or four-day layover in Panama, and I hated
23 to lose that trip.

24 And I thought, well, whatever he's confused about,
25 I can get this taken care of with a phone call. However, I

1 had this funny feeling in the pit of my stomach that this
2 had something to do with Laredo and the comments that Rob
3 Fisher had made to me after my May 1st meeting with him.

4 Q Well, let's start from the beginning. Will you
5 please tell the Court about what happened to you in Laredo,
6 Texas, on April 10th, 2013, what your situation was, where
7 you were?

8 A I was in the hotel in Laredo, with my first
9 officer in the lobby of the hotel, and we became aware of a
10 severe thunderstorm line between Laredo and Memphis. And we
11 had already looked at the flight release that our dispatcher
12 had given us, had assigned us. And we had looked at the
13 FedEx weather, we had looked at the FedEx radar screen.
14 Then I looked at the FAA's NOAA radar source. And, finally,
15 I looked at Intellicast weather source.

16 So, after reviewing the three radar screens, I
17 called Sherrie Hayslett, the GOC dispatcher for that flight
18 release, and advised her that I was going to be late -- or,
19 that we were going to be late out of Laredo. And she
20 acknowledged the weather and brought it up to me, as a
21 matter of fact.

22 And so I agreed with her that it was a significant
23 thunderstorm line, and I said, I don't see any way for us to
24 fly through this thing and get to Memphis. She originally
25 had assigned a flight route that took me east of the storm

1 thunderstorm. And it's a violation of the company FOM, the
2 flight operations manual. We're also not to penetrate
3 severe turbulence.

4 Q Uh-huh.

5 A And, if you survive doing something like that, you
6 would most likely damage the aircraft and probably lose your
7 job.

8 Q Was there any relevant communications from air
9 traffic control during this period?

10 A Yes. I was placed on what they call a gate hold.
11 I didn't even have the option to take off, as Mark Crook
12 was encouraging me to do, even if I wanted to. Memphis air
13 route traffic control placed a gate hold on my flight for
14 several hours.

15 And we communicated with the Laredo tower, and we
16 talked to them every 10 or 15 minutes on the radio and asked
17 them what our gate hold status was. And finally, as the
18 tower was closing that night, he said, I just got a release
19 from Memphis, you're cleared to take off. And that's when
20 we took off. If I had violated that gate hold, I would have
21 been in violation of Federal Aviation Regulations, and I
22 probably would have been seeing Bill McDonald for that
23 reason, as well.

24 Q I'd like you to turn to respondent's exhibit RX-
25 10, the transcripts of the audio recordings.

1 at 8214.

2 Q It indicates a two-minute call, does that sound
3 about right in terms of time?

4 A Yes.

5 Q Has respondent FedEx provided a transcript of this
6 call?

7 A No.

8 Q Okay. Now could you please recount the nature of
9 the discussion that you had with Mark Crook at 9:43?

10 A It was pretty heated. He was directing me to take
11 off and fly to Memphis, and I told him I would decide when I
12 take off and fly to Memphis. And he began saying what I
13 considered to be pilot-pushing type things, like you're the
14 only one not taking off, everybody else is taking off,
15 you're the only one that's going to be late tonight. Of
16 course, I found out when I got to Memphis that there are a
17 dozen other airplanes in the traffic pattern coming in just
18 as late as I was, all from the west of Memphis.

19 Q Now, CX-5, there are two remaining calls in terms
20 of -- in going down the list here, there are two remaining
21 calls on this CX-5 Verizon phone document. Do either of
22 those remaining calls reflect any further discussion with
23 Mark Crook?

24 A Yes.

25 Q Could you explain that?

1 A The next phone call, I was trying to get in touch
2 with Sherrie --

3 Q Uh-huh.

4 A -- because I wanted to talk to her about that
5 flight plan that needed to be reissued. I needed a new
6 flight plan. There was no way I was going to be able to
7 execute that flight based on her recommendation, so I
8 attempted to call her back.

9 And he answered the telephone, the GOC telephone,
10 and he claimed to be sitting right next to her, and I was --
11 I didn't know that. I thought I had mis-dialed on my cell
12 phone and that I had called him back again as the duty
13 officer.

14 And then he says, no, I'm in GOC now and I'm
15 watching you very closely, which I thought was very
16 sarcastic and very intimidating. And I said, well, I didn't
17 want to talk to you, Mark, I wanted to talk to Sherrie.
18 Well, what do you want? Have you pushed yet? And I said,
19 no, Mark, I haven't pushed, I'll call back and ask for
20 Sherrie.

21 So I terminated that phone call, and I called a
22 couple minutes later and talked to Sherrie. And I asked her
23 for a new flight plan, and she was pleasant, and she
24 complied, and it now had a westerly direction from which I
25 approached Memphis --

1 letter from Alan Armstrong.

2 Q Now if you can go back to the first page of this
3 exhibit, which is paginated C-36 -- we're still within the
4 exhibit CX-8 -- it reads, I acknowledge -- now, this is from
5 Rob Fisher saying, "I acknowledge receipt of your letter.
6 In accordance with established practice at FedEx, pilots
7 participating in disciplinary processes under section 19 of
8 the FedEx ALPA collective bargaining agreement are entitled
9 to representation by ALPA. No outside attorneys are
10 permitted to attend or otherwise participate in those
11 processes." Did you receive this e-mail on or about April
12 29th?

13 A Yes, I did.

14 Q Okay.

15 A Alan Armstrong sent this to me.

16 Q Now, did you have a investigative meeting on May
17 1, 2013?

18 A Yes, I did. I attended one with Rob Fisher.

19 Q And can you describe to us what happened at that
20 meeting?

21 A I asked before I ever showed up at the meeting if
22 Captain Fisher would review the tapes, the audio tapes from
23 Laredo, and he did. At least, he admitted that he did. And
24 so, when I was at the meeting, it was a very brief, short
25 meeting. Rob Fisher notified me that they were not going to

1 take any disciplinary action against me.

2 This was a meeting that he said to me upon the
3 conclusion of that meeting that Bill McDonald was upset with
4 not being able to punish me until Rob Fisher told him to
5 listen to the tapes. And he assured me that Bill McDonald
6 listened to the tapes.

7 Q Was there any discussion with respect to duty
8 officer Crook?

9 A I asked him if he was going to counsel Captain
10 Crook about pilot-pushing, and Rob Fisher said, yes, he
11 would counsel him.

12 Q Did Captain Fisher give you any reason, other than
13 the tapes, for his decision not to take any disciplinary
14 action against you?

15 A No.

16 Q And did he reference the tapes specifically in
17 terms of his decision-making?

18 A Yes.

19 Q Okay.

20 A He said that he listened to the tapes and he was
21 not going to take any further disciplinary action.

22 Q I'm going to refer you to respondent's exhibit RX-
23 8. And, again, this is the Mark Crook.

24 A Okay.

25 Q Are you there?

1 A I am.

2 Q Now, three paragraphs up from the bottom in this
3 e-mail from Mark Crook to William McDonald, Rob Fisher and
4 Michael Speer that's dated April 10th, 2013, it says, "I
5 have attached Sherrie's first conversation with Captain
6 Estabrook, my conversation, and then Sherrie's second
7 conversation.

8 "This accuses me of pilot-pushing and ordering
9 them to take off during Sherrie's second conversation. At
10 no time did that ever happen in my conversation with Captain
11 Estabrook." Did Fisher ever explain why you were brought in
12 for an interrogation when he had already received the tapes
13 three weeks in advance?

14 A He said that Bill McDonald directed him to.

15 Q If you can go to complainant's exhibit CX-9, and
16 explain to us what complainant's exhibit CX-9 is?

17 A This is a letter I received from OSHA
18 acknowledging that I had withdrawn my AIR-21 complaint the
19 day after Rob Fisher met with me on May 1st.

20 Q Did you discuss with Rob Fisher the withdrawal of
21 your AIR-21 complaint?

22 A Yes, I did. I notified him that, in lieu of the
23 fact that they weren't taking any disciplinary action
24 against me that I would, in kind, withdraw my AIR-21
25 complaint.

1 Q And how did you notify them? Was that face-to-
2 face, e-mail?

3 A I told Rob that at the meeting that we had on May
4 1st.

5 Q And if you could refer to complainant's exhibit
6 CX-10? This is a defendant's log of privileged documents.
7 I'm going to refer you to item 5 on this list. Tell me when
8 you get there. It's at a date of 04/29.

9 A I'm there.

10 Q All right. Date of 04/29, e-mails between
11 director W. McDonald and Attorney Rob Tice regarding Rob
12 Fisher letter to Attorney Armstrong. And my question for
13 you is, on April 29th, in that period, had Armstrong written
14 any letter to the company other than the letter that has
15 already been identified as part of complainant's exhibit CX-
16 8?

17 A Not that I'm aware of.

18 Q Okay.

19 A I believe that was -- you know, Armstrong's letter
20 to Fisher and these other individuals was written shortly
21 before the May 1st meeting.

22 Q Do you have any additional evidence that, in the
23 three months between your May 2nd, 2013 withdrawal of your
24 AIR-21 case, the Laredo-related case, and your August 5th,
25 2013 NOQ determination, that the Laredo incident was still a

1 Q No, I'm asking you what you actually said. You
2 just testified before about what you wanted to say. And
3 then I just want to get an overview of what you did actually
4 say at that meeting. Were you the first to address the
5 group?

6 A Yes, I was. The first thing I talked about was
7 the consequences of not stopping the publishing of our
8 package and aircraft tracking data, that in the articles I
9 had been reading in the days leading up to my August 4th e-
10 mail that I had discovered that Al Qaeda was exploiting the
11 data, just as I predicted that they would do when I made
12 briefings to the company management in 2001 and 2002, and
13 that concerned me greatly. And I wanted it to stop. I
14 wanted the publishing of our data to stop. So that was the
15 first thing that I told them.

16 I believe the second thing I told them was that we
17 had a rumor in the pilot lounge that Aubrey Calloway had
18 converted to Islam, and I had heard it from two separate
19 pilots in the crew lounge. And then I think I recommended
20 to them that we start an operations research group to
21 address security issues --

22 Q Uh-huh.

23 A -- and bring a blend of different expertise in the
24 pilot group to join this effort.

25 Q Okay.

1 A I gave them a background of my military experience
2 at AWACS and told them that I had worked in the Persian
3 Gulf, I had worked in the North Atlantic, and that I had
4 chased Russian aircraft around in the North Atlantic.

5 Q And in the context of the discussion of the
6 aircraft and package tracking information issue did you
7 discuss your background as a pilot union security committee
8 chairman?

9 A Yes, I did tell them that I had been the chairman
10 of the FPA Security Committee and that I had made these
11 briefings prior to Bill Logue and Bill Henrikson, and that I
12 had appealed it as far as I could, and it just stopped at
13 Bill Logue.

14 Q And did you discuss the October cargo aircraft
15 attempts by Al Qaeda that were identified in complainant's
16 exhibits CX-12 and CX-13?

17 A Yes. The whole point of me re-initiating this was
18 because of the printer bomb incidents in 2010, and I was
19 asking Todd Ondra if he was aware of those incidents, and he
20 acknowledged and shook his head. I asked him if he was
21 aware of the comparisons between the attack on the 9/11
22 aircraft and the attack on Flight 705 here at FedEx, if he
23 was aware of those similarities.

24 Q Uh-huh.

25 A And he nodded his head. And I think, for

1 brevity's sake, that's what I said.

2 Q Was the name al-Asiri raised during your
3 discussion?

4 A Yes, it was. Al-Asiri was the bomb-maker credited
5 with making the two printer bombs in Yemen, and I briefly
6 talked about his intentions to revisit the issue, as he has
7 in the past. And I also talked about Al Qaeda's fascination
8 with always completing their objectives and returning to
9 their target. I predicted that we would see these guys
10 again.

11 Q And, again, if you could turn to joint exhibit JX-
12 4?

13 A Okay.

14 Q This is a joint exhibit that the parties recognize
15 as a typed-up version of notes that Todd Ondra took during
16 this meeting.

17 A Uh-huh.

18 Q And four lines up from the bottom it reads,
19 "Estabrook advised the only scans on shipments should be the
20 pickup and the deliver scan." Did you say words to that
21 effect during this meeting?

22 A Yes, I did. I was directing my attention at this
23 time to Todd Ondra and waiting for some sort of
24 acknowledgement from him. And I told him that we need to
25 make sure that we treat the disclosure of our tracking data,

1 both in packages and airplanes, we need to limit that
2 distribution of information. I didn't get any
3 acknowledgement from anybody in the room about any of these
4 issues.

5 Q I want to draw your attention to complainant's
6 exhibit CX-31, at the page paginated as C-165 at the bottom
7 where it begins, RFA-8-11, which is an admission by FedEx
8 which the relevant portion starts after -- with the second
9 sentence that, "FedEx admits complainant raised safety-
10 related issues associated with the industry's package
11 tracking systems. FedEx also admits complainant expressed
12 concern that terrorist groups could use tracking information
13 in carrying out terrorist attacks." Did you say things to
14 that effect during this August 9th meeting?

15 A Yes, I did. The tracking data -- the
16 dissemination of tracking data gives the enemy the ability
17 to set timing devices.

18 Q But what I'm asking you more specifically, though,
19 just to keep this moving, is, did you say things to that
20 effect, not to say whether it's -- yeah, I'm just asking to
21 confirm whether this admission is accurate insofar as I read
22 it.

23 A Yes.

24 Q Now, you said you got -- was there any response
25 from the company representatives with respect to these

1 security issues that you raised?

2 A Zero.

3 Q So did they then begin to ask you questions? And
4 how did the meeting proceed after you concluded your
5 remarks?

6 A Rob Tice asked me if I had any other security-
7 related items to bring up. I said, no, that's about it.
8 And he said, well, Bill McDonald thinks that you've had a
9 stroke. And I said, when did Bill McDonald graduate from
10 medical school?

11 And he said, well, he thinks you are a fellow
12 named Mayday Mark on a pilot bulletin board. And, as he
13 said this, he pushed this stack of papers across the table
14 to me with highlighted passages in yellow. And he said, are
15 you Mayday Mark?

16 I said, no, I'm not Mayday Mark. And he said,
17 have you visited this website and posted any comments on
18 this website? And I said, well, you know, what is the name
19 of the website. And he told me. And I said, I haven't been
20 on a pilot bulletin board in 12 years, I don't have time for
21 this nonsense.

22 And at that time Rob Fisher interrupted the
23 conversation, and he said, Mark, do you have your flight
24 physical certificate with you? I said, yes, I do. And he
25 says, may I see it? And I gave it to him. He opened it up,

1 careful, you're on a recorded line. And I said, I don't
2 give a fuck. Why? Who's making me go back on NOQ? And he
3 said, security. And I said, what for? And he said, they
4 want you to go see a psychiatrist.

5 BY MR. SEHAM:

6 Q What did you do next?

7 A Well, I gathered myself, and then I called Alan
8 Armstrong again in Atlanta. I said, I need to hire you
9 again.

10 Q And can you turn to JX-7

11 A Okay.

12 Q And is this the letter that was sent on your
13 behalf by Alan Armstrong to Rob Tice, Fisher, Ondra and
14 McDonald?

15 A Yes, it is.

16 Q And let's see, I'm going to turn your attention to
17 item 9 on page 2, which states that, "Captain Estabrook
18 attended the Friday, August 9th, 2013 meeting with Tice,
19 Ondra and Fisher, suggesting, A, the removal of all flight
20 package tracking data from the internet and a request to
21 Homeland Security that would order the remaining airlines to
22 do so as well. Does that -- did you say words to that
23 effect at the August 9th meeting?

24 A Yes, I did.

25 Q Did you request that all data be eliminated?

1 A Well, with the exception of the pickup and
2 delivery times on the packages --

3 Q Okay.

4 A -- that's an accurate statement. But I think it's
5 probably a little too inclusive.

6 Q And I want to draw your attention to 12-B on page
7 3 of the letter, which states that Federal Express -- or, is
8 demanding that, quote, "Federal Express withdraw any
9 requests made by and through chief pilot Rob Fisher that my
10 client undergo a psychiatric evaluation." And why did -- if
11 you know, why did Armstrong include this reference to a
12 psychiatric examination?

13 A Well, that's one of the first things I told Alan
14 about when I hired him. I said, they're ordering me to go
15 see a psychiatrist. And that's what Rob Fisher told me on
16 the evening of August 9th, the same day as the meeting.

17 Q And, as of this time, had you had any evaluation
18 by a company aeromedical advisor?

19 A No.

20 Q Did you or Armstrong ever receive a denial from
21 FedEx concerning this representation that you had been asked
22 to see a psychiatrist as of August 9th?

23 A No.

24 Q Did you take any measures to get FedEx to disclose
25 its alleged reasonable basis for your psychiatric

1 THE WITNESS: No.

2 JUDGE MORRIS: During this process, did you ever
3 lose your first class medical certificate?

4 THE WITNESS: No, sir.

5 JUDGE MORRIS: When you're referring to third-
6 party vendors, I'm aware of FlightAware or Flight Tracker,
7 is that we're talking about?

8 THE WITNESS: Yes, sir.

9 JUDGE MORRIS: You mention opting out of providing
10 that data to the FAA. Where do you get this authority, or
11 where do you believe the authority exists for FedEx to opt
12 out of providing this information?

13 THE WITNESS: Well, there is a opt-out provision,
14 ongoing provision within the FAA. It's in the -- I can't
15 site you the exact req, but it's in the Federal Register.

16 MR. RIEDERER: Your Honor, if Mr. Seham is going
17 to testify for his witness, can I go ahead and object?

18 MR. SEHAM: Well, the question is whether you want
19 the testimony or the actual law.

20 JUDGE MORRIS: Well, we'll get to that after he's
21 done.

22 MR. RIEDERER: Okay.

23 JUDGE MORRIS: Questions based on mine?

24 MR. RIEDERER: What?

25 JUDGE MORRIS: Questions based on my questions of

1 myself or any person at FedEx tell somebody to fly -- to do
2 something dangerous.

3 Q But you had at least one conversation with Captain
4 Estabrook that wasn't recorded?

5 A Again, I can't recall. I know that when -- I'm
6 pretty sure that we talked. Whether I called him or he
7 called me, I can't recall, but I just told him he needed to
8 go to the ramp and get the jet ready to go.

9 Q There might have been more than one call with him
10 that wasn't recorded?

11 A [No audible response.]

12 Q You don't recall?

13 A I wouldn't bet my house on it.

14 Q You don't know one way or the other?

15 A Yes, I don't know one way or the other.

16 Q Okay.

17 A I know that was the second conversation I had with
18 him, telling him to get to the ramp. If we had a third one,
19 if he had called me and talked about the weather, I don't
20 recall that.

21 Q I want to take you to respondent's exhibit RX-10.

22 A The red book?

23 Q Yes. And I'm turning you to the fourth page, you
24 conversation with Captain Estabrook.

25 A RX-140?

1 does the releases. Weather is really -- you know, I'm
2 telling you, it's important to her, but it's not -- you
3 know, when she's getting 15 flights and the weather is
4 terrible, she's just trying to, you know, get the gasoline
5 correct and things like that to make this a legal flight.

6 Q Do pilots ever call dispatchers to get input on
7 the weather situation?

8 A Yes, they do.

9 Q And you knew that Captain Estabrook obviously
10 wanted --

11 A From these conversations --

12 Q Excuse me, let me finish.

13 A I'm sorry.

14 Q He wanted her further input on the weather, right?

15 A If she had any updates, yes.

16 Q But you still felt comfortable saying that Captain
17 Estabrook set himself up as the sole source of weather?

18 A I do.

19 Q And you never offered Captain Estabrook any
20 assistance in monitoring the weather, correct?

21 A I told Mark that once he got the jet ready, if he
22 had any concerns at all, to call me.

23 Q That's not in a recorded conversation?

24 A That's not recorded.

25 Q This is one of the conversations you had that

1 wasn't recorded?

2 A Yes.

3 Q Did Ms. Hayslett ever complain to you about --
4 well, withdraw that. Did you ever reach any conclusion that
5 Captain Estabrook was intentionally delaying the Laredo
6 departure?

7 A Intentionally?

8 Q For reasons -- let me add, for reasons other than
9 safety?

10 A No, I think Mark was -- there's no doubt about it,
11 Mark was concerned about the weather.

12 Q And he was the pilot in command, correct?

13 A Yes, he was.

14 Q And you knew that at the time you spoke to him?

15 A Yes.

16 Q So you didn't have a problem with the delay as
17 such, you just had a problem with his not reporting to the
18 ramp --

19 A Yes.

20 Q -- is that your testimony?

21 A Yes.

22 Q Did you fault him -- you were angry -- I'm going
23 to pursue this issue. You were angry about the delay, isn't
24 that true?

25 A Again, I was not angry.

1 we had lunch together, had the meeting, fairly short, 15
2 minutes. It was clear there was a miscommunication, and I
3 reiterated to Captain Estabrook that he needs to be at the
4 airport on time one hour prior to his scheduled departure
5 time.

6 Q During the meeting, did Captain Estabrook suggest
7 that the duty officer was pushing him to fly?

8 A He did make mention of that, yes.

9 Q Did you ever speak with the duty officer?

10 A I don't recall having a verbal conversation, but I
11 did receive an e-mail talking about the event. I think --
12 and plus we heard the tapes of the conversation between
13 Captain Estabrook and the duty officer. I could not
14 conclude that there was any pushing there. I concluded that
15 Captain Crook, the duty officer, was frustrated. He
16 couldn't understand why he wasn't at the airport. And so
17 the issue was, you're at your hotel, you're supposed to be
18 at the airport.

19 Q Do you know what an AIR-21 complaint is?

20 A Not in great detail. I know what it is now. At
21 the time, I did not.

22 Q During the meeting, did Captain Estabrook mention
23 he was withdrawing an AIR-21 complaint?

24 A I don't recall that, but it's possible.

25 Q Did you schedule this meeting with the intent to

1 Q Who is Bill McDonald?

2 A At that time in 2013, Bill McDonald was my boss,
3 and he was the system chief pilot.

4 Q Did you speak to Bill McDonald about this Laredo
5 incident?

6 A Yes. Captain Bill McDonald did -- I don't know if
7 he called me or we talked verbally, it was a long time ago,
8 but he did say, hey, we need to look into this and find out
9 why he didn't show up for work.

10 Q Did Captain McDonald instruct you to discipline
11 Captain Estabrook?

12 A No, he did not.

13 Q Did you follow up with Captain McDonald after the
14 meeting?

15 A I did. I believe I may have given him a phone
16 call just saying it's over, and I told him I'd follow up
17 with an e-mail, and I sent him an e-mail --

18 Q Can you look at --

19 A -- talking about what we did.

20 Q Can you look at respondent's exhibit RX-9?

21 JUDGE MORRIS: It's in the next volume.

22 MR. RIEDERER: And take your time to read that.

23 THE WITNESS: Okay.

24 BY MR. RIEDERER:

25 Q Is that the e-mail you sent to Captain McDonald

1 following your meeting?

2 A Yes, it is.

3 Q Can you explain in summary form what happened?

4 A Yeah, in summary form, that it was a fairly short
5 meeting. Once again, we told Captain Estabrook to please
6 work it out with the duty officer if there is -- if you have
7 a good reason to stay at the hotel. Otherwise, it's very
8 rare that you would ever be granted to stay in a hotel.

9 Therefore, we expect you to report to work one
10 hour prior to your scheduled departure time, that no one is
11 at that point -- once you show up for work, no one is going
12 to push you to fly an aircraft. I reiterated to him once
13 again that it's a joint responsibility between the captain
14 and the dispatcher, and you make a decision based on the
15 safe and legal operation of your aircraft.

16 Q At FedEx, have you ever instructed a pilot to fly
17 in unsafe weather conditions?

18 A No.

19 Q Was Captain McDonald upset that you didn't
20 discipline Captain Estabrook?

21 A No. It was -- no.

22 Q Do you know who Fred Smith is?

23 A Yes. Fred Smith is a founder of FedEx, the
24 chairman and CEO of FedEx Corporation, which is the parent
25 company of FedEx Express.

1 Q Prior to this e-mail, did Captain Estabrook ever
2 approach you and express any concerns with the safety or
3 security of the airline?

4 A No.

5 Q And did you eventually meet with Captain
6 Estabrook?

7 A Yes, we did.

8 Q Do you recall the date?

9 A Excuse me?

10 Q Do you recall the date?

11 A Yes. August 9th was the date we all met.

12 Q Who was present in the meeting?

13 A It was myself, Todd Ondra, who was the director of
14 aviation security, and it was Rob Tice, a labor relations
15 lawyer -- or, legal, I should say, and then, of course,
16 Captain Estabrook.

17 Q At the time of that meeting, what was Captain
18 Estabrook's flight status?

19 A At the time of the meeting, Captain Estabrook was
20 placed on NOQ, which is not operationally qualified.

21 Q Who made that decision?

22 A Captain McDonald.

23 Q Explain what NOQ means.

24 A NOQ is something that we use to take a pilot off
25 of his flight duties, with pay, so that we can arrange -- in

1 this case, arrange a meeting.

2 Q Are there other reasons why a pilot would be
3 placed on NOQ?

4 A It's typically when I want to meet with someone.
5 There could be other incidents where, you know, we kind of
6 interchange removing people with RMG based on a specific
7 trip, or we might NOQ based on an indefinite time until we
8 meet with someone.

9 Q And, if someone has other issues that are
10 questioning their fitness for duty, would they be placed on
11 NOQ?

12 A Yes.

13 Q So there's more than one reason why a pilot would
14 be placed on NOQ?

15 A Yes.

16 Q How long did the meeting last?

17 A It was less than an hour.

18 Q Let me back up. Have you placed pilots on NOQ
19 before?

20 A In my present position, yes, I place pilots on
21 NOQ.

22 Q As an overview, can you give us --

23 A And, actually, in that position, I did, as well,
24 yes.

25 Q As an overview, can you give me an example of

1 other times you've placed someone on NOQ?

2 A Yes. I had a captain call me about a first
3 officer who he believed was experiencing signs of
4 Alzheimer's. He was just very slow in the cockpit. In the
5 interest of safety, we immediately placed him on NOQ. We
6 also had a pilot who was sleepwalking, literally going to
7 get ready to fly an airplane. We obviously took him off NOQ
8 for further evaluation. So, yes.

9 Q How long did the meeting last?

10 A It was less than an hour.

11 Q What do you recall about the meeting?

12 A I recall -- you know, the high points were,
13 Captain Estabrook was interested in the tracking of our
14 packages. He also made mention of Auburn Calloway had
15 switched his religion to Islam and that he may be
16 communicating with Al Qaeda.

17 Q What were your impressions of the tracking data
18 comments?

19 A I thought they were, you know, interesting ideas
20 that he presented to Mr. Ondra. But I'm not a security
21 expert. It's really not something I would understand, you
22 know, how it would affect the security of our operation. So
23 I would leave that in Mr. Ondra's hands.

24 Q What were your impressions about the Auburn
25 Calloway comments?

1 BY MR. SEHAM:

2 Q Are you at the exhibit?

3 A Yes.

4 Q Just to move it along, I'm going to refer at this
5 moment to the first paragraph. This is an e-mail from you
6 to Katherine Walker, correct?

7 A Correct.

8 Q And you are copying Alan Armstrong?

9 A Correct.

10 Q And that would be a response to the attached
11 letter that begins at C-37, this letter dated April 29,
12 2013?

13 A Yes.

14 Q So you read this letter from Mr. Armstrong of
15 April 28th, 2013, and then responded with this covering e-
16 mail, correct?

17 A That is correct.

18 Q And the first sentence says, "I acknowledge
19 receipt of your letter. In accordance with established
20 practice at FedEx, pilots participating in disciplinary
21 processes under section 19 of the FedEx ALPA collective
22 bargaining agreement are entitled to representation by ALPA.
23 No outside attorneys are permitted or attend or otherwise
24 participate in these processes. The interview will not be
25 rescheduled. Mr. Estabrook is welcome to bring an ALPA

1 representative to the interview, as he was previously
2 informed." Now, did you -- this was written for you by Rob
3 Tice?

4 A Yes.

5 Q And the reason you deferred to Rob Tice is, he
6 knows the contract better than you?

7 MR. RIEDERER: Objection.

8 THE WITNESS: He knows section 19.

9 MR. RIEDERER: Objection. He lacks personal
10 knowledge of that.

11 JUDGE MORRIS: Overruled.

12 MR. SEHAM: And what was your answer?

13 THE WITNESS: Could you ask the question again?
14 I'm sorry.

15 BY MR. SEHAM:

16 Q I think the question I asked was, the reason you
17 deferred to Rob Tice here is because he knows the contract
18 better than you do?

19 A In all legal matters, I always -- I have labor
20 relations help me, assist me, to make sure I'm making the
21 right moves and then doing the right things as per the
22 contract.

23 Q Do you review the drafts that you get from legal
24 counsel?

25 A Yes, I do.

1 A I'm sorry, it says here, I have attached Sherrie's
2 first conversation, all right. I'm sorry, yes, you are
3 correct, they were attached.

4 Q So you received the calls several weeks before you
5 had your meeting with Captain Estabrook, correct?

6 A Yes.

7 Q And, in fact, you didn't send your demand for an
8 investigative interview until April 23rd? That's joint
9 exhibit JX-2. Correct?

10 A Joint exhibit JX-2?

11 Q That's dated April 23rd. Is that when you sent
12 that e-mail?

13 A Could I see that first? I'm sorry. That's
14 correct.

15 Q So it was about two weeks after you got the
16 recorded conversations that you sent this 19D letter,
17 correct?

18 A That's correct.

19 Q And that it schedules a meeting for May 1. Is
20 that -- would you agree with me that's the day that you held
21 your meeting with Captain Estabrook?

22 A Yes.

23 Q So it was then three weeks after you got the
24 recorded conversations that you actually interviewed Captain
25 Estabrook?

1 A Yes.

2 Q And you don't recall having any conversation with
3 Mark Crook during this period?

4 A I may have had a phone call conversation, but I
5 don't recall. But the e-mail was what I based my
6 information on.

7 Q And you listened to these recorded conversations
8 before you ever had this meeting with Captain Estabrook on
9 May 1, correct?

10 A That is correct.

11 Q And, when you listened to those conversations, you
12 determined that there was not enough information to
13 determine whether or not Captain Estabrook had communicated
14 that he was remaining at the hotel, correct?

15 A I determined that there was a miscommunication
16 between Sherrie Hayslett, the GOC dispatcher, and Captain
17 Estabrook. Therefore, based on that miscommunication, I
18 needed to find out more information about what happened.

19 Q Well, wasn't it based on the tapes that you
20 concluded that Captain Estabrook -- well, let me back this
21 up. You ultimately concluded that Captain Estabrook had a
22 good faith belief that the dispatcher had approved his
23 remaining in the hotel, correct?

24 A I agree with that.

25 Q And you based that conclusion on the tapes,

1 departure time.

2 Q I'm going to ask you again to look at respondent's
3 exhibit RX-8, and that portion which reads, "I have never
4 had a captain take it upon himself to delay a flight without
5 coordinating and coming to an agreement with the
6 dispatcher." Now, you got this e-mail, and you initiated a
7 section 19 investigation, correct?

8 A Stand by. I just want to read this, what you're
9 talking about. "I have never had a captain take it upon
10 himself to delay a flight without coordinating and coming to
11 an agreement with the dispatcher." I'm going to assume that
12 Captain Crook, who wrote this, meant delaying himself
13 getting to the airport. The frustration that Captain Crook
14 had, by the way, he got called by the Laredo ramp saying the
15 crew has not showed up for this airplane.

16 Q And you're basing that -- this testimony you're
17 basing on what, a telephone call that you don't recall, or
18 you're basing it on this e-mail?

19 A I'm basing it on this e-mail.

20 MR. SEHAM: I'm going to object to the testimony
21 because the e-mail says what it says, and he's going beyond
22 that e-mail.

23 JUDGE MORRIS: Well, the answer is in the record.

24 BY MR. SEHAM:

25 Q Now, if you based your determination that Captain

1 A I don't recall what I didn't know. But I will say
2 this, the main part of that meeting --

3 MR. SEHAM: Object, object, object, non-
4 responsive.

5 JUDGE MORRIS: Sustained.

6 BY MR. SEHAM:

7 Q Now, during your interview of him, Captain
8 Estabrook told you that Mark Crook was pressuring him to
9 depart into hazardous weather conditions, correct?

10 A I recall Captain Estabrook saying that, yes.

11 Q And you concluded during your investigation May 1
12 or your interview of Captain Estabrook on May 1 that Captain
13 Estabrook believed he was being pressured to fly into
14 hazardous conditions, correct?

15 A I would say that's correct that he believed that,
16 yes.

17 Q And you promised Captain Estabrook that you would
18 counsel Mark Crook concerning his conduct, correct,
19 concerning Mark Crook's conduct, correct?

20 A I believe I said that I would talk to Captain
21 Crook about his demeanor on the phone, yes.

22 Q Uh-huh.

23 A But I want to make it clear that Captain Crook,
24 in my estimation, never tried to push Captain Estabrook to
25 fly. His position was, why are you not at the airport.

1 Q His position was, why are you not at the airport?
2 And did you ever talk to Mark -- and Captain Estabrook
3 identified to you that he had gotten several calls from Mark
4 Crook, correct?

5 A I don't recall. I know of one call.

6 Q And you never called Mr. Crook to inquire with him
7 about the nature of the additional calls beyond the one
8 recorded call that you had?

9 A No.

10 Q Now, isn't it true that Captain Estabrook was
11 subject to an air traffic control gate hold on April 10th in
12 Laredo?

13 A As I recall, yes, that is a true statement.

14 Q Now, referring back to exhibit CX-8, complainant's
15 exhibit CX-8 --

16 MR. RIEDERER: In the white notebook.

17 BY MR. SEHAM:

18 Q I believe you said that you received this e-mail
19 from Katherine Walker that starts halfway down the page?

20 A Oh, okay. Okay, I must be at the wrong area here.
21 You said I received a letter from Ms. Walker?

22 Q Yes.

23 A And where is that?

24 Q We're looking at complainant's exhibit CX-8,
25 halfway down the page. It's paginated at the bottom C-36.

1 Q And Captain Estabrook also said at this August 9th
2 meeting that Federal Express was not doing enough to deter
3 terrorists from utilizing FedEx aircraft as a potential
4 weapon?

5 A I recall that he said that we could do more or,
6 you know, I have suggestions. I don't remember those words.
7 But, once again, it was a long time ago.

8 Q I'm going to hand you a copy of your deposition
9 testimony of March 24th, 2016.

10 A Okay.

11 Q I'm going to ask you to turn to page 39. I'm
12 going to start from line 2 where it reads, question, "Okay,
13 the FedEx mission continues, quote, this has the, quote, the
14 unfortunate result of encouraging terrorists to view FedEx
15 as a particularly effective means of utilizing explosive
16 incendiary and other destructive devices by placing in the
17 terrorists' hands the ability to select the most optimum
18 timing for detonation.

19 "Did Captain Estabrook express during the August
20 9th, 2013 meeting that Federal Express was not 00 in terms
21 of its dissemination of tracking information, was not doing
22 enough to deter terrorists from utilizing FedEx aircraft as
23 a potential weapon?" Answer, "I recall, you know, basically
24 that was the conversation." Now, was that your testimony on
25 March 16th?

1 A That is my testimony.

2 Q Oh, excuse me, March 24th. And does that refresh
3 your recollection that Captain Estabrook was communicating
4 to you on August 9th that, in terms of FedEx's dissemination
5 of tracking information, the company was not doing enough to
6 deter terrorists from utilizing FedEx aircraft as a
7 potential weapon?

8 A Well, let me just say this --

9 Q And I'm asking you whether that -- I'm asking you
10 a question as to whether you would agree, as you did on
11 March 24th, that that was what was communicated by Captain
12 Estabrook?

13 A Yes. I would like to make a distinction here,
14 though.

15 Q I'm asking you a yes or no question.

16 A Yes.

17 JUDGE MORRIS: Counsel will give an opportunity
18 for you to elaborate, if he feels it's necessary.

19 THE WITNESS: Yes, sir.

20 BY MR. SEHAM:

21 Q Now, there is -- are you familiar with the pilot
22 status designation code RMG?

23 A Yes.

24 Q And does that stand for removed from management?

25 A Yes.

1 Q And would you agree that RMG status is typically
2 used to take a pilot off his scheduled flight so that he can
3 attend an important meeting?

4 A Yes, we have used it for that.

5 Q Okay.

6 A And also we can use RMG for a special project, if
7 I needed someone to do a special project during a flight
8 day.

9 Q Uh-huh.

10 A It's a specific time frame.

11 Q And RMG can be used to schedule a meeting with an
12 individual pilot, correct?

13 A It can be, yes.

14 Q And not only can it be used that way, but it's
15 typically used that way, isn't that correct?

16 A I would say it can be used that way.

17 Q I'm going to ask you to turn to page 57 of your
18 transcript, and looking at line 17. The question reads, "In
19 what circumstances does the company resort to an RMG
20 schedule?" Answer, "Typically if -- let's say you want to
21 have a meeting with someone and they had a flight during
22 this very important meeting that you want them to be a part
23 of, you would RMG them from that trip." Is that your
24 testimony?

25 A That's my testimony, yes.

1 Q And would you agree with that today, that RMG is
2 typically used to assist a pilot to attend a very important
3 meeting?

4 A Yes. If I know exactly what date that meeting is
5 and the date falls exactly on a certain trip, I would use
6 that, that is correct.

7 Q And isn't it true that you don't know why the RMG
8 designation wasn't used for Captain Estabrook for the
9 meeting on August 9th, 2013?

10 A I can make an assumption, but --

11 Q No, I'm asking you if you know.

12 A I do not know.

13 Q You participated in the decision to put Captain
14 Estabrook on NOQ status on August 5th, 2013, is that
15 correct?

16 A That is correct.

17 Q And you don't know why the NOQ designation was
18 used instead of the RMG designation, correct?

19 A I believe the NOQ designation was used --

20 Q I'm asking you if you know.

21 A I think I know, yes.

22 Q I'm going to ask you to turn to page 58 of your
23 deposition, and turn to line 16, which reads, question, "So
24 why wasn't the RMG status used for Captain Estabrook's
25 meeting on August 9th on 2013?" Answer, "I don't know, I --

1 no." Captain Fisher, you don't know why the NOQ designation
2 was used on August 9th instead of the RMG designation, isn't
3 that correct?

4 A I can probably give you a better answer now, but
5 at the time I answered at the deposition --

6 Q Okay. And at the time of the designation on
7 August 5th, would it be your testimony that you didn't know
8 why the NOQ designation was being used rather than RMG?

9 A That's probably -- yes, that is correct.

10 Q Now, the NOQ designation is frequently used to
11 remove pilots for investigation, such as a 19D
12 investigation, correct?

13 A It can be used for that, yes.

14 Q And the jumpseat -- when you are placed on NOQ,
15 the jumpseat status is eliminated as a cautionary action
16 when you bring that pilot in for an investigation, is that
17 correct?

18 A I believe that is true most of the time. I don't
19 know if that's activated every time.

20 Q But in this case -- and maybe I didn't lay
21 something of a foundation -- attendant with an NOQ
22 designation is that pilot's loss of his jumpseat access,
23 correct?

24 A I actually don't know the answer to that.

25 Q Okay.

1 Q And you don't know specifically why these
2 questions were being posed?

3 A It seemed like there was some kind of a medical
4 thing there that that person had posted, and Mr. Tice wanted
5 to look into it.

6 Q Did he ask him any questions, any medical
7 questions?

8 A I don't recall any medical questions.

9 Q Now, Captain Fisher, subsequent to Captain
10 Estabrook's filing of an AIR-21 complaint in this matter,
11 you were interviewed at some point by a representative of
12 the Department of Labor/OSHA Division, correct?

13 A Yes.

14 Q And you were the only one from the company who was
15 submitted by the company for an interview by OSHA?

16 A I don't know that that's true.

17 Q Okay.

18 A I vaguely remember that meeting.

19 Q And can you identify anyone else who was ever
20 interviewed?

21 A No. I was -- I believe I had an attorney next to
22 me, and that's all I remember.

23 Q Oh, and you didn't remember the name of that
24 attorney?

25 A David Knox.

1 Q And if you could turn to complainant's exhibit CX-
2 23?

3 A Okay.

4 Q Have you arrived at that page, C-129?

5 A Yes.

6 Q You see it says Captain Rob Fisher at the top?

7 A Yes.

8 Q And you see there's a date of April 30th, 2014
9 right under your name?

10 A Yes, I do, April 30th.

11 Q Would you agree that that's approximately the date
12 of your interview by the OSHA investigator?

13 A Yes.

14 Q And you see the first line under that, it says,
15 "NOQ happens once per month, I would say." Would you agree
16 with that statement, that an NOQ happens about once per
17 month?

18 A Well, it's a handwritten note, so who knows what I
19 actually said.

20 Q Well, I'm asking you. That's not the question.

21 A Uh-huh.

22 Q I'm asking, do you agree with that statement? Is
23 that your experience as Captain Rob Fisher?

24 A That NOQ happens once per month? I would say
25 that's a pretty fair statement, yes.

1 Q And you're familiar -- would you agree that you're
2 familiar with NOQ being invoked for psychological issues in
3 the past?

4 A NOQ is invoked --

5 Q I'm asking you whether you have experience with
6 NOQ being invoked --

7 A Right.

8 Q -- for psychological purposes --

9 A Sure.

10 Q -- in the past?

11 A We don't make --

12 Q This is a yes or no question, sir. I'm asking
13 you, do you have that experience, that NOQ has been invoked
14 as a designation when there has been suspicion of a
15 psychological issue?

16 A No.

17 Q You have no experience with that?

18 A No.

19 Q Now, at the bottom of this first page it says, "In
20 hindsight, we probably should have kept him off flight
21 status and conferred with Todd Ondra rather than make the
22 decision on our own." Is it your feeling that on August
23 9th, when you reinstated Captain Estabrook to flight status,
24 that you should have conferred with Todd Ondra rather than
25 make the decision on your own?

1 THE WITNESS: I don't recall what I used for that,
2 unfortunately, whether it was NOQ or RMG or it was a free
3 day.

4 JUDGE MORRIS: Okay.

5 THE WITNESS: It seems like I recall it was before
6 he flew a trip, and that's why we met before he flew the
7 trip, because I think he was in uniform.

8 JUDGE MORRIS: Well, maybe I've got it wrong. So
9 let me rephrase it, then.

10 THE WITNESS: Yes.

11 JUDGE MORRIS: Let's talk about the August
12 interview.

13 THE WITNESS: Okay.

14 JUDGE MORRIS: Why did you use the NOQ versus the
15 RMG for the August meeting?

16 THE WITNESS: It was directed to me by Captain
17 Bill McDonald to place him on NOQ. I can assume that they
18 used it because we had to juggle the schedules of four
19 people, including Captain Estabrook, so he placed on NOQ
20 until we found a good day for all of us to meet, and then we
21 all got together.

22 JUDGE MORRIS: So you do not make the decision for
23 NOQ versus RMQ?

24 THE WITNESS: I can make a decision. At that
25 point, I did not --

1 JUDGE MORRIS: You did not?

2 THE WITNESS: -- in that specific incident.

3 MR. RIEDERER: It is RMG.

4 JUDGE MORRIS: RMG, okay. The Mayday Mark
5 discussion occurred during which meeting?

6 THE WITNESS: That happened at the end of the
7 August 9th meeting.

8 JUDGE MORRIS: And do we -- what's the exhibit
9 that refers to the notice that was provided for the August
10 9th meeting? What's the exhibit number? Do the parties
11 know?

12 MR. SEHAM: Your Honor, respondent's exhibit RX-14
13 includes e-mail correspondence related to that.

14 JUDGE MORRIS: Okay, looking at respondent's
15 exhibit RX-14 where you notified him of this meeting, was
16 there ever a formal letter that was submitted notifying him
17 that this meeting was to occur?

18 THE WITNESS: It's August?

19 JUDGE MORRIS: In August.

20 THE WITNESS: I am -- no, sir, there was not a
21 formal letter.

22 JUDGE MORRIS: Unlike the April incident, the
23 Laredo incident, where there was a letter, you just did this
24 by e-mail?

25 THE WITNESS: Yes, sir.

1 actually, I'm going to ask you a different question. In
2 your role as lead counsel in the labor relations group, have
3 you had occasion to attend meetings involving company
4 management and pilots?

5 A Yes.

6 Q What sort of circumstances might that -- excuse
7 me, strike that. When might that occur?

8 A Well, I think there's probably two main occasions
9 for that. One would be a 19E disciplinary hearing, and
10 another might be a 19D investigation process. And sometimes
11 19D doesn't really involve a concern about potential
12 discipline as much as it involves a concern that a pilot
13 might have some issues going on inside that need to be
14 attended to. And so occasionally I have attended those
15 kinds of meetings.

16 Q When did you first learn the name Mark Estabrook?

17 A I believe it was in April of 2013.

18 Q And in connection to -- do you recall what brought
19 his name to your attention?

20 A Yes. There was a failure to report to work on
21 time issue. However, I was deeply involved in preparing for
22 an arbitration, and my involvement in that matter was just
23 preliminary at the front end. I didn't get involved in it
24 later on.

25 Q Were you aware of Captain Estabrook's background

1 JUDGE MORRIS: No, that's mine.

2 BY MR. TADLOCK:

3 Q Is that a copy of the e-mail that you received?

4 A Yes.

5 Q And you reviewed that e-mail?

6 A Yes.

7 Q What was your impression of it?

8 A Well, it was weird, strange that a line pilot
9 would ask to speak to the top guy at the parent company of
10 FedEx Express.

11 Q Did you ultimately attend a meeting with Captain
12 Estabrook?

13 A Yes.

14 Q And were you involved in the -- or, did you make
15 the decision to place him into NOQ status prior to that
16 meeting?

17 A I didn't make that decision. I was involved in
18 the process of that result.

19 Q And that meeting occurred on August 9th?

20 A Correct.

21 Q Who else was in attendance in that meeting?

22 A Captain Estabrook, Todd Ondra, Rob Fisher, and
23 myself.

24 Q Mr. Tice, why were you invited to attend that
25 meeting?

1 of the chat room or whatever, the forum that is publicly
2 accessible. And they complain about FedEx and they praise
3 FedEx, and they relate different concerns about all kinds of
4 issues. I think that's a description of the website.

5 Q And who is Mayday Mark?

6 A I have no idea.

7 JUDGE MORRIS: So I'm clear, is this a blog?

8 THE WITNESS: You're talking to somebody who is
9 not real knowledgeable --

10 JUDGE MORRIS: It's a forum for --

11 THE WITNESS: -- about blogs.

12 MR. SEHAM: But it's more like a bulletin board.

13 JUDGE MORRIS: A bulletin board, okay. Okay, go
14 ahead.

15 MR. TADLOCK: Thank you, counsel.

16 BY MR. TADLOCK:

17 Q Why did you ask Captain Estabrook who is Mayday
18 Mark?

19 A Captain McDonald asked me to.

20 Q Did you review any postings by Mayday Mark on the
21 Airline Pilot Central website before attending the meeting?

22 A I did.

23 Q Okay, would you --

24 A We printed them out.

25 Q Would you turn to complainant's exhibit CX-21?

1 A I'm there.

2 Q Are those the postings you printed out?

3 A I haven't gone through every page, but it looks
4 like a complete collection to me.

5 Q Did Captain McDonald seem agitated that Mark
6 Estabrook might be Mayday Mark?

7 A No.

8 Q Did Captain McDonald say to you that he was
9 interested in Mayday Mark because of some information
10 related to the Laredo incident?

11 A No.

12 Q Did Captain McDonald show you any posting by
13 Mayday Mark that caught his interest?

14 A I don't think so. I found one that was of
15 interest to me, though.

16 Q And did you ask Captain Estabrook whether he was
17 Mayday Mark at the August 9th meeting?

18 A Yes.

19 Q And what did he say?

20 A He said no. And I accepted his word for it. He
21 had given a lot of information about prior involvement in
22 the internet process and stuff. I thought he was being
23 accurate and truthful about that.

24 Q How did the meeting conclude?

25 A Captain Fisher informed Captain Estabrook that he

1 in the context of setting up a meeting with Captain Mark
2 Estabrook after the August 4th e-mail was received, correct?

3 A You might want to have question repeated?

4 Q Yeah, sure.

5 A There was a noise that I think distracted me.

6 Q No, no, no problem. And you and Captain McDonald
7 discussed the Mayday Mark identity issue in the context of
8 setting up a meeting with Captain Estabrook on August 4th,
9 2013 -- and now I've bolluxed it up. You discussed the
10 Mayday Mark identity issue in the context of setting up a
11 meeting with Captain Estabrook after the company had
12 received the August 4th, 2013 e-mail, correct?

13 A I think I could say yes to that.

14 Q Okay.

15 A Yes.

16 Q And so it was at the request of Captain McDonald
17 that you asked Captain Estabrook if he was Mayday Mark?

18 A Yes.

19 Q And you didn't know -- it's your testimony that
20 you didn't know why Captain McDonald had this interest?

21 A Right. I highlighted something that drew my
22 attention.

23 Q That drew your own attention?

24 A Yes.

25 Q But he didn't -- those are copies of -- what you

1 were referring to before, those were copies of postings that
2 you obtained for yourself, correct?

3 A Yes.

4 Q So Captain McDonald never provided you with copies
5 of postings?

6 A He did not.

7 Q Okay.

8 A To the best of my recollection, he did not.

9 Q And I think those are in CX-21. Yes, CX-21. If
10 you could turn to CX-21, I think you referred to them on
11 direct.

12 MR. TADLOCK: You're in the wrong book.

13 THE WITNESS: I'm there.

14 BY MR. SEHAM:

15 Q Would you agree with me that you don't know for
16 certain whether these were the pages of the -- well, let me
17 back up. You brought to the meeting on August 9th, 2013,
18 you brought copies of postings on the Airline Pilot Central
19 forum that reference Mayday Mark, correct?

20 A Yes.

21 Q Okay.

22 A They contained postings by Mayday Mark.

23 Q Fair enough. And would you agree with me that
24 you're not certain whether these pages under CX-21 are
25 precisely those pages that you took to the meeting?

1 they are not going to be utilized to operate airplanes?

2 A That is one of the purposes and effects, yes.

3 Q And the effect of an NOQ designation is -- among
4 other things, is to suspend an individual's jumpseat access,
5 correct?

6 A I guess I don't know all of the possibilities that
7 exist there. I know that in the case of -- I guess I just
8 don't know the systems that well.

9 Q Okay.

10 A I think I'm familiar enough to say that a
11 consequence of NOQ is -- there's a jumpseat consequence,
12 yes.

13 Q Well, would you agree with me that in your
14 experience the standard reason for a jumpseat suspension is
15 that the person under investigation -- is that the person is
16 under investigation for a significant matter?

17 A I think so, yes.

18 Q Now, you understood at the time -- is it your
19 testimony --

20 A It depends on the -- I guess I would want to add
21 to that. It depends upon the reason for the NOQ, and
22 there's -- as I understand it, there's different kinds of
23 NOQ's and different reasons for NOQ's. In the case of
24 someone who is under investigation for a serious potential
25 disability matter, because of the Auburn Calloway case, we

1 limit their access to jumpseats. And, in order to have the
2 meetings that are associated, they are purchased airline
3 tickets. But there are other kind of NOQ's that don't
4 involve disciplinary matters.

5 Q You understood -- your understanding at the time
6 of this August 9th meeting was that the purpose of the
7 meeting was to provide an opportunity for Captain Estabrook
8 to explain to the company security expert what his -- what
9 Captain Estabrook's concerns were?

10 A It was a meeting that he had requested, that he
11 wanted it to be with Fred Smith.

12 Q Uh-huh.

13 A But we substituted for Fred Smith, I guess. And
14 there were some concerns about whether he should be on the
15 jumpseat.

16 Q What were the concerns?

17 MR. TADLOCK: Objection, to the extent that it
18 calls for attorney-client privileged information.

19 JUDGE MORRIS: Overruled.

20 MR. TADLOCK: Okay.

21 THE WITNESS: There was a communication from the
22 VP of flight ops, as I recall, questioning is this an
23 appropriate person to be on a jumpseat.

24 BY MR. SEHAM:

25 Q And who was the VP of flight ops?

1 A James Bowman.

2 Q Did you get involved in the discovery responses
3 with respect to this case?

4 A I recall looking at some. I don't know how much
5 involvement I had.

6 Q Okay.

7 A But I probably had some input.

8 Q So there was a contact from James Bowman.

9 A I think it's in the privilege log.

10 Q And what did he express as his concern?

11 A I think I testified to that, should this
12 individual be on the jumpseats.

13 Q But did he identify why, other than just a generic
14 reference to the August 4th e-mail?

15 A I think that contextually it was in light of
16 having read the e-mail asking Fred Smith to give him a call
17 when he wasn't sleeping.

18 Q So it's your understanding that the NOQ
19 designation on August 5th was motivated by safety
20 consideration?

21 A In part, I think. In part, yes. But also in an
22 effort to make sure we had a meeting that didn't get
23 interrupted by scheduling issues.

24 MR. SEHAM: Could I have the first set of
25 interrogatories, please?

1 BY MR. SEHAM:

2 Q I'd like you to turn to complainant's exhibit CX-
3 22, and look at the interrogatory number 6 at the bottom of
4 that page. And that interrogatory reads, "Identify any
5 persons involved in the decision to place the complainant on
6 not qualified NOQ status on August 5th, 2013."

7 The answer is, "Respondent identifies the
8 following individuals who may be contacted through
9 undersigned counsel." And it lists Robert Fisher, William
10 McDonald, Todd Ondra, and Rob Tice. Now, that answer should
11 have also included James Bowman, correct?

12 A To the extent that he wrote an e-mail asking that
13 question, I think that's probably true.

14 Q And, in fact, Todd Ondra did not participate in
15 the decision to place Captain Estabrook on NOQ status on
16 August 5th, 2013?

17 A Yeah. I think that -- wasn't there a supplemental
18 interrogatory answer here?

19 Q I'm asking you that question right now as you sit
20 here. Isn't it true that Todd Ondra did not participate in
21 that decision on August 5th, 2013?

22 A I don't know for sure, but I don't think he did.

23 Q Okay.

24 A And I think you would have to look at the
25 supplemental interrogatory answer for an explanation --

1 BY MR. SEHAM:

2 Q At least part of the reason behind the NOQ
3 designation and the suspension of jumpseat privileges at
4 this time was because there was a concern within Federal
5 Express as to whether Captain Estabrook had a fitness for
6 duty issue, correct?

7 A All I can recall is that the VP of flight ops
8 asked that question in an e-mail, and the tie-in the context
9 was the e-mail that was being discussed and is this somebody
10 that should be on a jumpseat. That's the best I can do for
11 you as far as my memory --

12 Q Well, how do you --

13 A -- having been served by the e-mail that I
14 described that I had read within the last week.

15 Q That question was raised -- just to confirm what
16 you just said -- the question was raised, is this a person
17 that should be on the jumpseat, correct?

18 A Or words to that effect, in an e-mail, yeah.

19 Q That was a question that was discussed among --

20 A It was a question posed by Captain Bowman in an e-
21 mail.

22 Q Uh-huh.

23 A I'm sorry, I can't be any more specific than that.

24 Q And what did you understand the reasoning to be
25 behind that question?

1 MR. TADLOCK: To the extent --

2 JUDGE MORRIS: Overruled.

3 THE WITNESS: I think I gave --

4 JUDGE MORRIS: Go ahead.

5 THE WITNESS: My turn?

6 JUDGE MORRIS: Yes.

7 THE WITNESS: I think I gave the context of it.

8 BY MR. SEHAM:

9 Q Whether -- the context being whether this person
10 based on the August 4th e-mail, had a fitness for duty
11 issue?

12 A Yes.

13 Q Now, as of August 5th, 2013, did you have any
14 concern about Captain Estabrook's mental health?

15 A I don't believe that I did. But I believe I
16 acceded to the VP's concerns, and he made that decision or
17 provided that input. I didn't know enough about Captain
18 Estabrook to form any judgments about that.

19 Q In your discussions with -- did you have
20 discussions with Mr. Ondra, McDonald and Fisher at this time
21 concerning the NOQ designation?

22 A I don't remember. All I remember is that e-mail
23 that I described to you.

24 Q Do you have any recollection of Ondra, McDonald or
25 Fisher expressing any concerns with respect to Captain

1 Estabrook's mental health prior to the August 9th meeting?

2 MR. TADLOCK: I'm going to object. I don't think
3 that the privilege has been waived with respect to anything
4 relating to those individuals.

5 JUDGE MORRIS: Who are those individuals?

6 MR. SEHAM: Ondra, McDonald and Fisher? They are
7 the persons identified in the company's interrogatories as
8 the NOQ decision-makers. And this question and answer has
9 already been posed and answered.

10 JUDGE MORRIS: Overruled.

11 THE WITNESS: Well, let me be as complete as I
12 can, because that's my obligation here. Those individuals
13 were on the e-mail, all right? My recollection is that
14 their names were among the persons who received Jim Bowman's
15 e-mail.

16 JUDGE MORRIS: While he's doing that, since it's
17 going to be *in camera*, can I get those e-mails tomorrow?

18 MR. RIEDERER: Yes.

19 JUDGE MORRIS: Okay.

20 MR. TADLOCK: Anything else?

21 BY MR. SEHAM:

22 Q I'm going to ask you to turn to your deposition,
23 CX-49 for identification purposes only, and can I ask you to
24 the bottom of page 26? Now, line 25 on page 26, the last
25 line, question, "Well, I just want to be clear, as of August

1 e-mail?

2 MR. TADLOCK: Oh, I'm sorry.

3 MR. SEHAM: No, that's all right.

4 MR. TADLOCK: CX-13? I believe that's us, as far
5 as --

6 MR. SEHAM: I have it here at CX-11, so why don't
7 I just go with what I have in front of me?

8 BY MR. SEHAM:

9 Q If you could turn to complainant's exhibit CX-11
10 at C-52?

11 A Can I see it, please?

12 Q And the August 4th, 2013 e-mail from Captain
13 Estabrook disclosed that he had served as the chairman of a
14 pilot union security committee, correct?

15 A That's what it says.

16 Q Did you have any basis for doubting that?

17 A No.

18 Q And the August 4th e-mail disclosed that Captain
19 Estabrook, in his capacity as chairman of the pilot security
20 meeting [*sic*], had dealings with Bill Henrikson, you see
21 that reference?

22 A I see that name. I don't know who that was.

23 Q Do you know today, as you sit here, that that is
24 the former vice president of corporate security --

25 A No.

1 Q -- for FedEx?

2 A No.

3 Q You don't know that?

4 A I don't know that.

5 Q Prior to the August 5th NOQ designation, did you
6 make any effort to confirm Captain Estabrook's service as
7 the pilot union security committee chairman?

8 A No.

9 Q And did you make any effort to investigate the
10 nature and scope of his transactions with Bill Henrikson?

11 A No.

12 Q And you made no effort to confirm his service or
13 the scope of his service as the pilot union security
14 committee chairman at any time prior to the issuance of the
15 August 16th, 2013 15D letter, correct?

16 A That was kind of a long question.

17 Q It's just the same question, that you didn't make
18 those inquiries as of August 5th and up through and
19 including August 16th, you didn't make those inquiries
20 either with respect to the scope of his service as a pilot
21 union security committee chairman? Is that true?

22 A I'm trying to search my memory as much as I can.
23 It may have been a matter of idle chatter within labor
24 relations, but I don't think anybody informed me that he had
25 held any title at ALPA of that kind. If that's what you

1 mean by investigation --

2 Q Uh-huh.

3 A -- I didn't talk to anybody who said, I remember
4 Captain Estabrook serving in that capacity.

5 Q Sometime after the August 9th meeting, you
6 asserted that your reason for asking questions to Captain
7 Estabrook about whether or not he was Mayday Mark was
8 because Mayday Mark was a FedEx pilot who had admitted to
9 having suffered a stroke, correct?

10 A There was a posting that I think used the word
11 seizure.

12 Q Yeah.

13 A And I don't know if I misused the word stroke, if
14 they are different. But that's the reason for what I
15 highlighted, because it came to my attention when I was
16 looking at the website.

17 Q But Captain McDonald never identified his concern
18 as relating to an individual --

19 A Not that I can recall.

20 Q -- having a stroke?

21 A Not that I can recall.

22 Q If I complete the question, it doesn't change the
23 answer?

24 A [No audible response.]

25 Q But you were -- at that meeting, you were of the

1 victim was?

2 A I wouldn't know how to do that, and I did not.

3 Q Did you ask anyone to investigate whether there
4 was another pilot out there who was a FedEx pilot who
5 suffered a stroke?

6 A No. It was a dead issue by then.

7 Q It's not a concern of yours that there's a FedEx
8 pilot out there who has an undisclosed stroke?

9 A If I believed everything I read on the internet, I
10 probably would not be able to sleep. I couldn't do anything
11 with the information that Captain McDonald asked me to ask.
12 It was done, it was closed. I dropped it a long time ago.

13 Q And why did you conclude in the first place that
14 Captain Estabrook might have been Mayday Mark?

15 A Only because Captain McDonald said, I think he
16 might be Mayday Mark. He asked me to ask, and I asked.

17 Q Now, Todd Ondra was not present for the entirety
18 of the meeting, correct?

19 A That is correct.

20 JUDGE MORRIS: Hold on, counsel, I have a
21 question. Did you relay the response that your conclusion
22 that he was not Mayday Mark back to the person that asked
23 you about that?

24 THE WITNESS: I'm sure I did.

25 JUDGE MORRIS: Okay. Thanks. Go ahead.

1 conversations with the certified bargaining rep about 15D
2 exams and evaluations. So that process, in the ordinary
3 course, usually resolves the issue, and we usually go right
4 to a 15D and deal with the medical issue, not a legal issue
5 out of it.

6 JUDGE MORRIS: So, if an employee refuses, then,
7 to take a medical evaluation because it does not believe
8 that the company has a reasonable basis, is that a separate
9 basis for disciplinary action and/or termination?

10 THE WITNESS: I think the form letter actually has
11 a tag line at the end that there can be disciplinary
12 consequences for not following through on the direction.

13 JUDGE MORRIS: If the company never states what
14 the reasonable basis is, how is a pilot able to know so he
15 can make a determination on whether or not the company's
16 action is reasonable in the first place?

17 THE WITNESS: The contract doesn't address that
18 issue, I don't think.

19 JUDGE MORRIS: Does Mr. Smith have an open-door
20 policy?

21 THE WITNESS: I have no idea. I have seen him,
22 never spoken to him, never talked to him.

23 JUDGE MORRIS: Does Mr. Smith prefer to be called
24 Mr. Smith, Fred, you know, Mr. FedEx? What does he --

25 THE WITNESS: I have only been here since 2006,

1 and I have not heard any of the lore over that repeated
2 while I'm here. So I don't know.

3 JUDGE MORRIS: Those are the questions I have.
4 Questions based on mine?

5 MR. TADLOCK: No further questions.

6 MR. SEHAM: No further questions.

7 JUDGE MORRIS: All right. Thank you, sir.

8 THE WITNESS: Thank you.

9 JUDGE MORRIS: You're dismissed.

10 [WHEREUPON, witness Rob Tice was
11 excused.]

12 JUDGE MORRIS: And then I have some procedural
13 matters to talk with counsel. All right, so we're clear,
14 it's my understanding that respondent's counsel is going to
15 produce for my *in camera* inspection tomorrow the e-mails
16 that we have addressed previously, is that correct?

17 MR. RIEDERER: Correct.

18 JUDGE MORRIS: I intend -- go ahead.

19 MR. TADLOCK: Just so we're totally clear, can you
20 once identify on the privilege log? I'm not sure that we --

21 MR. SEHAM: Tab 11.

22 MR. TADLOCK: Just tab 11?

23 JUDGE MORRIS: Tab 11 only.

24 MR. TADLOCK: Okay.

25 JUDGE MORRIS: As well as, if it's not the same e-

1 mail, the e-mail he was addressing with the VP.

2 MR. RIEDERER: Right. I understand.

3 JUDGE MORRIS: I will tell you right now, I will
4 look at it. If I conclude that it's privileged, I am going
5 to return it and not include it in the record, okay? If I
6 have a question, I am going to retain it in an envelope so I
7 can do some further research.

8 So, if it's clear to me it's coming right back to
9 you. If I have some questions or concerns I'm going to
10 retain it for further deliberation, and then, if I
11 subsequently decide that it's not, I will return it to the
12 company, all right? That's my course of action. Counsel?

13 MR. SEHAM: Yes. With all due respect, I'd like
14 to inquire on behalf of the complainant the basis for
15 overruling -- the tribunal overruling the respondent's
16 objections with respect to the testimony concerning his
17 exchange with Captain Bowman.

18 And the reason I make that request is, it has been
19 our position all along that any correspondence in which Mr.
20 Tice was involved in this process should have been produced
21 to us because he was a decision-maker. And we cited case
22 law, and I can reproduce those briefs for you if you have
23 any interest.

24 But it was always a source of great frustration to
25 us that he was identified as one of the NOQ decision-makers

1 of August 5th, and yet -- and there's all this
2 correspondence during this period flying around, and,
3 frankly, we could find no -- we didn't receive any documents
4 in discovery that discussed the decision process during that
5 time of August 5th -- August 4th, August 5th -- up through
6 the 9th. So that's why I am deferentially requesting if we
7 could get a nicer understanding of the tribunal's decision
8 and whether that might impact some of the other privilege
9 documents.

10 JUDGE MORRIS: Yeah. I can envision -- or, I see
11 thus far where Mr. Tice could be both. At one point, in one
12 moment in time, he could be acting as a lawyer, and at
13 another moment in time he could be acting as a decision-
14 maker. It may not be the best situation for the respondent,
15 but I can envision how that's possible.

16 And so I am seeing a challenge that the
17 respondents -- and, frankly, the complainants -- have in
18 parceling out what would be considered privileged and what
19 would not be considered privileged information. I don't
20 have enough fidelity or visibility right now on exactly the
21 extent of his role in the decision-making process to
22 conclude a waiver of the attorney-client privilege. That
23 privilege is one of the most sacred privileges in our
24 judicial system. I will guard it zealously. But if in fact
25 it's waived, it's waived.

1 let's just skip down to the second sentence.

2 MR. RIEDERER: Lee, he's looking at the wrong
3 book.

4 MR. SEHAM: There are two --

5 JUDGE MORRIS: Red binders.

6 THE WITNESS: Oh, red binders, okay. Thank you.
7 Got it, okay.

8 BY MR. SEHAM:

9 Q So, if you look at the second sentence, "I did my
10 best to protect the company and reported as much as I could
11 through Bill Henrikson when I was security chairman at
12 ALPA." Now, you read this e-mail, correct?

13 A I did.

14 Q And you decided that you thought it was odd at the
15 time?

16 A The e-mail?

17 Q Yes.

18 A Yes, for the reasons stated.

19 Q Okay.

20 A Yes, I did.

21 Q And you knew at the time you read the e-mail that
22 he had served as a security chairman, correct?

23 A Not prior to the e-mail, but at this e-mail I
24 guess when I read it I would have been aware.

25 Q And you made no effort to look into his history of

1 service or the scope of his duties as security chairman,
2 correct?

3 A None whatsoever.

4 Q And you knew who Bill Henrikson is -- or, was,
5 correct?

6 A I do know who Bill Henrikson is, yes.

7 Q And he was the vice president of corporate
8 security?

9 A Yes, he was at that -- he was previously the vice
10 president of corporate security, yes.

11 Q And he was alive at that time, correct?

12 A Yes.

13 Q And to the best of my knowledge he still is alive,
14 correct?

15 A Yes, best of my knowledge.

16 Q Did you ever call up Bill Henrikson and ask him
17 about the history of dealings that he had with Captain
18 Estabrook?

19 A No, I did not.

20 Q Now, you never engaged in any review of your
21 correspondence files prior to your August 9th, 2013 meeting
22 to see if you had had any correspondence with Captain
23 Estabrook?

24 A No, I didn't, just preparing to go to the meeting
25 based on the request of Mr. McDonald.

1 Q And isn't it true that you were never asked by
2 anyone at FedEx to review your correspondence files
3 concerning any correspondence you may have had with Captain
4 Estabrook until a week before your March 2016 deposition?

5 A I don't remember the specific time I was asked to
6 review correspondence. It was sometime after the 9th
7 meeting of August, but -- your question again, to make sure
8 I understand?

9 Q That you have no recollection of reviewing your
10 files for correspondence with Captain Estabrook until a week
11 prior to your deposition?

12 A Correct, yes.

13 Q Could you turn to complainant's exhibit CX-16?

14 JUDGE MORRIS: That would be in the white binder.

15 THE WITNESS: Thank you, sir. And you said CX-16,
16 sir, correct?

17 MR. SEHAM: Yes.

18 THE WITNESS: All right, I'm there.

19 BY MR. SEHAM:

20 Q You see the subject line is jumpseat security
21 issues? Back in the period of 2002, did you have any
22 involvement with jumpseat security issues?

23 A I may have had a limited involvement, not a
24 significant involvement.

25 Q And you see on the second page, three lines down,

1 I'm asking you to move to the second page of this document.

2 And at the fourth -- or, third line here on the second
3 page, it says, "We understood from today's meeting that if
4 we have questions about the items the FPA proposed we should
5 direct them to Captain Estabrook." Now, you were copied --
6 you see on the next page you were copied on this letter, the
7 third reference there?

8 A Yes, I am copied on the letter.

9 Q And who is William Logue?

10 A William Logue at the time is listed as a senior
11 vice president, AGFS.

12 Q Now, Mr. Ondra, would you agree with me that you
13 didn't have any involvement in any FedEx determinations as
14 they related to Captain Estabrook prior to August 9th, 2013,
15 correct?

16 A Correct.

17 Q You don't know, for example, if a 15D decision had
18 not already been made at that time?

19 A At that time prior to the August 9th meeting?

20 Q Uh-huh.

21 A Correct.

22 Q Okay. And you had no involvement in placing
23 Captain Estabrook on NOQ status on August 5th, 2013,
24 correct?

25 A Correct.

1 completed his comments?

2 A I'm not sure I understand the question.

3 Q Captain Estabrook raised the issues that you've
4 discussed on your direct testimony, correct?

5 A Yes, sir.

6 Q When he had completed making his comments, is that
7 the point at which you departed?

8 A No. I departed obviously after those comments,
9 but I also departed after I heard Mr. Estabrook's concerns
10 that he had that he wanted to relay, as Mr. McDonald asked
11 me to attend. I heard all the comments, not just those two
12 kind of strange comments or interactions that we had. I
13 heard all the comments. And then at some point I was told
14 that there was another matter that needed to be discussed,
15 and I left the meeting and went back to my office.

16 Q Well, what my question is, you didn't remain at
17 the meeting to have any discussion with Captain Estabrook
18 about his concerns?

19 A I didn't, because I heard Mr. Estabrook's concerns
20 during the meeting.

21 Q Uh-huh.

22 A So I did not stay after, no.

23 Q You made no response to Captain Estabrook's
24 concerns, correct?

25 A I did not have follow-up conversations with Mr.

1 Estabrook following this meeting, no, I did not.

2 Q And one of your -- one of the primary goals of
3 your job is to prevent terrorist attacks, correct?

4 A That's one of our team's primary goals, and really
5 one of the goals of our company based on the environment
6 today.

7 Q And Captain Estabrook, during this meeting he made
8 several comments concerning the possible use of tracking
9 information published by FedEx by terrorists as intelligence
10 that could be exploited by terrorists for their attacks,
11 correct?

12 A He did mention that.

13 Q And Captain Estabrook asserted during this meeting
14 that Al Qaeda had sent packages through FedEx in October
15 2010 to test the system and the timelines, correct?

16 A He did mention that.

17 Q And, in fact, you were familiar with the reported
18 efforts to this effect by Al Qaeda, correct?

19 A Yes.

20 Q And they are referred to as the October 2010 cargo
21 bomb plots, correct?

22 A Yes, sir.

23 Q And those were -- those efforts by Al Qaeda were
24 published in credible media sources, correct?

25 A Yes, sir, they were.

1 Q So, Mr. Ondra, isn't it true -- and I'm going to
2 ask you to close your transcript now, okay, please? Isn't
3 it true, Mr. Ondra, that on that meeting on August 9th, 2013
4 that Captain Estabrook was explaining that the actions that
5 he was proposing that FedEx take were needed for the purpose
6 of deterring terrorists more effectively from introducing
7 explosives into FedEx aircraft?

8 A It was the point that Mr. Estabrook was trying to
9 make, yes.

10 Q Okay, thank you. Now, you never -- you say these
11 comments concerning the value of tracking intelligence and
12 Captain Estabrook's interest in deterring terrorists, that
13 those were rational thoughts that were being expressed,
14 correct?

15 A By Mr. Estabrook during that meeting?

16 Q Yes.

17 A Yes.

18 Q But you never conducted any research into the
19 issues that he had raised, correct?

20 A I didn't conduct any research because, again, I
21 understand and am familiar with the tracking data that is
22 available both internally and externally already to the
23 public.

24 Q I am asking you whether you conducted any
25 research.

1 Q And you thought it was odd that he didn't complain
2 to -- or, that he did not raise his tracking information
3 issue with flight management first?

4 A I thought it was odd that, if he had a security
5 concern, that he didn't file a flight crew member security
6 report.

7 Q You didn't --

8 A Or use one of the other more immediate venues to
9 address security concerns --

10 Q Uh-huh.

11 A -- than say, I'd like to speak with the CEO of the
12 parent corporation.

13 Q But you knew at the time he had already raised his
14 concerns previously with Mr. Henrikson, correct?

15 A No, sir, I did not. I didn't know which concerns
16 he was going to raise.

17 Q Didn't he tell you --

18 A I believed --

19 Q -- in that e-mail that he had raised these issues
20 before with Mr. Henrikson?

21 A He said he had spoken to Mr. Henrikson with these
22 issues, yes. But I didn't know what the issues were.

23 Q And part of your decision -- now, it was your
24 decision to put him on NOQ?

25 A Yes, sir. I was the one that directed Captain

1 Estabrook to be placed in an NOQ status.

2 Q And who had input with respect to that decision?
3 Or did you make that completely alone without any
4 consultation whatsoever?

5 A No, I asked some guidance from above.

6 Q And, when you say above, is that Our Father Who
7 Art In Heaven, or was it a superior within the FedEx
8 management?

9 A No, I asked other people within FedEx management.

10 Q Whom did you ask?

11 A Captain --

12 MR. TADLOCK: I'm going to object to the extent
13 that it requests attorney-client privileged information.

14 MR. SEHAM: Well, I'm asking for the
15 identification of persons at this point.

16 JUDGE MORRIS: Overruled.

17 BY MR. SEHAM:

18 Q Whom from above did you consult concerning your
19 NOQ designation?

20 A Other flight management and other sources in the
21 legal department.

22 Q Could you name the names, please?

23 A Captain Jim Bowman and Mr. John Maxwell.

24 Q Isn't it true that, during this period of August
25 4th and August 5th, you had discussions with other

1 individuals concerning the e-mail and/or the NOQ
2 designation?

3 MR. TADLOCK: I'm going to have a standing
4 objection with respect to --

5 MR. SEHAM: Not asking for substance. I'm just
6 asking whether he had discussions with other persons.

7 JUDGE MORRIS: Overruled.

8 THE WITNESS: I'm sure I talked to Todd Ondra
9 about it, and I'm sure I talked to Rob Fisher about it, and
10 Rob Tice, as well.

11 BY MR. SEHAM:

12 Q You say you spoke to Todd Ondra? You've been
13 here, and you've heard the testimony of all the witnesses in
14 this case up until now, isn't that correct?

15 A Yes, sir.

16 Q And did you hear Todd Ondra testify that he had no
17 input into the NOQ decision of August 5th?

18 A Yes, sir. I didn't think that was the question.

19 Q I'm asking you, did you hear that testimony?

20 A Yes.

21 Q And did you --

22 A Oh, yes. Todd didn't have any input into the NOQ
23 process.

24 Q And did Rob Fisher have any input into the NOQ
25 determination?

1 A Well, Rob was the person that probably entered him
2 into the NOQ, and so I'm sure we discussed it.

3 Q Well, I'm asking, did he make suggestions? Was he
4 just the implement by which it was implemented, or did he
5 actually give you some input and deliberate with you about
6 whether he should be placed on NOQ or not?

7 MR. TADLOCK: To the extent this involves
8 attorney-client privileged information and the seeking of
9 legal advice where attorneys are involved, I think he's now
10 getting into the substance of discussions.

11 JUDGE MORRIS: Overruled.

12 MR. SEHAM: I'm asking if he had a discussion with
13 Rob Fisher.

14 THE WITNESS: I don't remember the specific
15 conversation, other than me asking Rob to place him in an
16 NOQ status.

17 BY MR. SEHAM:

18 Q So you didn't get any advice --

19 JUDGE MORRIS: Wait a minute. So I'm clear, we're
20 talking about Captain Fisher, right?

21 MR. SEHAM: Yes.

22 JUDGE MORRIS: We're not talking about an
23 attorney?

24 MR. SEHAM: Yes.

25 THE WITNESS: Correct.

1 JUDGE MORRIS: Okay, overruled.

2 BY MR. SEHAM:

3 Q And you did get input from Jim Bowman?

4 A Yes, I did.

5 Q And Jim Bowman raised issues about whether Captain
6 Estabrook should have access to the jumpseat based on the
7 August 4th e-mail, correct?

8 MR. TADLOCK: Objection to the extent that it
9 involved communications with an attorney.

10 JUDGE MORRIS: Is Jim Bowman an attorney?

11 MR. TADLOCK: No, but to the extent -- I'm not
12 sure in these communications who Jim Bowman was speaking to
13 with respect to --

14 JUDGE MORRIS: Well, we'll find out.

15 MR. TADLOCK: Okay.

16 JUDGE MORRIS: Overruled.

17 THE WITNESS: I'm not sure whether he had concerns
18 or not. I would have to go back and review some
19 communications.

20 BY MR. SEHAM:

21 Q You don't recall? It's possible that Jim Bowman
22 had a concern as of August 5th about whether Captain
23 Estabrook should have continued jumpseat access?

24 A It could be possible.

25 Q Now, a very large portion of FedEx pilot flying is

1 Q Now, you testified that your 15D determination --
2 as of August 9th it's your testimony that it was based on a
3 report from Todd Ondra, correct?

4 A Partially, yes.

5 Q And then what else?

6 A I would say that my initial concerns with Captain
7 Estabrook's situational awareness, as raised with his
8 original e-mail, then with the recommendation of Todd Ondra,
9 those in concert led me to direct Captain Estabrook to
10 undergo a company-mandated medical examination.

11 Q Now, to the extent it rested on -- and I'm
12 understanding that your testimony today is that it was based
13 in part on the August 4th e-mail. To the extent it was
14 dependent on Todd Ondra's report, what was it in that report
15 that prompted you to reinstate Captain Estabrook to NOQ
16 status and refer him for a 15D evaluation?

17 A Todd Ondra told me that he was concerned with his
18 fitness for duty, that he was concerned with his mental
19 state, the concerns he raised in relationship to Auburn
20 Calloway, his thoughts that he may be transmitting
21 information to Al Qaeda and the desire to have his cell in
22 prison wiretapped, led to that decision.

23 Q Anything else?

24 A Not that I recall right now.

25 Q Now, you recall that you were deposed in this

1 matter, correct?

2 A Yes, sir.

3 Q And do you recall testifying that it was not until
4 March 2016 that you had any notice that Captain Estabrook
5 had served as the chairman of a pilot union security
6 committee?

7 A That's the first time that I understood that he
8 served as the chairman of a security committee, yes, sir.

9 Q March 2016?

10 A Yes, sir.

11 Q And you're aware that he identified himself --
12 today, as we sit here, you're aware that he identified
13 himself as the chairman of the pilot union security
14 committee in his August 4th e-mail --

15 A Yes, sir.

16 Q -- correct?

17 A I'm aware of that.

18 Q And so did you make any effort to research what
19 his role was and what the scope of his duties were or the
20 scope of his interfacing with company representatives?

21 A No, sir, I did not.

22 Q But you knew at that time that he had had
23 transactions with VP of corporate security Bill Henrikson,
24 correct?

25 A I know that he said that.

1 Q Well, did you make any --

2 A I didn't know that he did it.

3 Q Did you make any effort to inquire into that or
4 verify that?

5 A Did not.

6 Q And would you agree with me that it's an important
7 contractual agreement between the pilots collectively and
8 Federal Express that the aeromedical advisor and not flight
9 management determine whether an individual should be subject
10 to a mental health examination?

11 A Absolutely. Yes, sir, I do.

12 Q Now, you say you bore no grudge about the Laredo
13 incident, correct?

14 A Yes, sir, that's correct.

15 Q Isn't it true that when you referred Captain
16 Estabrook to Harvey Watt, the aeromedical advisor, that you
17 had -- that it's your contention that you had no
18 anticipation that it would be for a psychological
19 examination?

20 A Could you say that again?

21 Q Yes. When you referred Captain Estabrook to
22 Harvey Watt, is it your contention that you had no
23 anticipation that the result would be a psychological
24 examination?

25 A That decision is up to Dr. Bettles at Harvey Watt.

1 through a line of thunderstorms." So you had this e-mail on
2 April 10th, 2013?

3 A Yes, sir.

4 Q And you actually were in possession of audio tapes
5 concerning Captain Estabrook's exchanges with the duty
6 officer and the dispatcher, correct?

7 A I probably was.

8 Q And did you -- before you ordered an investigation
9 pursuant to 19D, did you listen to those audio tapes?

10 A I would be speculating, but I would say, yes, I
11 probably listened to them.

12 Q Okay.

13 A If they were sent to me, I probably listened to
14 them. And I don't recall listening to them specifically,
15 but, if they were sent to me, I would have listened.

16 Q Did Mark Crook tell you -- and you say you had a
17 conversation with Mark Crook?

18 A I believe so.

19 Q Did Mark Crook admit to you during those
20 conversations that he had telephone calls with Captain
21 Estabrook other than the ones that had been recorded?

22 A I don't recall the specific details of our
23 conversation. I imagine we probably talked about the
24 situation, yes, sir.

25 Q Did you ever call Captain Estabrook to get his

1 Q Okay.

2 A You can't fly any airplane.

3 Q But an NOQ, for example, has the effect of --
4 well, I'm not sure what verb to use now. But it has the
5 effect -- it reflects FedEx's decision that that pilot is no
6 longer permitted to operate FedEx aircraft or board FedEx
7 aircraft?

8 A No. They are no longer permitted to operate FedEx
9 aircraft.

10 Q Now, you directed that Captain Estabrook be placed
11 on NOQ UFN, correct?

12 A No, sir.

13 Q What does UFN -- do you understand what UFN means?

14 A I think I do, but we refer to NOQ as open-ended.
15 We call it an open-ended NOQ. That means you have a start
16 date but you don't have an end date. You haven't identified
17 an end date for the NOQ process. I think UFN was used as
18 until further notice, which is essentially an open-ended
19 NOQ.

20 Q Now, you were aware that Captain Estabrook had
21 been placed on NOQ UFN, correct?

22 A Yes, sir. He was placed in an open-ended NOQ.

23 Q And it's your testimony that you made that
24 decision alone?

25 A In which instance, sir?

1 Q The August 5th NOQ?

2 A Yes, sir.

3 Q Now, typical reasons for placing a pilot on NOQ
4 designation would be a failed check ride, sick leave in
5 excess of 30 days, losing medical certification, long-term
6 disability, or being subject to an investigation, correct?

7 A Yes, sir, those are some of the reasons. Not all.
8 But, yes.

9 Q I'm trying to recall your previous testimony. You
10 said that the primary reason for your placement of Captain
11 Estabrook on NOQ status was to facilitate a meeting that
12 later occurred on August 9th, correct?

13 A This is the August 4th NOQ?

14 Q Yes. August 5th.

15 A August 5th NOQ?

16 Q Yes.

17 A Yes, sir. That's correct.

18 Q But there was a secondary reason, which was that
19 you had concerns about his mental balance?

20 A No, I never said that.

21 Q Okay, can you tell me -- because I'm failing to
22 recall what you testified to --

23 A I said --

24 Q -- that there was a secondary reason?

25 A I said I had some concerns about his situational

1 A No, sir, I'm not aware.

2 Q And what does RMG stand for?

3 A Management removal.

4 Q And would you agree with me that RMG is a type of
5 leave designed for us on a one-time basis to allow for a
6 specific activity?

7 A It's a removal code that takes a pilot off a
8 scheduled activity for a time-definite period.

9 Q And, by contrast, the NOQ designation is an open-
10 ended designation designed as part of a longer
11 administrative process, correct?

12 A Potentially longer, yes, sir, that's correct.

13 Q Now, prior to August 4th, you received messages
14 that had been posted on the internet by a self-styled Mayday
15 Mark, correct?

16 A Yes, sir.

17 Q And who provided you with these postings?

18 A I do not recall. I know that all the postings,
19 one was brought to my attention to Rob Tice, I believe.

20 Q And so Rob Tice provided you some of the postings?

21 A Based on these exhibits I read some postings, and
22 I believe Rob Tice showed me one of those previously.

23 Q And did you obtain others independently?

24 A Other people have shown me postings from Mayday
25 Mark, yes, sir.

1 Q And these postings interested you because they
2 related to the April 10th, 2013 Laredo incident, correct?

3 A My recollection is, the first time I was brought
4 to -- the Mayday Mark was brought to my attention was
5 because it closely resembled the events associated with
6 Captain Estabrook's experience in Laredo.

7 Q And can you tell us how you came to draw that
8 conclusion?

9 A It was -- all I can do is rely on my recollections
10 from that period of time, and I think it was that I was --
11 he was purporting to have delayed his departure and the
12 company was attempting to discipline him.

13 Q And it was your view that the information posted
14 by Mayday Mark concerning Laredo was tightly held
15 information, correct?

16 A I didn't know if it was Laredo. But, for someone
17 to post that and mischaracterize it as a disciplinary event,
18 yes, I thought that that was inappropriate.

19 Q And you thought it was possible that Mayday Mark
20 was Captain Estabrook, correct?

21 A I had a suspicion that -- I didn't know of any
22 other circumstances -- or, one other circumstance that fit
23 but it didn't fit the specific circumstances in the blog.

24 Q And you gave these postings to Rob Tice?

25 A I gave them to nobody.

1 Q You destroyed them at some point?

2 A I didn't destroy -- I don't know. I just looked
3 at it. Someone brought it to my attention, I looked at it
4 and discarded it.

5 Q Okay. And, after having reviewed it and discarded
6 it, you asked Rob Tice to inquire with Captain Estabrook as
7 to whether he was Mayday Mark, correct?

8 A I don't remember asking Mr. Tice to do that. I
9 probably expressed to him that I'd like to know if Mayday
10 Mark was Mark Estabrook, but I have -- I don't recall asking
11 him to specifically ask Captain Estabrook if that was -- if
12 he was the blogger.

13 Q And why would you have asked him to do that?

14 A To find out who Mayday Mark was.

15 Q To find out who was discussing the Laredo
16 incident?

17 A That would be one case, yes.

18 Q Now, you don't recall any reference to a stroke in
19 the Mayday Mark postings that you reviewed, correct?

20 A No, sir, I do not.

21 Q And you were in possession of these Mayday Mark
22 postings prior to the August 5th NOQ decision, correct?

23 A I don't recall if I was or not. After reviewing
24 the exhibits here, I imagine I probably saw them.

25 Q I'm sorry, you imagine what?

1 A I imagine I probably saw them, but I don't recall
2 if I had them in my possession.

3 Q Well, does it help for you to -- and I may not
4 have heard your last answer, but these postings by Mayday
5 Mark related to the Laredo incident, you would agree that
6 you probably were in possession of those prior to the August
7 5th NOQ designation?

8 A Yes, it would have been prior to that.

9 Q And it was your view at the time that the
10 disclosure of the Laredo incident information probably
11 constituted a violation of Federal Express company policy,
12 correct?

13 A I would say that would depend on who was making
14 the posting. If the event was -- if Captain Estabrook was
15 making the posting and he wants to tell people about his
16 experiences, you know, that's his prerogative. If it's
17 somebody else trying to relay false information about the
18 company, then, yeah, that's a different problem.

19 Q You said that would have been Captain Estabrook's
20 prerogative?

21 A If he wants to discuss his situation in Laredo
22 accurately and honestly, then I have no problems with it.

23 Q Uh-huh. But, if you felt that it was in accurate
24 in any way, that might be grounds for discipline?

25 A No. Posting on a blog is never grounds for

1 discipline.

2 Q Okay.

3 A I want to -- excuse me, I'd like to retract that.
4 If you publish company information, proprietary company
5 information, photos of an aircraft cockpit, sections of the
6 FOM, proprietary company information on a public forum, that
7 would be a violation of FedEx policy, I believe.

8 Q Was there anything in the Laredo postings that
9 constituted proprietary information?

10 A No, sir, not that I know of.

11 Q But you still thought at the time that the poster
12 was possibly violating FedEx policy, correct?

13 A I thought that might be the case.

14 Q And your interest in finding out whether Captain
15 Mark Estabrook was Mayday Mark was to investigate whether
16 there might be a violation --

17 A No, sir.

18 Q -- of company policy?

19 A No, sir.

20 Q So why was it important for you to know whether
21 Captain Estabrook was Mayday Mark?

22 A I don't think it was important. I think it was a
23 curiosity.

24 Q I'd like to direct your attention to page 64 of
25 your deposition transcript, complainant's exhibit CX-51 for

1 identification purposes.

2 A Page 64, Mr. Seham?

3 Q Uh-huh. Yeah, commencing at line 11, question,
4 "Okay, so you were concerned about the disclosure of
5 operational information to a wider public audience,
6 correct?" Answer, "Not on operational information, but it
7 was information that is between the pilot and flight
8 management, and that's not the place for it to be aired."
9 Question, "So it would be a violation of FedEx policy?"
10 Answer, "I would say so." So was that your testimony during
11 your deposition?

12 A That was my testimony during my deposition.

13 Q So isn't it true that, at the time you got these
14 Laredo incident postings, that you thought that poster, if
15 it had been Captain Estabrook, that he might have been
16 violating company policy?

17 A [No audible response.]

18 Q I'm not asking you to look at the transcript. In
19 fact, I'm asking you to close the transcript and not refer
20 to it.

21 A Yes.

22 Q But I'm asking you a question right now in live
23 time --

24 A Yes, sir, and I think --

25 Q -- as you sit here --

1 A -- it's later in the deposition I said --

2 Q -- if you testified truthfully.

3 A I think I said later in the deposition that if it
4 was Captain Estabrook I wouldn't have a problem with it.

5 Q So I'm asking you right now, all right, on the eve
6 of this August 5th NOQ decision, you had concerns that
7 whoever had been the poster of that material might have been
8 violating FedEx policy?

9 A No, sir, the Laredo incident was a great deal of
10 time prior to that. And I don't think the posting that I
11 recall seeing on Laredo, it didn't happen the evening of the
12 August 5th NOQ, or the day before. I was much earlier than
13 that.

14 Q Didn't you just testify that you got the Laredo
15 material prior?

16 A Prior. Not just prior, prior.

17 Q Okay, prior. And, just prior to the meeting, you
18 asked Rob Tice to ask questions to Mark Estabrook concerning
19 the posting, correct?

20 A I do not recall asking Rob Tice to ask Captain
21 Estabrook that.

22 Q Okay.

23 A I expressed a concern to Mr. Tice that I would
24 like to know if Captain Estabrook was Mayday Mark, but I
25 don't remember telling him -- or, asking him to question

1 Captain Estabrook in that regard.

2 Q I'm sorry, your testimony just now was you recall
3 telling Rob Tice that you would like to know who Mayday Mark
4 was?

5 A Well, I'm sure I did. When we looked at the
6 postings, yes, I would have liked to have known who Mayday
7 Mark was.

8 Q And you told him that you suspected that it was
9 Mark Estabrook, correct?

10 A At one time, I think I did, yes.

11 Q Uh-huh. And did Mr. Tice ever report back to you
12 about the questions he had asked Captain Estabrook about
13 Mayday Mark?

14 A Yes, sir, he did. After the meeting with Captain
15 Estabrook, Rob Tice told me that he had asked Captain
16 Estabrook if he was Mayday Mark, and Captain Estabrook said
17 that he was not.

18 Q Did you conduct any further investigation for the
19 purposes of determining who Mayday Mark was?

20 A I did not.

21 Q Did you ask anybody to conduct any further
22 investigations as to the identity of Mayday Mark?

23 A I did not ask anybody else to do that.

24 JUDGE MORRIS: Counsel, I'm going to interject a
25 question. You said that you learned from Mr. Tice that

1 under countdown parameters. I don't know if we have that
2 section here, though.

3 JUDGE MORRIS: Okay. Is it a common practice for
4 pilots to turn off their cell phones during the pilot's crew
5 rest period?

6 THE WITNESS: I'd be guessing.

7 JUDGE MORRIS: Then that's all I need to know.
8 Questions based on mine?

9 MR. SEHAM: None, Your Honor.

10 MR. TADLOCK: No.

11 JUDGE MORRIS: All right. Thank you, sir.

12 THE WITNESS: Yes, sir.

13 [WHEREUPON, witness William McDonald was
14 excused.]

15 JUDGE MORRIS: Anything else?

16 MR. SEHAM: No, Your Honor.

17 MR. RIEDERER: Nothing from respondent.

18 JUDGE MORRIS: All right. Joint exhibits JX-1
19 through JX-7, respondent's exhibits RX-1 through RX-33 are
20 admitted into evidence. I'm summarizing the evidence, make
21 sure we're all on the same sheet of music. Respondent's
22 exhibits RX-34 and RX-35 are not admitted into evidence.
23 Complainant's exhibits CX-1 through CX-47, it's my
24 recollection, are admitted into evidence.

25 \\

1 And the other thing I will tell the parties is, given -- I
2 am losing my law clerk, gaining another law clerk, and this
3 law clerk I have has been really good at understanding AIR-
4 21, and I'm going to get a law clerk who doesn't even know
5 how to spell AIR-21.

6 Do not anticipate a ruling from this decision
7 until probably this time next year, I'm just laying that out
8 for you for a timeline, because I've got at least AIR-21
9 cases ahead of me. And the last thing that I'll do -- we're
10 still on the record, right?

11 COURT REPORTER: Yes, sir.

12 JUDGE MORRIS: The items I would like some
13 particular focus in on is, on the complainant's side --

14 MR. RIEDERER: I'm sorry, is this on the record?

15 JUDGE MORRIS: It is on the record.

16 MR. RIEDERER: Okay, good.

17 JUDGE MORRIS: On the complainant's side, I would
18 like you to provide me some specificity and connect me the
19 dots on how the -- I'll call it the second incident, not the
20 Laredo incident but the August 2013 incident -- falls under
21 49 U.S.C. 42121 as a protected activity specifically.

22 MR. SEHAM: The August 9th?

23 JUDGE MORRIS: The August 9th one.

24 MR. SEHAM: Uh-huh.

25 JUDGE MORRIS: For the respondents, I would like

1 you to focus in on the clear and convincing portion of the
2 case, okay?

3 MR. RIEDERER: Yes, Your Honor.

4 JUDGE MORRIS: Thank you, gentlemen. This hearing
5 is closed.

6 [WHEREUPON, the hearing was concluded at
7 2:15 p.m.]

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CX-6

Maryanne Miller

From: Rob Fisher
Sent: Wednesday, April 24, 2013 10:17 AM
To: Cindy Sartain
Subject: FW: Cap Mark Estabrook #88775 Flight 1317/11 LRD-MEM
Attachments: F1317Sherrie first conversation.wav; F1317 Estabrook Crook conversation.wav; F1317-2 Sherrie second conversation.wav

Cindy.....Here they are.....rob

From: Mark Crook
Sent: Wednesday, April 10, 2013 11:46 PM
To: William McDonald; Rob Fisher; FODO; Michael Speer
Subject: Cap Mark Estabrook #88775 Flight 1317/11 LRD-MEM

Received a call at 0215Z from the LRD ramp manager informing me that the crew for FDX 1317/11 was not at the ramp and they were due out in 10 minutes. This was the first I had heard of any problem so I immediately called the Captain, Mark Estabrook. Cap Estabrook told me he had coordinated staying at the hotel with the dispatcher Sherrie Hayslett and was not going to operate an aircraft through any line of thunderstorms. I asked if Sherrie and he had agreed to delay the flight. He told me that he was delaying the flight.

I went over and talked with Sherrie. She told me she had no idea the crew was still at the hotel. When the Captain told her they were going to be late, she assumed the Captain meant that the flight was going to be delayed into MEM due to the MEM weather.

At the scheduled arrival time of FDX 1317 (0412Z), 40 aircraft were on the ground in MEM and no holding was in progress in any quadrant by MEM approach control.

At 0317Z a first tier ground stop was announced for MEM. Since LRD is in Houston Center, this included flight 1317. This ground stop was 52 minutes after the scheduled block time for flight 1317 and should have never included them.

I've attached Sherrie's first conversation with Cap Estabrook, my conversation and then Sherrie's second conversation. This Cap accuses me of pilot pushing and ordering him to takeoff during Sherrie's second conversation. At no time did that ever happen in my conversation with Cap Estabrook.

In my 2+ years as a DO, I have never had a Captain take it upon himself to delay a flight without coordinating and coming to an agreement with the dispatcher. Cap Estabrook was directive to Sherrie and told her how it was going to be. Cap Estabrook also never took it upon himself to touch base with the weather department. He became the sole source of weather by looking at the weather plot on intellicast and delayed the flight by that sole source of information.

Over to you guys but this Captain is on his own program in a system that runs by time not much slop.

Cap Mark Crook
ACP/Flight Operations Duty Officer

CX-8

Maryanne Miller

From: Rob Fisher
Sent: Monday, April 29, 2013 4:05 PM
To: Katherine Walker
Cc: alan@alanarmstronglaw.com; Robb Tice; Terry.McTigue@alpa.org; Coy.Briant@alpa.org;
Rob Fisher; Mitch Matheny
Subject: RE: Mark Estabrook

Ms. Walker,

I acknowledge receipt of your letter. In accordance with established practice at FedEx, 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 those processes. The interview will not be rescheduled. Mr. Estabrook is welcome to bring an ALPA representative to the interview as he was previously informed.

Sincerely,

Rob Fisher

Airbus Fleet Captain
901-494-2905

From: Katherine Walker [<mailto:AAparalegal@comcast.net>]
Sent: Monday, April 29, 2013 3:18 PM
To: Rob Fisher
Cc: alan@alanarmstronglaw.com
Subject: Mark Estabrook
Importance: High

Please see attached letter.

Katherine Walker, Paralegal
Alan Armstrong, Esq.
An AV Rated Law Firm Since 1989
2900 Chamblee Tucker Road
Bldg. 5, Suite 350
Atlanta, GA 30341
Phone: 770-451-0313
Fax: 770-451-0317

~~ALAN ARMSTRONG~~

ATTORNEY AT LAW

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April 29, 2013

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alan@alanarmstronglaw.com
www.alanarmstronglaw.com

Via Email and U.S. Mail

Capt. Rob Fisher
Chief Pilot/Regional
Federal Express
3131 Democrat Road
Bldg. C
Memphis, TN 38118-0123

RECEIVED

MAY 06 2013

LEGAL DEPARTMENT

Re: Capt. Mark Estabrook/888775

Dear Capt. Fisher:

Please enter my name as counsel of record on behalf of Capt. Mark Estabrook. In order to allow Capt. Estabrook to have to have meaningful assistance of counsel and prepare for your interview scheduled for May 1, 2013 at 3:00 p.m., kindly reschedule the interview to a later date. Also, please confirm I may attend the interview. In connection with this request, please provide the undersigned with the following:

1. Any and all recordings, tapes, transcripts or materials reflecting or confirming communications between my client and the Fed Ex Dispatcher (Sherrie Hayslett) on April 10/11, 2013;
2. Any and all recordings, tapes, transcripts or other materials reflecting or confirming communications between my client and Fed Ex Crew Scheduling on April 10/11, 2013;
3. Any and all recordings, tapes, transcripts or other materials reflecting or confirming communications between my client and the Fed Ex Duty Officer (Mark Crook) on April 10/11, 2013;
4. Any and all recordings, tapes, transcripts or other materials reflecting, confirming or relating to the Federal Express flight from Laredo, Texas (KLRD) to Memphis, Tennessee (KMEM) scheduled for April 10/11, 2013 captained by my client; and
5. Any and all recordings, tapes, transcripts or other materials reflecting or concerning communications between the Fed Ex Dispatcher (Sherrie Hayslett), the Duty Officer (Mark Crook), Capt. Mark Estabrook and/or Fed Ex Crew Scheduling concerning the Fed Ex flight from KLRD to KMEM of April 10/11, 2013.

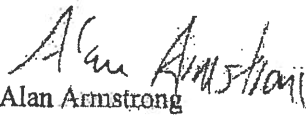
Captain Mark Estabrook
April 29, 2013
Page 2

I am sure that you can appreciate the need for Capt. Estabrook and his counsel to review and consider the contents of these recorded conversations in advance of any interview to afford Capt. Estabrook fundamental fairness.

At my direction, an AIR-21 Complaint has been filed pursuant to 49 U.S.C. §42121 with the U.S. Department of Labor/OSHA, and the Federal Aviation Administration. See Exhibits A and B attached.


Thank you for your assistance in this matter.


Sincerely,


Alan Armstrong

AA/kjw

Cc: Robert Tice, Sr. Counsel
Scott Williams, Sr. Attorney
Cindy Sartain, Sr. Paralegal Specialist, Labor Relations Law
Terry McTigue, ALPA, FedEx MEC, Grievance Committee
Maggie Comes, ALPA, Legal Secretary
Capt. Mark Estabrook


CITY OF MEMPHIS
 DEPARTMENT OF LANDS



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Thank You!

Your Safety and Health Hazard Notice has been forwarded to the OSHA Federal Area Office listed below. Your complaint may be forwarded to the State of Tennessee, which operates its own OSHA approved State Plan. [Click Here](#) for more information on State Plans or if you would like to contact the state directly. If you identified yourself, you will be contacted by OSHA. Please call the OSHA Federal Area Office below if you are not contacted.

Complaint Number: 861872

Tennessee

Nashville Area Office
 51 Century Boulevard Suite 340,
 Nashville, TN 37214
 (615) 232-3803
 (615) 232-3827 FAX

Establishment Name: FedEx Express

Site Street: 3131 Democrat Rd., Building C

Site City: Memphis

Site State: Tennessee

Site Zip: 38118

Management Official: Captain Rob Fisher

Telephone Number: 901.224.3435

Type of Business: Express Shipping

Hazard Description:

On April 10, 2013, after coordinating a delay with GOC (Sherrie Hayslett) and speaking to the Fed Ex Duty Officer (Mark Crook) that there was a line of thunderstorms [described in an active SIGMET] between my departure airport Laredo, TX (KLRD) and Memphis, TN (KMEM), the Duty Officer directed me to depart and fly toward KMEM and through the line of thunderstorms. Asserting my pilot in command authority under 14 CFR Sec. 91.3(a) I related: "I am not going to depart until I can plan my arrival for storm passage through Memphis." He then told me he had consulted with our FedEx Weather Department and said they told him the thunderstorm would pass through Memphis in about 30 minutes. He directed me to takeoff and fly to Memphis. I declined. It would be 4-6 hours later before the storm would pass through Memphis. "You are the only one not taking off" he said, and directed me to go sit in the cockpit until we had our departure clearance. Laredo tower held us on the ground for over 2 additional hours due to a weather hold for all Memphis inbound flights as directed by Memphis Air Route Traffic Control. 14 CFR Sec. 91.3(a) provides: "The pilot in command is directly responsible for, and is the final authority as to, the operation of that aircraft." In addition to violating Sec. 91.3(a), such an operation would have violated 14 CFR Sec. 91.13(a) which provides: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." These provisions in Part 91 of the Federal Aviation Regulations specifically apply to Part 121 operations such as those conducted by Federal Express.



See 14 CFR Sec. 91.1(a) ["this part prescribes rules governing the operation of aircraft...within the United States."]. These directives are also in violation of FedEx Flight Operations Manual (FOM) procedures 8.17 TURBULENCE, which states, in part, that "Turbulence increases the difficulty of flight operations. In extreme cases it may cause damage to the aircraft. Areas of known severe/extreme turbulence should be avoided. If the Captain determines an area of turbulence to be unsafe, he will detour or delay the flight until conditions improve. All meteorological conditions (e.g., SIGMETS, PIREPS, ATC advisories, etc.) shall be considered prior to releasing a flight to or operating in areas of turbulence." My decision to exercise my pilot in command authority has led to a Section 19.D.1 disciplinary interview Capt. Rob Fisher has declared he intends to convene on May 1, 2013, in Memphis, TN. Despite my requests, I have not been provided with records or recordings of my conversations either with the Duty Officer or the Dispatcher. The GOC dispatcher lied about my consultation with her when she agreed I should stay at the hotel and wait out the storm. My first officer, Randy Burleson, can verify this. The audio tapes will also corroborate my account of events. My conversation with the Duty Officer was an act of intimidation in response to my reporting an FAR violation to my employer as is the receipt of the letter received from my supervisor Rob Fisher notifying me of an interview set for May 1, 2013, under the auspices of Section 19.D.1 of the Collective Bargaining Agreement (CBA) currently in force and effect at Federal Express. There are approximately 4,500 pilots at FedEx Express.

Hazard Location:

The hazardous location is airborne in nature. Every aircrew that may be intimidated by flight management to penetrate severe turbulence and thunderstorms is at risk all over the world.

This condition has previously been brought to the attention of:

* The following government agency: FAA

I am an employee.

My name may be revealed to the employer.

Complainant Name: MARK ESTABROOK
 Complainant Telephone Number: 901-230-4933
 Complainant Mailing Address:

PO BOX 1890
 MANCHACA
 Texas
 78652

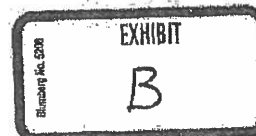
Complainant Email: cargopilot@gmail.com

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U.S. Department of Labor | Occupational Safety & Health Administration | 200 Constitution Ave., NW, Washington, DC 20210
 Telephone: 800-321-OSHA (6742) | TTY: 877-889-5627
www.OSHA.gov

Federal Aviation
Administration

Electronic Complaint Notification



To qualify for the Whistleblower Protection Program (WBPP), you must be or have been an employee of a U.S. air carrier, or a contractor or subcontractor of a U.S. air carrier.

A PERSONAL REMEDY FOR DISCRIMINATION IS ONLY AVAILABLE THROUGH THE U. S. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA). You must file a WBPP complaint with OSHA within 90 DAYS of the discrimination event. This notification advises the FAA but is not a substitute for filing the required complaint with OSHA.

Has this complaint been filed with OSHA?: Yes No

Required fields are marked with an asterisk (*).

Personal Information

Complainant's Name *:

Mr. MARK S ESTABROOK

Date:

04/29/2013

Address1 *:

PO BOX 1890

Address2:

City *:

MANCHACA

State *:

TX

Zip Code *:

78652

Country *:

United States

Province (Non-U.S.):

Postal Code:

Phone *:

512-772-1605

Cell Phone:

901-230-4933

E-Mail Address *:

cargopilot@gmail.com

Employee's Job * : Flight Deck Crewmember If other, please specify:

Employer Information

Company Type *:

Air Carrier

Company Name *:

FedEx Express

Certificate Number:

Address1 *:

3131 Democrat Rd., Building C

Address2:

City *:

Memphis

State *:

TN

Zip Code *:

38118

Phone *:

901-224-3435

Extension:

Alleged Safety Violation(s)

Safety Violation Category * : Operations If other, please specify:

CX-10

Ex S

Mark Estabrook v. Federal Express Corporation
Defendant's Log of Privileged Documents
 (Revised 2/17/2015)



DOCUMENT NO.	DATE	DOCUMENT DESCRIPTION	PRIVILEGE
1.	4/23/13	Emails with advice from counsel from paralegal C. Sartain to managers R. Fisher and M. Matheny regarding draft letter to Estabrook	Attorney/Client Communication, Attorney Work Product - Prepared at the direction of or under the supervision of FedEx attorneys
2.	4/26/13	Email from paralegal C. Sartain to attorney R. Tice regarding recordings related to flight 1317 LRD-MEM	Attorney Work Product - Internal Legal Dept. Communication
3.	4/29/13	Emails with advice of counsel between manager R. Fisher, attorney R. Tice, and paralegal C. Sartain regarding 4/29/13 letter from attorney A. Armstrong	Attorney/Client Communication, Attorney Work Product - Internal Legal Dept. Communications
4.	4/29/13	Email from attorney R. Tice to paralegal C. Sartain and attorney S. Williams regarding manager R. Fisher letter to attorney A. Armstrong	Attorney Work Product - Internal Legal Dept. Communication
5.	4/29/13	EW Emails between director W. McDonald and attorney R. Tice regarding manager R. Fisher letter to attorney A. Armstrong	Attorney/Client Communication - Internal Legal Dept. Communications
6.	5/7/13	Email from paralegal J. Harrison to paralegal C. Sartain regarding attached Estabrook OSHA complaint with handwriting	Attorney Work Product - Internal Legal Department Communication
7.	5/7/13	Email from paralegal C. Sartain to managers M. Matheny and R. Fisher regarding Estabrook OSHA complaint	Attorney/Client Communication - Prepared at the direction of or under the supervision of FedEx attorneys
8.	8/4/13	Emails between VP and attorney J. Maxwell, VP J. Bowman, director W. McDonald, and attorney R. Tice regarding Estabrook 8/4/13 email	Attorney Work Product, Attorney/Client Communication - Internal Legal Department Communications
9.	8/5/13	Email with advice of counsel from attorney R. Tice to director W. McDonald and cc to manager R. Fisher, VP Jim Bowman, VP and attorney J. Maxwell, and director T. Ondra regarding R. Fisher	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communication

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		meeting with Estabrook	
10.	8/5/13	Email from attorney R. Tice to manager R. Fisher and director W. McDonald with cc to VP J. Bowman, VP and attorney J. Maxwell, and director T. Ondra regarding R. Tice communication with ALPA	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communication
11.	8/4-5/13	Emails with advice of counsel between attorney R. Tice, VP and attorney J. Maxwell, VP J. Bowman, director W. McDonald, director T. Ondra, and managers R. Fisher and T. Arnett and cc to VP T. Harris regarding Estabrook 8/4/13 email	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communications
12.	8/7/13	Email from G. Hubbard to R. Tice regarding message from director W. McDonald	Attorney/Client Communication - Internal Legal Dept. Communication
13.	8/7/13	Emails with advice of counsel between W. McDonald, VP J. Bowman, director T. Ondra, VP/attorney J. Maxwell, attorney R. Tice, and SVP Paul Cassel and cc to paralegal C. Sartain regarding Estabrook 8/4/13 email	Attorney/Client Communication, Attorney Work Product - Internal Legal Dept. Communications
14.	8/9/13	Email from attorney R. Tice to VP and attorney J. Maxwell regarding Estabrook case update	Attorney Work Product - Internal Legal Dept. Communication
15.	8/9/13	Emails with advice from counsel between attorney R. Tice and manager R. Fisher and cc to director W. McDonald regarding Estabrook decision	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communications
16.	8/12/13	Emails from attorney R. Tice to VP and attorney J. Maxwell and paralegal C. Sartain regarding Estabrook case update	Attorney Work Product - Internal Legal Dept. Communications
17.	8/12/13	Emails between director T. Ondra, attorney R. Tice, attorney S. Williams, and paralegal C. Sartain regarding Estabrook and Trafton case updates	Attorney/Client Communications, Privacy of Non-Party - Internal Legal Department Communications

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18.	8/12/13	Email from paralegal C. Sartain to attorney R. Tice and manager M. Matheny regarding Estabrook 15.D letter with draft attached	Attorney Work Product, Attorney/Client Communication - Internal Legal Department Communications
19.	8/13/13	Emails with advice of counsel between attorney R. Tice, VP and attorney J. Maxwell, SVP and attorney R. O'Keefe, attorney Phil Tadlock, directors T. Ondra and W. McDonald, manager R. Fisher with cc's to paralegal C. Sartain and VP J. Bowman regarding attorney A. Armstrong 8/13/13 letter (attached)	Attorney Work Product, Attorney/Client Communication - Internal Legal Department Communications
20.	8/13/13	Email from attorney R. Tice to assistant E. Garvey with a cc to VP and attorney J. Maxwell, attorney P. Tadlock, and paralegal C. Sartain regarding Estabrook case summary	Attorney Work Product - Internal Legal Dept. Communication
21.	8/13-14/13	Emails with advice of counsel between attorney R. Tice, manager R. Fisher, directors T. Ondra and W. McDonald, and paralegal C. Sartain with cc's to VP J. Bowman, VP and attorney J. Maxwell, attorney P. Tadlock regarding Estabrook 15.D letter with draft attached	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communications
22.	8/14/13	Email from attorney P. Tadlock to attorney R. Tice regarding response to A. Armstrong 8/13/13 letter with draft attached	Attorney Work Product - Internal Legal Dept. Communication
23.	8/15/13	Emails with advice of counsel between manager R. Fisher, attorney R. Tice, paralegal C. Sartain, and director W. McDonald regarding Estabrook 15.D letter	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communications
24.	8/16/13	Emails between attorney R. Tice and SVP and attorney R. O'Keefe regarding response to A. Armstrong 8/9/13 letter (attached)	Attorney Work Product - Internal Legal Dept. Communications
25.	8/16/13	Emails between attorney R. Tice and VP and attorney J. Maxwell with a cc to attorney P. Tadlock	Attorney Work Product - Internal Legal Dept. Communications

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		regarding rersponse to A. Armstrong 8/9/13 letter	
26.	8/16/13	Emails with advice of counsel between attorney R. Tice and manager R. Fisher and a cc to attorney Phil Tadlock and paralegal C. Sartain regarding Harvey Watt's request for a written statement	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communications
27.	8/16/13	Emails between director W. McDonald and attorney R. Tice regarding response to attorney A. Armstrong 8/9/13 letter	Attorney/Client Communication - Internal Legal Department Communications
28.	8/20/13	Emails between assistant B. Harrison and SVP and attorney R. O'Keefe regarding attorney letter received	Attorney Work Product - Internal Legal Dept. Communications - Internal Legal Department Communications
29.	8/20/13	Emails between attorney R. Tice, VP and attorney J. Maxwell, SVP and attorney R. O'Keefe, attorneys S. Williams and P. Tadlock regarding attorney A. Armstrong 8/20/13 letter	Attorney Work Product - Internal Legal Dept. Communications
30.	8/22/13	Email from attorney R. Tice to attorney P. Tadlock with a cc to VP J. Bowman, VP and attorney J. Maxwell, directors W. McDonald and T. Ondra regarding 8/22/13 letters to J. Bowman, Dr. T. Bettes of Harvey Watt, and R. Fisher (attached)	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communication
31.	8/22/13	Emails between manager S. Voye, attorney R. Tice, Chris Johnson of Harvey Watt with a cc to C. Sartain regarding Hanson 15.D and Estabrook 15.D	Attorney/Client Communication, Privacy of Non-Party - Internal Legal Department Communications
32.	8/22/13	Email from attorney R. Tice to manager R. Fisher and cc to attorney P. Tadlock regarding attorney A. Armstrong 8/20/13 letter (attached)	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communication
33.	8/23/13	Emails between attorneys R. Tice and P. Tadlock regarding Tice response to attorney A. Armstrong 8/20/13 letter (draft attached)	Attorney Work Product - Internal Legal Dept. Communications
34.	8/23/13	Email from attorney R. Tice to VP	Attorney/Client

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		J. Bowman, director W. McDonald, manager R. Fisher with cc to attorney P. Tadlock, paralegal C. Sartain, and director T. Ondra regarding Estabrook case update	Communication, Attorney Work Product - Internal Legal Department Communication
35.	8/23/13	Email from attorney P. Tadlock to attorney R. Tice regarding draft response letter to attorney A. Armstrong (attached)	Attorney Work Product – Internal Legal Dept. Communication
36.	8/23-26/13	Emails between attorney R. Tice and SVP and attorney R. O’Keefe, SVP P. Cassel, VP and attorney J. Maxwell, VP J. Bowman, and attorney P. Tadlock regarding Tice 8/23/13 letter (attached)	Attorney/Client Communications - Internal Legal Department Communications
37.	8/26/13	Email between assistant B. Harrison and SVP and attorney R. O’Keefe and VP and attorney J. Maxwell and attorney R. Tice regarding attorney A. Armstrong 8/20/13 letter (attached)	Attorney Work Product – Internal Legal Dept. Communication
38.	8/26-27/13	Emails between VP J. Bowman and attorney R. Tice with cc to directors W. McDonald and J. Pearson; managers R. Fisher, N. Coplas, and A. Antonian; attorney S. Williams, paralegals M. Miller and C. Sartain regarding Estabrook grievance letters (attached)	Attorney Client Communication, Attorney Work Product - Internal Legal Department Communications
39.	8/27-28/13	Emails between VP and attorney J. Maxwell and attorneys R. Tice and P. Tadlock regarding attorney A. Armstrong 8/27/13 letters	Attorney Work Product – Internal Legal Dept. Communications
40.	8/28/13	Emails between attorney R. Tice and paralegal M. Miller regarding Estabrook grievance	Attorney Work Product – Internal Legal Dept. Communications
41.	8/28/13	Emails between assistant B. Harrison, SVP and attorney R. O’Keefe, and attorney R. Tice regarding attorney A. Armstrong letter of 8/20/13	Attorney Work Product – Internal Legal Dept. Communications
42.	8/28/13	Email from attorney R. Tice to attorney P. Tadlock and paralegal C. Sartain regarding 8/28/13 letter from attorney A. Armstrong (attached)	Attorney Work Product – Internal Legal Dept. Communication
43.	8/28/13	Email from director W. McDonald	Attorney/Client

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		to attorney R. Tice regarding Estabrook 15.D	Communication - Internal Legal Department Communication
44.	9/18-19/14	Emails between manager R. Fisher and attorney R. Tice with cc to VP J. Bowman, director W. McDonald, attorney P. Tadlock, and paralegal M. Miller regarding Estabrook case update	Attorney/Client Communication, Attorney Work Product - Internal Legal Department Communications

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November 1, 2010

Earlier Flight May Have Been Dry Run for Plotters

By SCOTT SHANE and ROBERT F. WORTH

WASHINGTON — American intelligence officials in September intercepted several packages containing books, papers, CDs and other household items shipped to Chicago from Yemen and considered the possibility that the parcels might be a test run for a terrorist attack, two officials said Monday night.

Now the intelligence officials believe that the shipments, whose hour-by-hour locations could be tracked by the sender on the shippers' Web sites, may have been used to plan the route and timing for two printer cartridges packed with explosives that were sent from Yemen and intercepted in Britain and Dubai on Friday.

In September, after American counterterrorism agencies received information linking the packages to Al Qaeda in the Arabian Peninsula, the terror network's branch in Yemen, intelligence officers stopped the shipments in transit and searched them, said the officials, who would discuss the operation only on the condition of anonymity. They found no explosives, and the packages were permitted to continue to what appeared to be "random addresses" with no connection to the terrorist group in Chicago.

"At the time, people obviously took notice and — knowing of the terrorist group's interest in aviation — considered the possibility that AQAP might be exploring the logistics of the cargo system," one of the officials said, referring to Al Qaeda in the Arabian Peninsula.

The apparent test run might have permitted the plotters to estimate when cargo planes carrying the doctored toner cartridges would be over Chicago or another

city. That would conceivably enable them to set timers on the two devices to set off explosions where they would cause the greatest damage.

The September shipments were first reported by ABC News on Monday night, which also noted that Inspire, the English-language magazine of Al Qaeda in the Arabian Peninsula, recently published a picture of the Chicago skyline.

One of the officials said that when the American intelligence agents received a tip from Saudi intelligence officials last week that bombs might be on cargo flights to Chicago from Yemen, analysts "recalled the incident and factored it in to our government's very prompt response."

"Both events reflect solid intelligence work," the official said.

On Monday, Germany, France and Britain said they had banned cargo shipments from Yemen, following a similar move by the United States. Britain prohibited passengers from carrying printer cartridges aboard flights, and Germany halted passenger flights from Yemen as well. Many countries have stepped up cargo screening, but no additional bombs have been found.

After the recovery of the unexploded printer cartridges in Dubai and Britain on Friday, Yemeni and American intelligence officials have stepped up the hunt for Ibrahim Hassan al-Asiri, 28, a Saudi who is believed to be the top technical expert of Al Qaeda in the Arabian Peninsula. They believe he designed the underwear explosives that failed to detonate aboard a Detroit-bound airliner last Dec. 25, as well as the body-cavity bomb that killed his younger brother, Abdullah al-Asiri, in a failed attempt last year to assassinate the top Saudi counterterrorism official, Prince Mohammed bin Nayef.

In a related development, a Yemeni official in Washington said late Monday night that prosecutors in Yemen intend to charge the American-born cleric Anwar al-Awlaki later this week with "the crime of promoting violence and the killing of foreigners." The official, who asked not to be named, said the case would likely be sent to a specialized criminal court in Sana, the capital.

No evidence has been made public linking Mr. Awlaki to the printer cartridge bombs, but intelligence officials believe he played a role in the failed airliner bombing last December, and he has publicly called for more attacks on the United

States. Early this year, he became the first American citizen to be placed on the Central Intelligence Agency's list of terrorists approved for targeted killing.

On Monday, information about the latest failed plot continued to emerge. An American official said that the addresses on the packages were outdated addresses for Jewish institutions in Chicago. But in place of the names of the institutions, the packages bore the names of historical figures from the Crusades and the Spanish Inquisition, the official said. The addresses are one reason that investigators now believe the plan may have been to blow up the planes, since there were no longer synagogues at the Chicago locations.

Explosives experts with the Federal Bureau of Investigation have been sent to London and Dubai to inspect the printer bombs, and technicians planned to "reverse-engineer" the bombs to understand their construction and purpose, Janet Napolitano, the homeland security secretary, told National Public Radio. The Yemeni president, Ali Abdullah Saleh, said Sunday that he would keep up pressure on Al Qaeda, which he said had killed 70 members of the Yemeni Army and security forces during the past four weeks.

American counterterrorism officials, meanwhile, said they were taking a new look at the crash of a United Parcel Service cargo plane in Dubai on Sept. 3 in light of the explosives plot, which used both U.P.S. and FedEx. An investigation of the crash, which involved an onboard fire and killed the two pilots, found no evidence of an explosion.

New details about the two explosive packages were disclosed by security officials in several countries, who discussed the continuing investigation on condition of anonymity. The explosive powder, pentaerythritol tetranitrate, or PETN, was found inside toner cartridges that were themselves inside HP LaserJet P2055 printers, according to officials from Germany and the United Arab Emirates.

German security officials also offered new details about the two bombs, one of which was on a plane that made a stop in Cologne. They said that bomb, which was found at the East Midlands Airport near Nottingham, England, contained 400 grams, or about 14 ounces, of PETN, one of the most powerful explosives known. The one found in Dubai contained 300 grams of PETN, the officials said.

Neal Langerman, an expert on explosives at Advanced Chemical Safety, a

consulting firm in San Diego, said 14 ounces of PETN is the equivalent of five pounds of TNT. He said that a one-pound stick of TNT would level a house.

Both bombs contained circuit boards from cellphones, but the phone parts appeared to be used as timers, because the so-called SIM cards necessary to receive calls were missing, American officials said. Their construction appeared to support the conclusion, announced Sunday by John O. Brennan, the White House counterterrorism adviser, that the bombs were designed to blow up aboard the aircraft.

At least one of the packages was initially carried out of Yemen on two Qatar Airways passenger flights, and it was unclear whether they were intended to take down those passenger jets or the U.P.S. and FedEx cargo planes scheduled later to carry them to the United States.

An official familiar with the investigation said that both packages bore the name of a Yemeni student, Hanan al-Samawi, as the sender. Yemeni officials arrested Ms. Samawi but released her after determining that the packages were dropped off at the U.P.S. and FedEx offices in Sana, the Yemeni capital, not by Ms. Samawi but by another woman using her identity.

At the core of the shipping plot, American officials believe, was Mr. Asiri, the suspected Qaeda bomb maker. Saudi news accounts say he is the son of a Saudi military man and grew up in a religious family in the Saudi capital, Riyadh; studied chemistry at King Saud University, and later joined a militant cell hoping to fight the Americans in Iraq.

But he does not appear to have fought in either Iraq or Afghanistan. He appears to have gotten his training after moving to Yemen around 2005.

Scott Shane reported from Washington, and Robert F. Worth from Beirut, Lebanon. Reporting was contributed by Michael Slackman from Berlin; John F. Burns from London; Charlie Savage, Matthew L. Wald and Mark Mazzetti from Washington; and Joseph Berger from New York.



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NOVEMBER 1431 | 2010



INSPIRE

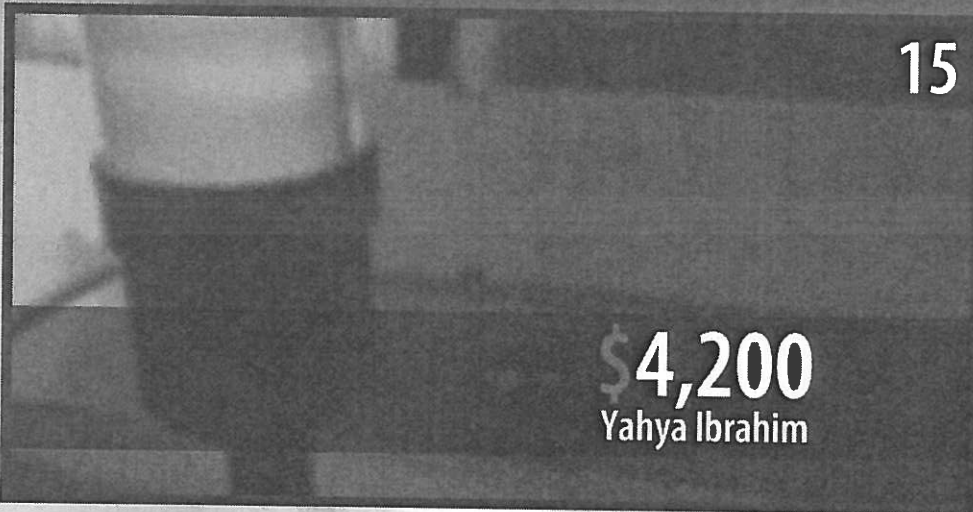
« ...AND INSPIRE THE BELIEVERS »

SPECIAL ISSUE

\$4,200

The Objectives of Operation Hemorrhage | Technical Details | Exclusive Images

CONTENTS



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\$4,200
Yahya Ibrahim

07



THE OBJECTIVES OF OPERATION HEMORRHAGE

What motivated al Qaeda in the Arabian Peninsula to send the packages? What were the inside details of the operation? Why were Jewish synagogues targeted? Details are answered here.

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TECHNICAL DETAILS IKRIMAH AL-MUHAJIR

Now that you have seen how it works, what it does to global security, and how much fear it strikes in the enemies of Allah, we reveal the technical side of the bomb including our scientific findings.

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EXCLUSIVE IMAGES

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TAWAGHIT EXPOSED SHAYKH IBRAHIM AL-BANNA

Outlining the religious objectives of the operation, Shaykh al-Banna discusses the humiliation of the coalition of enemies.

LETTER FROM THE EDITOR

OPERATION HEMORRHAGE

QUESTIONS WE SHOULD BE ASKING

HEAR THE WORLD

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\$4,200. That is the total cost of Operation Hemorrhage. The operation has succeeded in achieving its objectives. We thank Allah for His blessings.

The strategy of al Qaeda was to strike big while the enemy was off guard. The blessed operations of Washington and New York represent the greatest special operations in the history of man. Nineteen men ended the lives of almost three thousand Americans, cost the U.S. treasury trillions of dollars, and embroiled America in a War on Terror that it would definitely eventually lose. America has spent time, effort, and money to prevent a large scale attack such as 9-11 from ever occurring again. Even though that is what they state, on our side we believe that if Allah willed it no security measures could stand in the way of the mujahidin from repeating the glory of the operations of Washington and New York. However, to bring down America we do not need to strike big. In such an environment of security phobia that is sweeping America, it is more feasible to stage smaller attacks that involve less players and less time to launch and thus we may circumvent the security barriers America worked so hard to erect. This strategy of attacking the enemy with smaller, but more frequent operations is what some may refer to as the strategy of a thousand cuts. The aim is to bleed the enemy to death.

We dedicate this issue to cover exclusive material of Operation Hemorrhage. We reveal for the first time the details of the operation and we correct the erroneous information that has been spreading through the airwaves.

In this special issue of Inspire, the Head of the Foreign Operations Team will cover the general details and objectives of the operation, Ikrimah al-Muhajir will go through some of the technical details of the device, Yahya Ibrahim will go through the economic leverage of such an operation and Shaykh Ibrahim al-Banna will discuss the religious objectives. We will also post some photos we took for some of the items we included in the packages.

We would like to congratulate the Muslim nation for the success of our operation and we ask them to pray for us that Allah enables us to carry on this fight against America, the head of today's Crusade.





OPERATION HEMORRHAGE

All praise is due to Allah and may His peace and blessings be upon His Messenger and his companions and family.

Allah says: **{And let not those who disbelieve think they will escape. Indeed, they will not cause failure}** [8: 59]

We, in the al Qaeda of the Arabian Peninsula would like to convey to our nation the glad news and the awaited surprise: We have been enabled by Allah to blowup a UPS cargo plane on the 3rd of September, 2010, after its takeoff from Dubai International Airport.

We have succeeded in bringing down the UPS plane but because the enemy's media did not attribute the operation to us we have remained silent so we may repeat the operation. This time we sent two explosive packages, one was sent through UPS, and the other through FedEx.

We would like to ask: Why didn't the enemy reveal the truth about what happened with the downed UPS plane? Is it because the enemy could not discover why the plane was brought down? Or was it because the Obama administration wanted to conceal the truth so it doesn't expose the failure of his administration especially that it was during an election season?

We would like to say to Obama: We have struck against your aircrafts twice within one year and we will continue directing our blows towards your interests and the interests of your allies.

With the praise of Allah, our developed explosive device gives the option of detonation in the air or at the point of arrival and it is designed to evade the latest bomb detection methods.

We would like to tell the al-Saud government that Allah has exposed your treason and collaboration with the Zionists. The packages were being sent to Jewish synagogues and yet you interfered to defend them. May Allah's curse be upon the transgressors.

Since the two operations have succeeded, it is our plan to disseminate the idea to the mujahidin worldwide and to expand its deployment onto both Civilian aircraft in the West as well as Cargo aircraft.

Our Shaykh Usama bin Ladin, may Allah protect him, said: "If our messages can reach you by words, then they wouldn't have traveled by planes..."

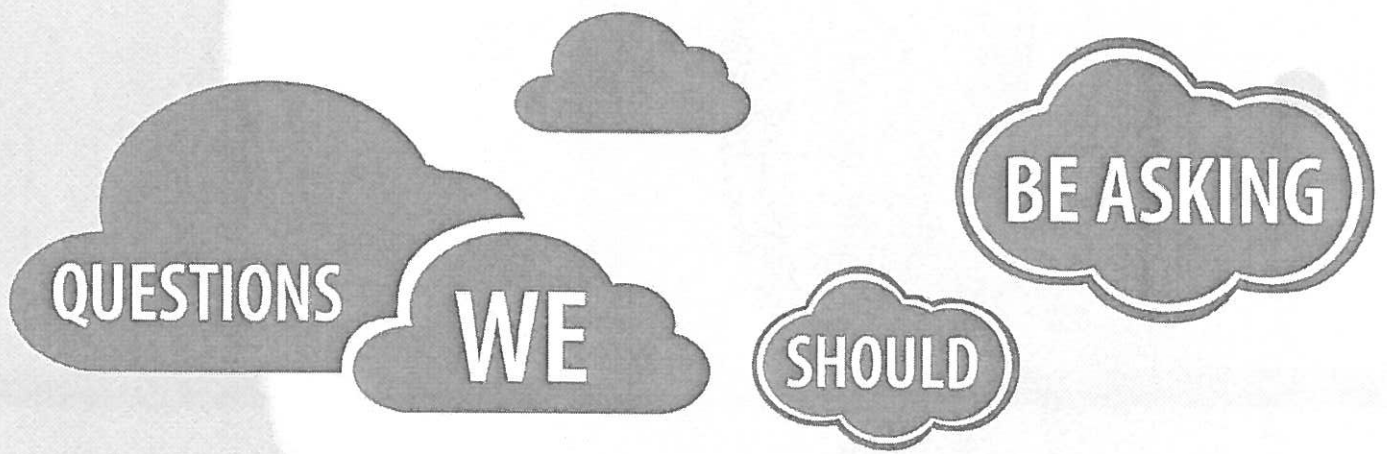
May peace and blessings be upon His Messenger and his family.

al Qaeda in the Arabian Peninsula
11/02/2010 | Dhul Qa'dah 25 1431H

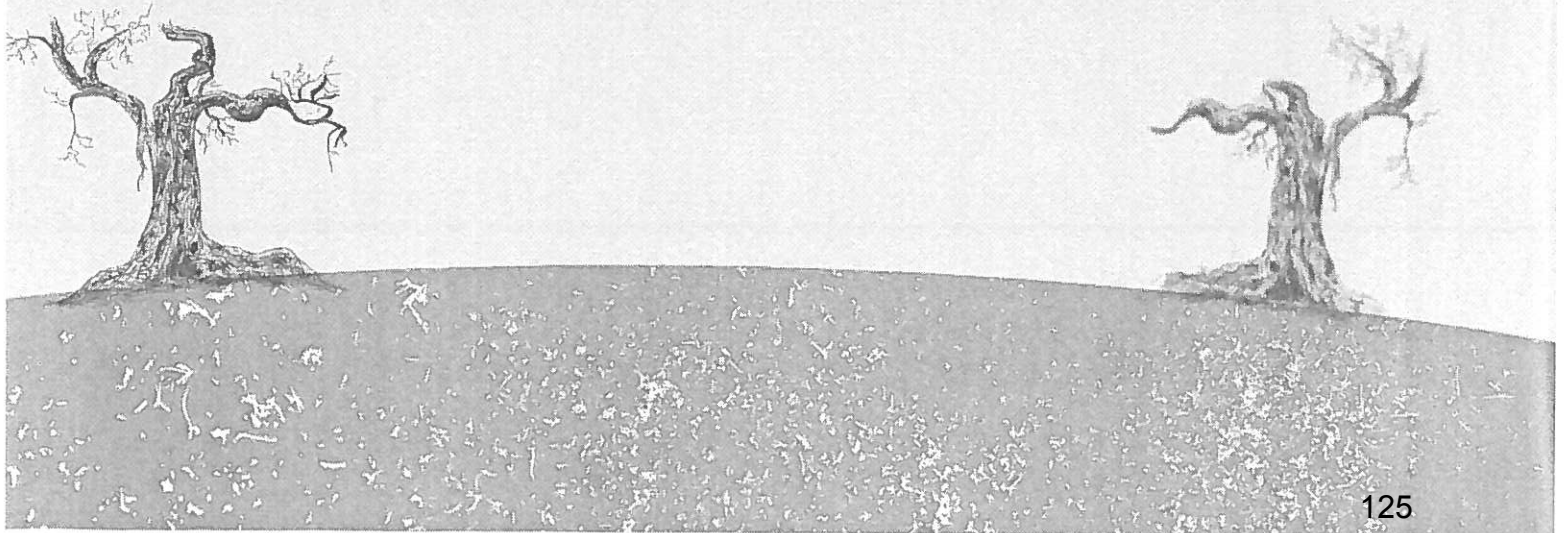


9/3/2010.

The day a tree fell into a forest that nobody heard

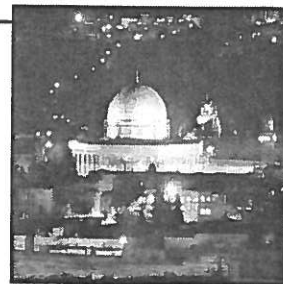


- 1 We are waiting for the intelligent U.S. intelligence to tell us how we downed the UPS flight out of Dubai on the 3rd of September. Was it an incendiary or an explosive device? Was it sent from Sana'a or somewhere else?
- 2 Do we have to keep sending messages to America through airplanes so that they finally fulfill our demands?
- 3 Why did the media stay completely mute over the UPS cargo airliner that was blown up just outside of Dubai?
- 4 Isn't it funny how America thinks AQAP has only one major bomb maker?
- 5 How many times are we going to see the Saudi Monarchy proving their love for the Jews?
- 6 Can America be likened to an ant hole that gets stomped upon whenever discovered? Apparently yes.



THE OBJECTIVES OF OPERATION HEMORRHAGE

THE HEAD OF FOREIGN OPERATIONS



If your opponent covers his right cheek, slap him on his left. Since 9-11 the West has been stepping up defenses for its commercial aircrafts. The continuous attempts that followed 9-11 by our brother Richard Reid, the Heathrow airport plot and finally the operation of brother Umar Farouk have forced the West to spend billions of dollars to defend its airplanes. But what about cargo planes?

The air freight is a multi-billion dollar industry. FedEx alone flies a fleet of 600 aircrafts and ships an average of four million packages per day. It is a huge worldwide industry. For the trade between North America and Europe air cargo is indispensable and to be able to force the West to install stringent security measures sufficient enough to stop our explosive devices would add a heavy economic burden to an already faltering economy. We knew that cargo planes are staffed by only a pilot and a co-pilot so our objective was not to cause maximum casualties but to cause maximum losses to the American economy. That is also the reason why we singled out the two U.S. air freight companies: FedEx and UPS for our dual operation.

In our discussions prior to the operation we set the passage of explosive devices from any airport as a benchmark of success. For us, blowing up the planes would have made us very pleased but according to our plan and specified objectives it was only a plus. The first package made it successfully and brought down the UPS flight in Dubai. The experiment was a brilliant success. In our follow-

ing operation we used a different explosive package and determined that if both packages passed through the inspection at the FedEx and UPS facilities and passed through the X-Ray systems at the airport, that would raise a worldwide alert that would force upon the West two choices: You either spend billions of dollars to inspect each and every package in the world or you do nothing and we keep trying again. The packages not only made it out of Sana'a but one of them made it all the way to London and if it was not for an intelligence tip, both devices would have detonated.

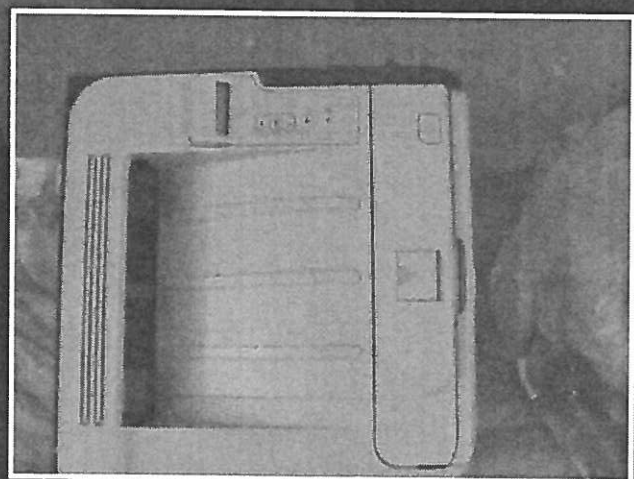
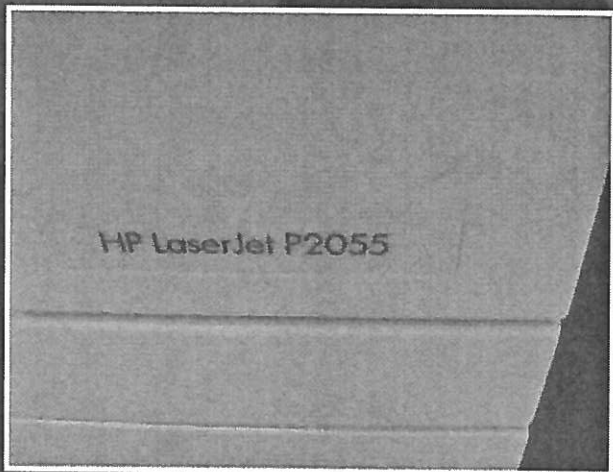
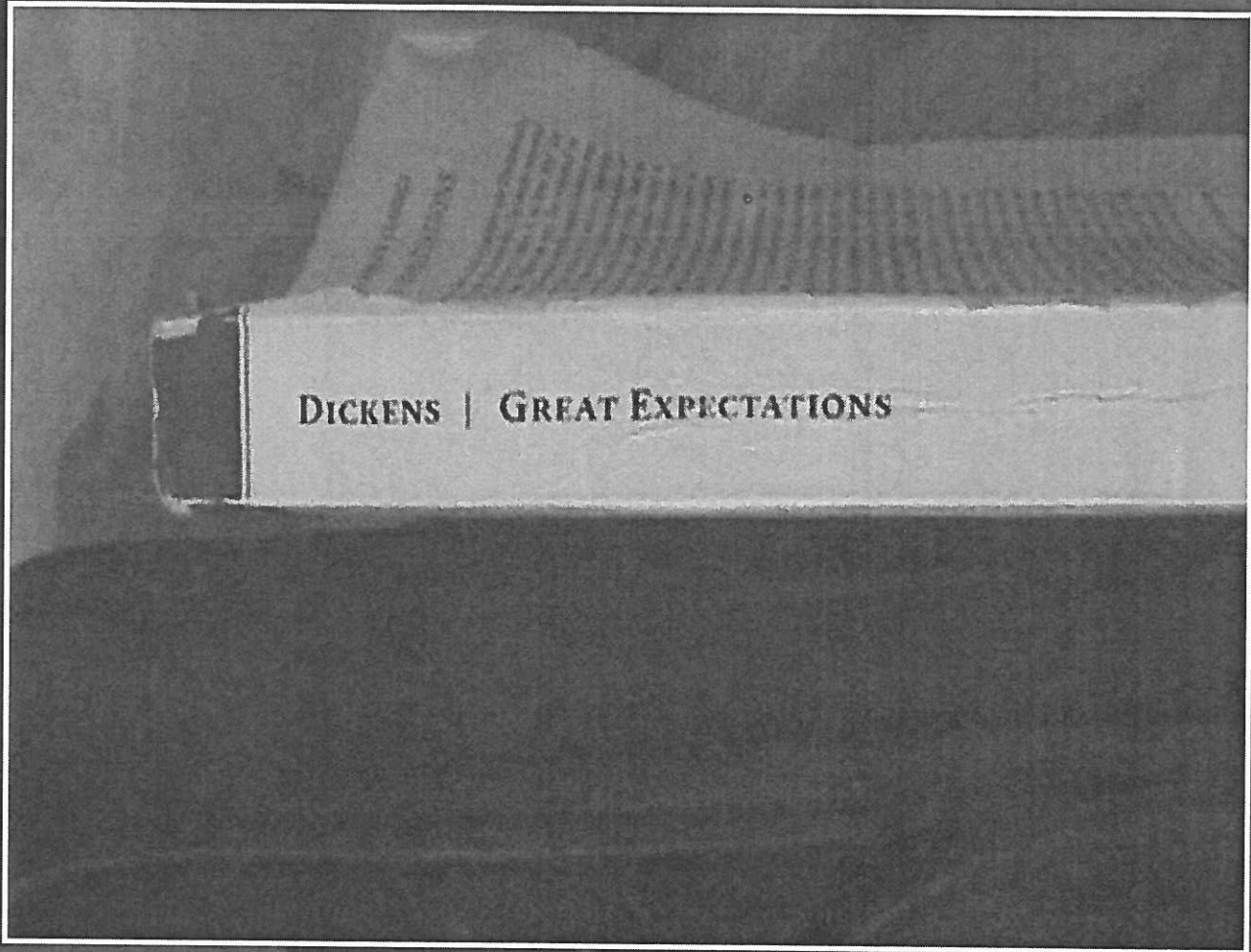
After the operation of brother Umar Farouk we have been experimenting with ways to bring down airplanes. We have researched the various security systems employed by airports. We looked into X-Ray scanners, full body scanners, sniffing dogs and other aspects of security. The resulting bomb was a device that we were confident that, with the will of Allah, it would pass through the most stringent and up-to-date security equipment.

We were right. The packages were inspected at the FedEx office (the deliverer reported to us that there was no checking at the UPS), they passed through the X-Ray machines at Sana'a airport, and went through the other procedures required by cargo companies. Both devices were not detected.

We are fighting a war against American tyranny. This is a new Crusade waged by the West against Islam. Therefore we wanted to put things

into proper perspective. This current battle fought by the West is not an isolated battle but is a continuation of a long history of aggression by the West against the Muslim world. In order to revive and bring back this history we listed the names of Reynald Krak and Diego Diaz as the recipients of the packages. We got the former name from Reynald de Chatillon, the lord of Krak des Chevaliers who was one of the worst and most treacherous of the Crusade's leaders. He fell into captivity and Salahuddeen personally beheaded him. The name we used for the second package was derived from that of Don Diego Deza, the Inquisitor General of the Spanish Inquisition after the fall of Granada who along with the Spanish monarchy supervised the extermination and expulsion of the Muslim presence on the Iberian Peninsula employing the most horrific methods of torture and done in the name of God and the Church. Today we are facing a coalition of Crusaders and Zionists and we in al Qaeda of the Arabian Peninsula will never forget Palestine. How can we forget it when our motto is: "Here we start and in al-Aqsa we meet"? So we listed the address of the "Congregation Or Chadash", a Gay and Lesbian synagogue on our one of our packages. The second package was sent to "Congregation B'nai Zion". Both synagogues are in Chicago, Obama's city.

We were very optimistic about the outcome of this operation. That is why we dropped into one of the boxes a novel titled, *Great Expectations*. □



EXCLUSIVE

IMAGES SHOWN ABOVE WERE TAKEN BEFORE THE ITEMS WERE SHIPPED TO AMERICA.

Operation Hemorrhage



An Operation of Leverage

Indeed, those who disbelieve spend their wealth to avert people from the way of Allah. So they will spend it; then it will be for them a source of regret; then they will be overcome. [8: 36]



TAWAGHIT EXPOSED

SHAYKH IBRAHIM AL-BANNA

Translated by al-Malahem Media

Praise be to Allah who said: {We will cast terror into the hearts of those who disbelieve} [3: 151].

Allah says: {And let not those who disbelieve think they will escape. Indeed, they will not cause failure to Allah} [8: 59].

And may peace and blessings be upon the Seal of the Prophets ﷺ, who said: "I was given victory through fear the distance of walking for a month." [Narrated by al Bukhari]

The operation of the explosive packages which was performed by the mujahidin of the Arabian Peninsula against the companies of air freight belonging to the disbelieving nations is our right. It is our right because we are defending the Muslim lands. This operation has struck fear in the hearts of the Americans and their allies. This operation is a response to the Crusaders aggression against the Muslims of Afghanistan, Iraq, Somalia, the Maghreb, Chechnya and the Arabian Peninsula. It is a response to the continuous support to the usurping Jews who are invading Jerusalem and are blockading Gaza.

Every Muslim should know that Jihad is continuing until the Day



American interests will remain our target

of Judgment and that the conflict between Islam and disbelief will not end until the Day of Judgment. The Messenger of Allah ﷺ said: "A group of my nation will continue fighting for the cause of Allah. They will not be harmed by those who are against them or those who betray them. They will continue fighting until the Day of Judgment."



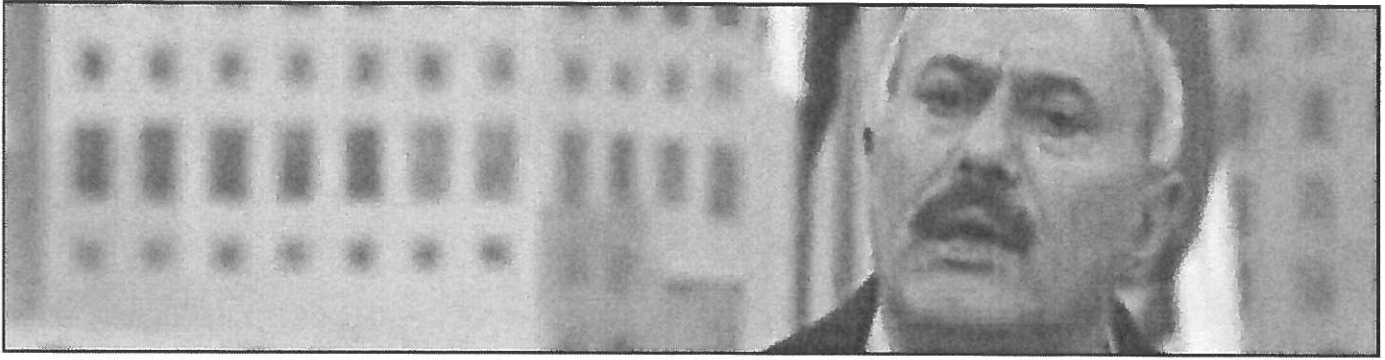
Palestine will remain the center of the issue

Allah says: {And let not those who disbelieve think they will escape. Indeed, they will not cause failure [to Allah]. And prepare against them whatever you are able of power and of steeds of war by which you may terrify the enemy of Allah and your enemy and others besides them whom you do not know [but] whom Allah knows. And whatever you spend in the cause of Allah will be fully repaid to you, and you will not be wronged} [8: 59-60].



The mujahidin will not submit to the West

And since this war is one of information and technology, our duty becomes to prepare what we can. The powers of disbelief no matter how much strength they have and no matter how technologically advanced they are, cannot escape the wrath of Allah and they cannot defeat the believers who are aided by Allah. Allah says: {And how many of a small band has defeated a larger



one by the leave of Allah} [2: 249] and Allah says: {and incumbent upon Us was support of the believers} [30: 47].

This operation comes to prove to every true Muslim that there is no comparison between the price of sacrifice for the sake of Allah and the price for submission to the Jews and Christians. The mujahidin with simple means and without a state have succeeded in striking fear in the hearts of the disbelievers and this is an evidence against the governments in the Muslim world and the scholars who support them, those who fear America and do not fear Allah.

This operation comes to expose the traitor Arab rulers who are competing in pleasing their American masters. Obama stood in front of the world with a terrified face announcing that his nation is being threatened by terrorism (i.e. real Islam) and he was thanking the government of al-Saud for the intelligence information they provided on the explosive packages. Obama called King Abdullah to thank him on this cooperation.

Allah says: {O you who have believed, do not take the Jews and the Christians as allies. They are [in fact] allies of one another. And whoever is an ally to them among you – then indeed, he is [one] of them. Indeed, Allah guides not the wrongdoing people. So you see those in whose hearts is disease [i.e., hypocrisy] hastening into [association with] them, saying, "We are afraid a misfortune may strike us." But perhaps Allah will

bring conquest or a decision from Him, and they will become, over what they have been concealing within themselves, regretful} [5: 51-52].

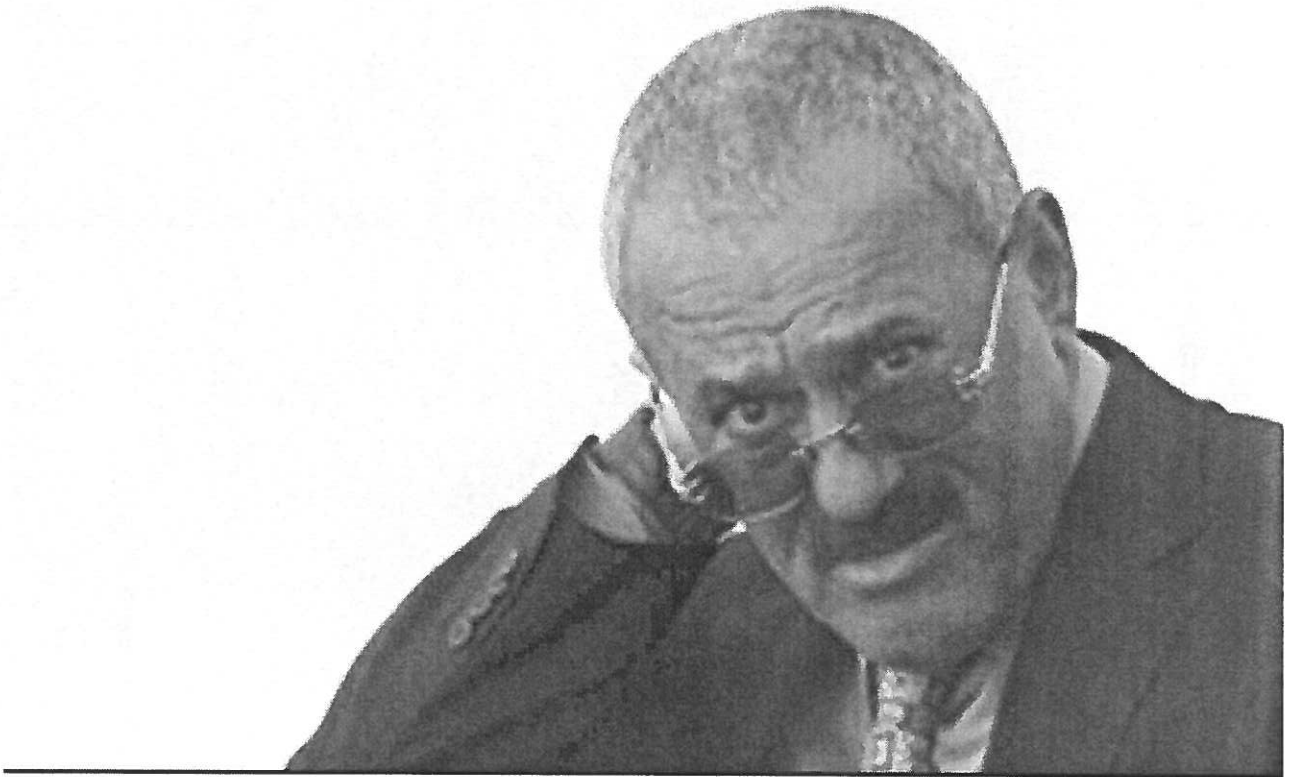
Then the Yemeni President came out angrily saying that he has the political will and sufficient forces to combat al Qaeda, when the information bypassed him and was provided directly by the al-Saud government. The Messenger of Allah ﷺ says: "*If you do not have any shame then do whatever you want.*"

We tell every truthful Muslim who wants to protect his religion and nation: do not wait for these traitor governments to free Jerusalem or to stand in the face of the Crusader invasion on Muslim land like we see in Afghanistan, Iraq, Chechnya, Somalia, Palestine, and tomorrow Sudan and before it was Bosnia and Kosovo, so where are their armies? And where are their weapons which they spent billions on? It is clear to you what you see with your own eyes that they are stooges to the Jews and Christians. On the other hand there is a small band of mujahidin who are putting the nose of America in the dirt even though they do not possess the means that are available to the traitor governments.

Dear Muslim hasten to join the ranks of the mujahidin or to form cells to perform operations against the disbelievers in their own land. We are paying back America for only a small portion of what they do to our nation. □

"This is an evidence against the governments in the Muslim world and the scholars who support them, those who fear America and do not fear Allah."

What can President Ali Abdullah Saleh do about his failed state?



Yeah, keep scratching your head

TECHNICAL DETAILS

IKRIMAH AL-MUHAJIR EXPLOSIVES DEPARTMENT

Translated by al-Malahem Media

Praise be to Allah and may the peace and blessings be on His Messenger.

The most important aspect of preparing for the enemy is having the proper creed. All victory is from Allah and thus we need to have true faith in Him. After that we need to prepare the means that are needed to fight the enemy. In this article we will go through some of the technical aspects of the explosive packages.

Metal Detection Equipment:

We have been blessed by Allah to be able to sidestep the metal detection equipment and this is evident in the operation of Umar Farouk and the operation of Abul Khayr, may Allah accept him. That capability was a result of avoiding the use of metals altogether in our detonators. We have developed five such detonators.

Sniffers:

Good packaging and sealing of the explosive material prevents sniffing dogs or equipment from detecting the explosives. That is done by sealing the material and preventing any molecules from escaping the package, and afterwards cleaning the package thoroughly to clear off any molecules that may have dispersed during the filling of the material. We used a number of organic solvents to wash the toners from any residue that might have been on the surface.

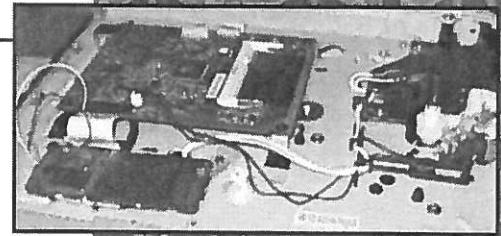
X-Ray Equipment:

The first X-Ray machines where dual color followed by three colors and eventually six colors. Metals show up in three colors, organic material shows up in two colors and inorganic material in one color. The color depends on the atomic number of the scanned material. There are other types of machines that we have not mentioned here but we talked about in an article by the Explosives Department and published in the twelfth issue of *Sada' al-Malahem*.

So how did we succeed in sidestepping the X-Ray scanners?

We used a device that contains organic, non-organic material, and metals. The toner cartridge contains the toner which is carbon based and that is an organic material. The carbon's molecular number is close to that of PETN. We emptied the toner cartridge from its contents and filled it with 340 grams of PETN. We then inserted the detonator. We designed the detonator to be short so that it wouldn't be detected and we filled it with 4 grams of Lead Azide. We connected the wires from the circuit to the toner in a way that would raise no suspicions if inspected. When the toner is inside the printer, a metal plate on the toner would touch the circuit wire. If inspected the toner could be pulled out and would look normal without any wires sticking out. This method makes human inspection of the printer useless.

For the circuit we used a Nokia mo-



Metal detectors are amateurish



Filled with PETN for a surprise



American Gravestones expanding



“But now you can see that we revealed to you a bigger security lapse than the last one and yet you are still being stubborn.”

bile phone. We removed the circuit board from the mobile and attached it next to a circuit board of the printer so if passed through a scanner the mobile circuit board would blend in with the circuit boards of the printer and even if opened it would not be recognized as a mobile since we used only the circuit board of the mobile. The wires of the circuit also blend in well with the many wires of the printer. When the toner is pulled out the circuit is disconnected. When it is placed back the circuit is connected. The door of the printer cannot close unless the toner is in place and this way we guaranteed that even if the printer is manually inspected, the toner must be placed back in its place otherwise the printer door would remain open.

With all the intelligence information the enemy had, they could not detect the explosives even though the printers were inspected twice in the UK. They only discovered the explosives when they had the exact tracking number of the package.

Are X-Ray scanners sufficient for the detection of explosives?

All X-Ray machines work on the same principle: The diffraction of rays off the atom of the scanned material. The rays pass through all material except lead which doesn't allow the

penetration of even Gamma rays.

We have studied various X-Ray scanners that are in use and those that might be deployed in the future but are too expensive to deploy now. All these scanners work on one principle even if they are different. In the future, new scanners could be developed to designate specific colors for explosive material, but is this method practical? To answer this question we need to point out that explosive material contains a variety of a thousand different compounds and each of these compounds has its own molecular characteristics that are different than the rest. With such a huge variety can scanners solve this problem?

We would like to ask the Americans a question: Why try to solve the symptoms of the problem **rather than the root?**

Didn't your security experts come together to find solutions for the security lapses in your airports and you spent millions of dollars in less than a year even though we already told you then that we knew the weak points of your equipment and by the will of Allah we would be able to exploit them? Nevertheless you were stubborn. But now you can see that we revealed to you a bigger security lapse than the last one and yet you

are still being stubborn. The British government said that if a toner weighs more than 500 grams it won't be allowed on board a plane. Who is the genius who came up with this suggestion? Do you think that we have nothing to send but printers? Another suggestion is that the bomb maker needs to be killed. I and my brothers in the explosives department are from among the blessings of Abu Khabab al-Misri and Abu Abdul Rahman al-Muhajir who were killed in Afghanistan. Do you think that our research will only be used by al Qaeda of the Arabian Peninsula and won't be shared with other mujahidin?

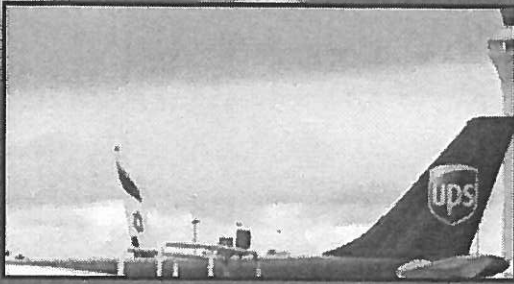
We want to say to those of reason and wisdom among you: There is no solution for you with us except if you abide by this simple equation which has been repeated to you by our Shaykh Usama bin Ladin, may Allah protect him:

Our security = Your security

And likewise:

Our insecurity = Your insecurity

If you refuse then we will continue our war against you. In the name of Allah we are preparing for you since years and we will continue on this path. □



\$4,200

Two Nokia mobiles, \$150 each, two HP printers, \$300 each, plus shipping, transportation and other miscellaneous expenses add up to a total bill of \$4,200. That is all what Operation Hemorrhage cost us. In terms of time it took us three months to plan and execute the operation from beginning to end. On the other hand this supposedly "foiled plot", as some of our enemies would like to call, will without a doubt cost America and other Western countries billions of dollars in new security measures. That is what we call leverage. A \$4,200 operation will cost our enemy billions of dollars. In terms of time and effort, three months of work for a team of less than six brothers would end up costing the West hundreds of thousands, if not millions, of hours of work in an attempt to protect itself from our packages of death.

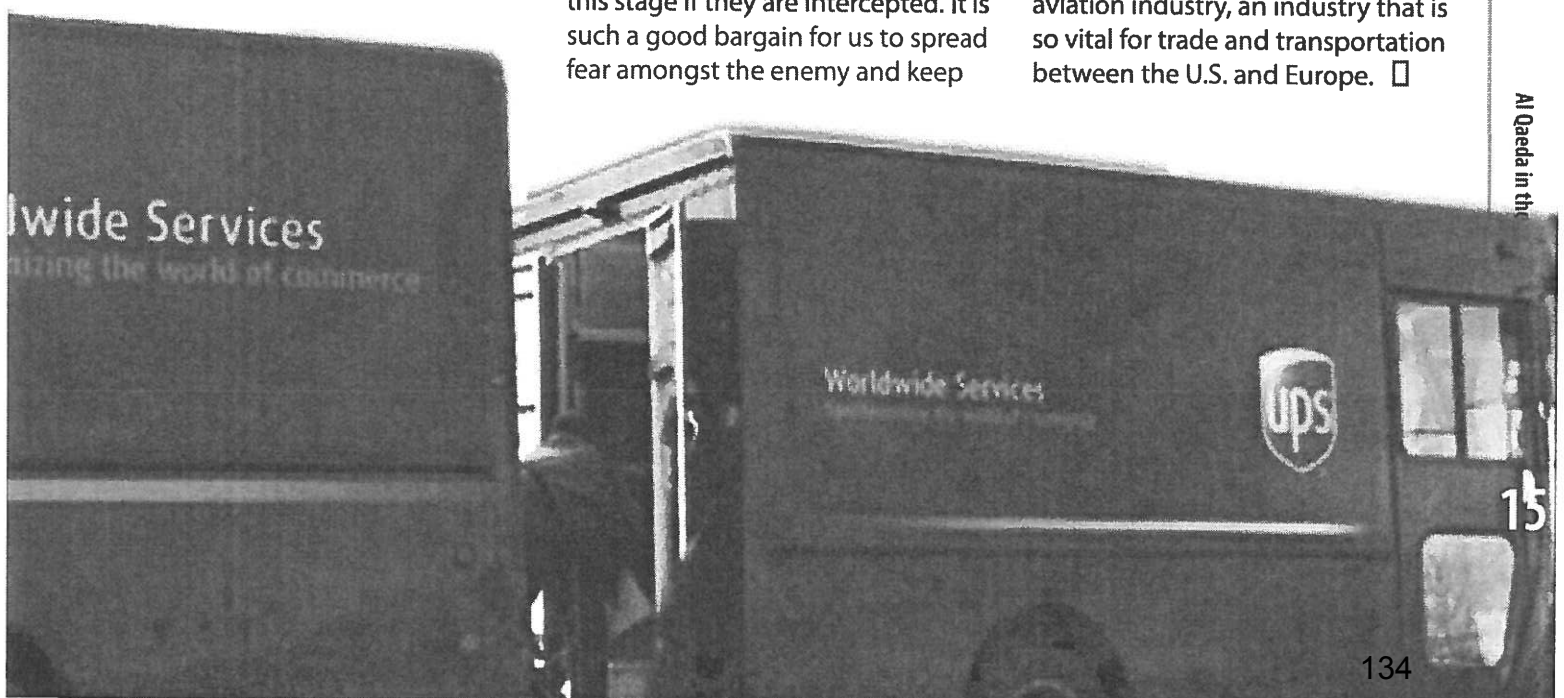
From the start our objective was economic. Bringing down a cargo plane would only kill a pilot and co-pilot. It is true that blowing up the planes in the sky would add to the element of fear and shock but that would have been an additional advantage to the operation and not a determining factor of its success.

During the initial discussions of the team it was determined that the success of the operation was to be based on two factors: The first is that the packages pass through the latest security equipment. The second, the spread of fear that would cause the West to invest billions of dollars in new security procedures. We have succeeded in the former and we are now witnessing the inception of the latter.

We will continue with similar operations and we do not mind at all in this stage if they are intercepted. It is such a good bargain for us to spread fear amongst the enemy and keep

him on his toes in exchange of a few months of work and a few thousand bucks. We would gladly dispense with a remote controlled device that does not require us to put a mujahid on board a plane. For our enemies to think that intercepting such a package is evidence of their success is truly ridiculous.

What has passed is the first of a multi-phased operation. The next phase would be to disseminate the technical details of our device to the mujahidin around the world to use from their respective countries. The following phase would be for us to use our connections to mail such packages from countries that are below the radar and to use similar devices on civilian aircrafts in Western countries. We are laying out for our enemies our plan in advance because as we stated earlier our objective is not maximum kill but to cause a hemorrhage in the aviation industry, an industry that is so vital for trade and transportation between the U.S. and Europe. □



LEVERAGE

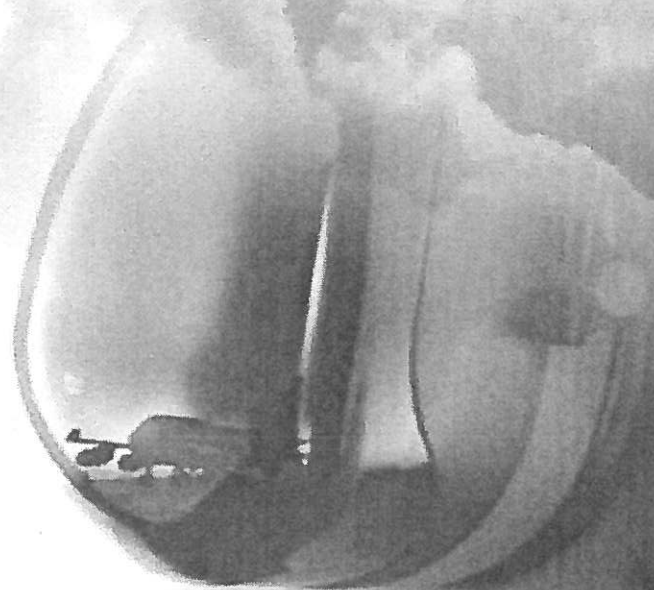
People tend to judge us by what is apparent,
Only a few look so far into the distant

Muscles shake the world,
Only when minds shape their form

Shooting high for the skies,
Is greater than living a life of lies

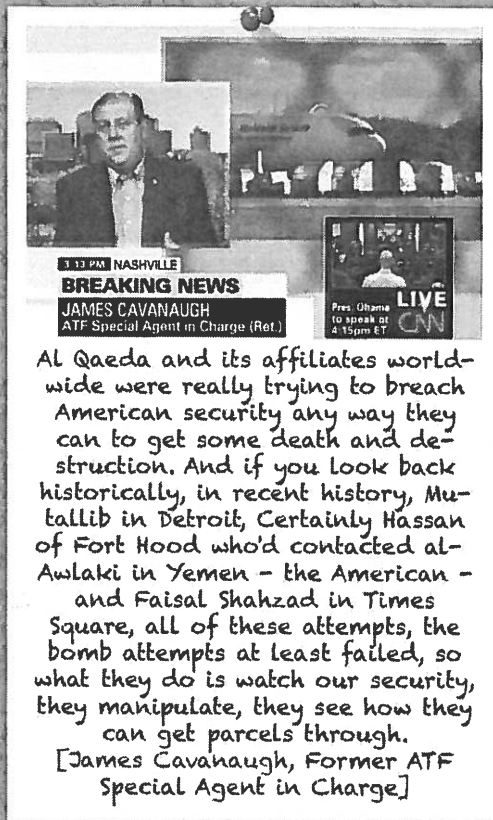
Israel's massacres empowers our efforts,
America's crimes unshackle our creativity

Every frame has its Achilles heel,
No matter how strong one feels

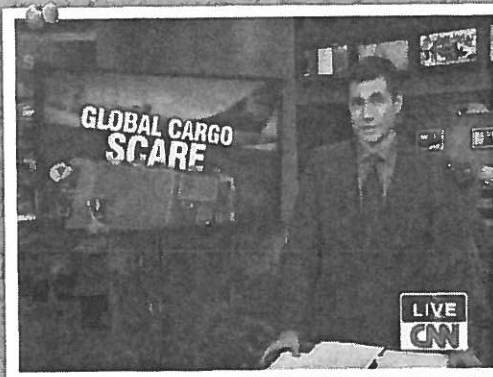


HEAR THE WORLD

A collection of quotes from
friend and foe



We ran some tests earlier this year with a scientist here in Britain whose done a lot of work with counter-terrorism Officials with this [type of PETN] explosive. If you get an amount of explosive that just would fit the top of this pen its enough to blow a hole in a metal plate; that would be the fuselage in an aircraft for example. That gives you an idea of how powerful it is... an amount that would fit into a toner or something larger, a printer we've heard, that would be very devastating; that would be a very, very powerful explosive once detonated.
[Nic Robertson, Senior International Correspondent, CNN]



We talked to a terrorism expert earlier today and he's saying, 'don't just rely on this 100% number and think that all of our problems go away'. There are other ways that we can possibly see some of these attacks come through the mail or through shipping, and so 100% screening whether domestically or internationally isn't going to solve the problem.
[Reggie AQUI, CNN Anchor]



It has been a dirty secret for ten years since 9-11 that we do not screen cargo, particularly cargo from overseas. We're just now getting to screening upwards of 100% of domestic cargo but even that is somewhat faulty.

Well this is a tremendous wakeup call on two levels. One is how sophisticated the bombs were. I mean these were apparently very sophisticated devices. And then two: What are we going to do about it and you can't shutdown commerce?

[Peter Goelz, Aviation Security Expert]



This did expose a weakness in our armor.

American jihadists living in this country are constantly on his website, constantly motivated by him, and that's apart from those who are actual al Qaeda members, I'm talking about just even self-starters who take their, if you want to call inspiration, from Anwar al-Awlaki. [Rep. Peter King, New York]

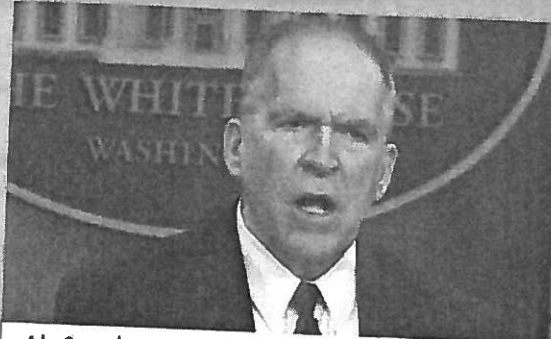


This (AQAP) is the most active operational arm of al Qaeda right now... other than al Qaeda central. If you look back at the last year and a half, AQAP has been linked to two successful attacks in the United States and two failed ones... [Peter Bergen, CNN]



We had an interview with the head of the counter-terror forces [in Yemen], General Yahya Saleh, and he acknowledged for the first time to us that the U.S. and U.K. had been involved with Yemeni Security Forces in airstrikes that were happening in Yemen. That has been a very, very sensitive issue and up until the past month, the Yemeni government was really denying that U.S. wasn't commenting. So the fact that the Yemeni's aren't just asking for help, but they are starting to acknowledge how much help they are getting and saying that the U.S. is even assisting in airstrikes, you know that's significant and that shows the level of concern there and it shows that they're trying to ask for as much help as possible and that they know that they need it.

[Mohammed JamJoom, CNN Correspondent]



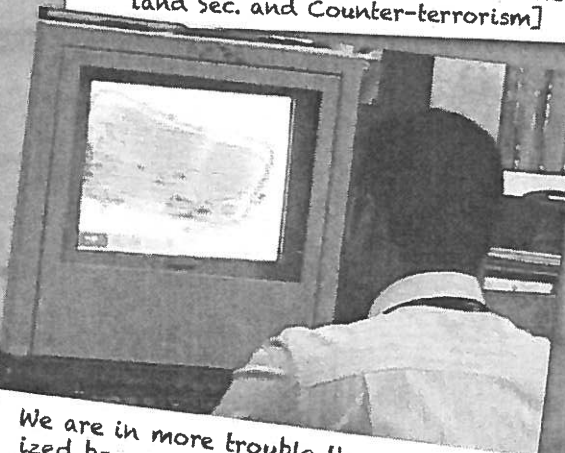
Al Qaeda in the Arabian Peninsula has been rather open in its venom towards the United States, towards our Western interests. There are a number of individuals there that we are very concerned about.

[John Brennan, Asst. to Pres. on Homeland Sec. and Counter-terrorism]



Today's developments demonstrate very clearly is that the deteriorating security and stability situation in Yemen is increasingly affecting not only domestic Yemeni security and regional security, but increasingly international and American domestic security.

[Christopher Boucek, Carnegie Endowment for Intl. Peace]



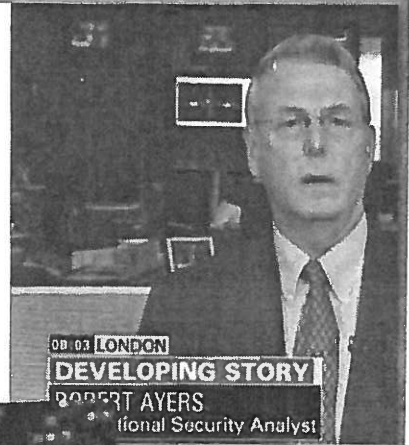
We are in more trouble than we realized because what we are seeing now from our experience here is exceptionally good scanners and monitors yesterday not identifying a parcel that was intelligence identified.

[Dr. Sally Leivesley, Counter-terrorism expert]

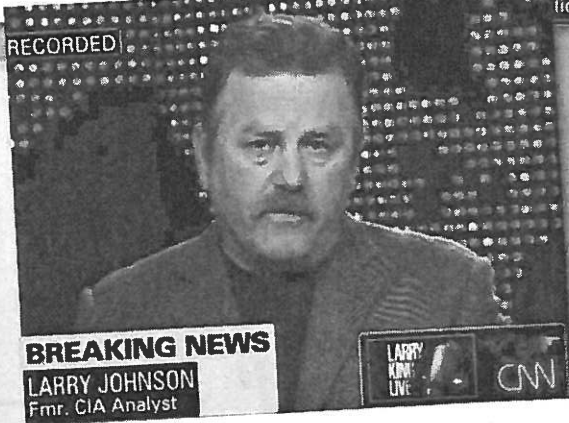


CNN Anchor: I'm wondering how al-Asiri has been able to allude being captured and where he might be now?
 Our Answer: Our brother Ibrahim al Asiri is safe & well & he is currently busy teaching a new batch of students the latest in bomb making skills.

The issue is in a wider picture, to take a little exception from something you said earlier, we failed on this one. The security mechanisms failed. Whoever introduced these explosives put them in a package, they put them on an aircraft, the aircraft flew from Yemen to the Emirates or the United Kingdom with the explosives on-board, and it was only as a result of a tip that the reaction forces were able to intercept these packages while they were in the distribution chain. If the intelligence was working properly, they never would have gotten into the distribution chain.
 [Robert Ayers, International Security Analyst]



We still have to recognize that we're relying upon the Saudi's in this case to tip us off... But we shouldn't have a system that's basically like having your best friend or a friend, giving you a tip on what's going on. Relying on intelligence is not a security system. That's a good system for going to the Casino or the Horse track to win, but it's not a good security system.
 [Larry Johnson]



Going forward, we will continue to strengthen our cooperation with the Yemeni government to disrupt plotting by al Qaeda in the Arabian Peninsula, and to destroy this al Qaeda affiliate.
 [President Obama]

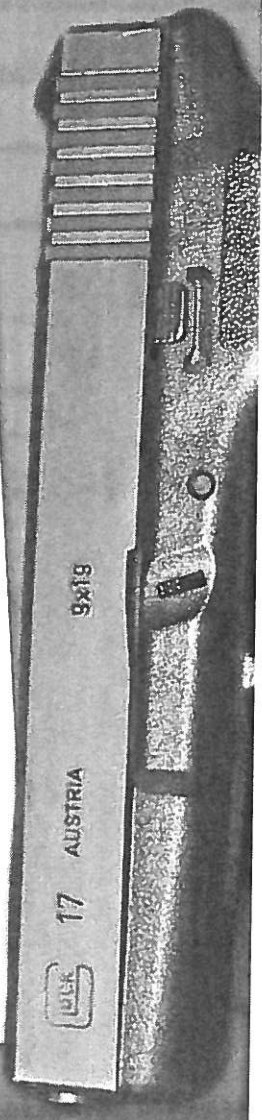
We've also known that cargo has been a vulnerability for more than twenty two years. Larry, we were able to put a man on the moon after John F. Kennedy announced at 1961, we got it done in eight years. Here we are twenty two years later, and we still do not have a system. 96% of the cargo that comes from overseas is not screened, its not checked. It was only of August of this last year that the Congressional GAO Office identified that we finally have 100% screening on domestic cargo and even then when you penetrate that, it's not using 100% of the most effective technology... both Democrats and Republicans have failed at this. We've got twenty two years of it and we're going to wait until we get somebody killed before we decide to do something.
 [Larry Johnson, Fmr. CIA Analyst]

You want to destroy us?

Reminds us of Pharaoh's threats to Prophet Moses, peace be upon him. In the end, it is the believers who will inherit the lands.

"We are making great progress there." That was U.S. Homeland security secretary Janet Napolitano one year ago promising the Congress that 100% screening of cargo on all passenger planes would be accomplished by its target date. Three months ago.

The International Air Transport Association representing nearly all scheduled airlines rejects the very goal of 100% screening. The carriers and shippers worry that total screening worldwide could put the brakes on global airborne commerce causing even more economic damage than any successful bomb plot. [Tom Ackerman, Al-Jazeera Correspondent]



A SPECIAL THANKS TO



shabakat ansar al-mujahideen



FOR TRANSLATING OUR 1ST ISSUE IN ARABIC

« اللهم فك أسرى المسلمين »
© Allah, Free the Muslim Prisoners

Shaykh Umar Abd ar-Rahman
Shaykh Ali at-Tamimi
Shaykh Abu Qatadah al-Filistini
Shaykh Jamil al-Amin
Sister Aafia Siddiqui
Sister Colleen LaRose
Brothers of 'The Toronto 17'
Brothers of 'Fort Dix Case'
Brother John Walker Lindh
Brother Daniel Manalnado
Brother Abdul Hakim Mujahid
Brother Fahd Hashmi
Brother Tariq Mehanna

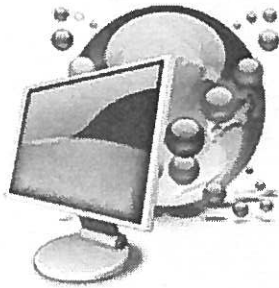
Brother Irhabi 007
Brother Umar al-Farouk
Brother Nidal Hassan
Brother Babar Ahmed
Brother Sharif Mobley
Brother Faisal Shahzad
Brother Walter Barry Bojul
Brother Carlos Amante
Brother Muhammad Elessa
Brother Paul Gene Rockwood
Brother Zachary Adam Chesser
Brother Shaker Masri
Brother Omar Khadr

May Allah free all the Muslim prisoners not listed here



How to communicate with us

If you are interested in contributing to this magazine with any skills - be it writing, research, editing, or advice - you can contact us at any of the email addresses below. We strongly encourage everyone to use the *Asrar al-Mujahideen* program to get in touch with us. Please take special precautions when using the program in order to avoid detection from the intelligence services. Our public key can be obtained below.



inspire1magazine@hotmail.com
inspire11malahem@gmail.com
inspire22malahem@fastmail.net
inspire2magazine@yahoo.com

Due to technical difficulties, we have been unable to check our e-mails for some time. We will respond to e-mails soon, In Sha' Allah.

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Key 2048 bit---
pyHAvNeRKLqFHJG+LA5hZfEYISJCYB6zeKc5Bq1F5EwjBuJyt0
9cMJHoSdEv98hVymwhLsOgLzigJHPTfxA0Ani7EWNaxZx1hLaRm
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/OOZhU9Shqv3k0rA4Yft3XoqLoeprXucHzXFRX0CCQOdrnFQzG
+49YV1YeTPpv7TtHvLoYxbsl31ieOPogM7/rkXvQRRzZFstkxA
==
#---End AI-Ekhlaas Network ASRAR EI Moujahedeen V2.0 Public
Key 2048 bit---
```

Children Innocent Missiles Bom Crazy Israel Destructive Hoodlums No beating UN Torture Ridiculous Inhumane For Injustice For Repression Oppr Imprisonment Maltreat No Human Rights Sad Palestine Forever's for Terrorist Al-Qaida is coming Swords and guns will Popular Victory Islam is coming Jihad Paradise

PALESTINE SPEAKS A THOUSAND WORDS



CX-14

FEDEX PILOTS ASSOCIATION

1669 Kirby Parkway, Suite 202 • Memphis, TN 38120
(901) 752-8733 / 1-888-372-4339
Fax (901) 752-9097 / 1-888-512-8831
e-mail: fedexpa@fedexpilot.org
<http://www.fedexpilot.org>

VIA FACSIMILE & FEDEX TRACKING #7901 6400 6444

September 20, 2001

Capt. Bruce Cheever
Federal Express Corporation
Building C
3131 Democrat Road
Memphis, TN 38118

Re: Public package tracking

Dear Bruce,

During the last 24-hours it has been brought to our attention that package tracking information, a staple in FedEx customer service, may be a source of intelligence gathering for terrorists. As you know, the 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.

Although our company has prided itself on providing as much information as possible to its customers, that service should be reevaluated in light of the events of September 11, 2001.

It goes without saying that the biggest threat to our airline operation is the bomb threat. Therefore, we are asking FedEx management to temporarily suspend that portion of our package tracking software that deals with the flight segment.

In addition, we have already suggested to Captain Duane Woerth and the DOT Flight Standards and Certification task force that FAA flight tracking data no longer be distributed to private sector contractors who rebroadcast that real-time data on the internet. We would like your support through your government liaisons on this issue, as it is another troublesome source of flight tracking data that should no longer be permitted in the public arena.

These solutions can be done in short order, and cost very little to implement and increases the safety of our flight crewmembers.

Thank you for your time and attention in this matter and I look forward to working with you further on the numerous security issues that affect our pilots.

Sincerely,



Capt. David Webb
President

cc: Norman Mineta, Secretary of Transportation
Jane Garvey, FAA Administrator
Keith Mears, Vice Chairman FPA Security Committee

ME 926

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CX-18

901.492-5205 fax
pac@fedex.com

From: Rob Fisher
Sent: Monday, August 05, 2013 3:38 PM
To: PAC (Pilot Administration Center)
Cc: William McDonald; Robb Tice; Cindy Sartain
Subject: Mark Estabrook,

PAC,

Please place Mark Estabrook, 88775, on NOQ UFN.

Thanks,

Rob

CX-19

Ex I

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

MARK ESTABROOK,

Complainant,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

Case No.: 2014-AIR-00022
Hearing Date: TBA

RESPONDENT FEDERAL EXPRESS CORPORATION'S SUPPLEMENTAL
ANSWERS TO COMPLAINANT'S FIRST SET OF INTERROGATORIES

Respondent, Federal Express Corporation (FedEx), by and through counsel and pursuant to 29 C.F.R. § 18.18, supplements its answers to Complainant's First Set of Interrogatories in accordance with Judge Sellers' August 19, 2015 Order as follows:

PRELIMINARY STATEMENT

Respondent has not completed its investigation, discovery, or analysis of all the facts of this case and has not completed preparation for trial. Accordingly, all of the following responses are provided without prejudice to Respondent's right to further supplement or amend discovery responses as permitted by the applicable rules, or introduce at trial any evidence that is subsequently discovered relating to proof of presently known facts and to produce and introduce all evidence whenever discovered relating to the proof of subsequently discovered material facts. Moreover, facts, documents and things now known may be imperfectly understood and accordingly such facts, documents, and things may not be included in the following responses. Respondent reserves the right to reference, discover or offer into evidence at the time of trial any



and all facts, documents, and things which it does not presently recall but may recall at some time in the future.

RESPONSES TO INTERROGATORIES

~~XXXXXXXXXXXXXXXXXXXX~~ state the reasons why the Complainant was placed on NOQ status on or about August 5, 2013.

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

SUPPLEMENTAL RESPONSE: This Supplement Responses supersedes Respondent's original response. Complainant was placed on Administrative NOQ status on or about August 5, 2013 to facilitate the scheduling of a meeting he requested. The effect of the placement on Administrative NOQ status was to clear his work schedule and prevent the scheduling of conflicting activities. Pursuant to Fed. R. Civ. P. 33(d), additional information responsive to this interrogatory may be obtained from documents previously produced, bates numbered FDX 4-000021, 23, 49, 72, 90-91, 415, 417, 419-421, 448, 456 and 507-508. A meeting was conducted on or about August 9, 2013. Following that meeting, Todd Ondra questioned whether Complainant was fit to fly based upon his observations of Complainant during that meeting. Based on Ondra's concerns, FedEx exercised its rights under Section 15.D. of the Collective Bargaining Agreement and referred Complainant to the Company's aeromedical advisor for evaluation. Pending the results of the aeromedical advisor's evaluation, Complainant was placed on Company Aeromedical Advisor ("CAMA") NOQ status. Pursuant to Fed. R. Civ. P. 33(d), additional information responsive to this interrogatory may be obtained from Ondra's meeting notes, which were previously produced at Bates Nos. FDX4-000060-64.

Respectfully submitted,

Daniel Riederer

P. Daniel Riederer
Federal Express Corporation
3620 Hacks Cross Road, Building B
Memphis, Tennessee 38125
Telephone: (901) 434-8556
Facsimile: (901) 434-9279
daniel.riederer@fedex.com

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2014, a copy of the foregoing Respondent Federal Express Corporation's Supplemental Answers, to Complainant's First Set of Interrogatories was served upon the following via Federal Express overnight letter, postage prepaid:

Lee Seham, Esq.
Seham, Seham, Meltz & Petersen, LLP
445 Hamilton Avenue, suite 1204
White Plains, NY 10601
Telephone: (914) 997-1346
Facsimile: (914) 997-7125
Email: lseham@ssmplaw.com

Daniel Riederer

Counsel for Respondent

1132530

VERIFICATION

MaryAnne Miller, being of full age, certifies and states that she is authorized to sign the foregoing Respondent Federal Express Corporation's Supplemental Answer to Complainant's First Set of Interrogatories and that she has read and knows the contents thereof, and that the Responses, subject to inadvertent or undiscovered errors, are based upon and, therefore, limited by, the records and information still in existence, presently recollected, and thus far discovered in the course of the preparation of these Responses; that consequently, Respondent reserves the right to amend the Responses if it appears at any time that omissions or errors have been made therein, or that more accurate information is available; that subject to the limitations set forth therein, said Responses are true to the best of her knowledge, information, and belief.

I hereby certify under penalty of perjury that the foregoing statement is true.



MaryAnne Miller
Senior Paralegal Specialist, Labor Relations

CX-20

Maryanne Miller

From: Robb Tice
Sent: Wednesday, August 07, 2013 4:32 PM
To: 'McTigue, Terry, FDXMEC'; 'Sago, Latasha, FDXMEC'
Cc: Rob Fisher; Cindy Sartain
Subject: RE: Estabrook -- Meeting Date

Terry and Latasha –

To my surprise, Rob Fisher advises that Estabrook told him he doesn't want ALPA representation at the meeting. Let me know if you wish to discuss with me.

Robb

From: Robb Tice
Sent: Wednesday, August 07, 2013 4:28 PM
To: 'McTigue, Terry, FDXMEC'
Cc: Rob Fisher; Cindy Sartain
Subject: RE: Estabrook -- Meeting Date

OK. Copying Fisher & Sartain for their info in scheduling. I'll give Latasha a call.

From: McTigue, Terry, FDXMEC [<mailto:Terry.McTigue@alpa.org>]
Sent: Wednesday, August 07, 2013 4:18 PM
To: Robb Tice
Subject: RE: Estabrook -- Meeting Date

I will have to check with Latasha as she will be handling.

From: Robb Tice [<mailto:rwtrice@fedex.com>]
Sent: Wednesday, August 7, 2013 4:17 PM
To: McTigue, Terry, FDXMEC
Subject: FW: Estabrook -- Meeting Date

Would Friday morning work for you or someone in your office? Rob Fisher is giving your name and phone numbers to Estabrook if he wants ALPA at the meeting. We can fly Estabrook here on Thursday and get him a hotel room Thursday night if needed.

From: Robb Tice
Sent: Wednesday, August 07, 2013 3:54 PM
To: McTigue, Terry, FDXMEC
Subject: Estabrook

Terry – FYI – Rob Fisher is trying to set up a meeting with Estabrook. They have missed each other's calls. Now looking at Fri, Mon or Tue. Not sure if any of those days will work or not. Attendees for the Company will be Rob Fisher, me and Todd Ondra of Corporate Security.

Robb

CX-22

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

MARK ESTABROOK,

Complainant,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

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Case No.: 2014-AIR-00022
Hearing Date: TBA

**RESPONDENT FEDERAL EXPRESS CORPORATION'S RESPONSES TO
COMPLAINANT'S FIRST SET OF INTERROGATORIES**

Respondent Federal Express Corporation (FedEx), by and through counsel and pursuant to 29 C.F.R. § 18.18, hereby responds to Complainant's First Set of Interrogatories to Respondent FedEx as follows:

PRELIMINARY STATEMENT

Respondent has not completed its investigation, discovery, or analysis of all the facts of this case and has not completed preparation for trial. Accordingly, all of the following responses are provided without prejudice to Respondent's right to supplement or amend discovery responses as permitted by the applicable rules, or introduce at trial any evidence that is subsequently discovered relating to proof of presently known facts and to produce and introduce all evidence whenever discovered relating to the proof of subsequently discovered material facts. Moreover, facts, documents and things now known may be imperfectly understood and accordingly such facts, documents, and things may not be included in the following responses. Respondent reserves the right to reference, discover or offer into evidence at the time of trial any



and all facts, documents, and things which it does not presently recall but may recall at some time in the future.

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1: Identify each person you have interviewed to obtain facts relating to the Complaint.

RESPONSE TO INTERROGATORY NO. 1: Respondent objects to Interrogatory No. 1 to the extent in seeks information protected by the attorney-client privilege and attorney work product doctrine. Without waiver of or prejudice to the foregoing objections, Respondent identifies the following individuals:

Robb Tice, Lead Counsel, Labor Relations

Phil Tadlock, Senior Attorney, Labor Relations

Cindy Sartain, Senior Paralegal Specialist

Maryanne Miller, Senior Paralegal Specialist

Rob Fisher, Assistant System Chief Pilot

Todd Ondra, MD Aviation & Regional Security

INTERROGATORY NO. 2: Identify each person with first-hand knowledge of any fact upon which you might rely in defense of the Complaint.

RESPONSE TO INTERROGATORY NO. 2: See Response to Interrogatory No. 1. In addition, Respondent identifies Manager Fleet Operations Mitch Matheny, Duty Officer Mark Crook and Senior GOC Specialist Sherrie Hayslett.

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

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

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

RESPONSE TO INTERROGATORY NO. 4: Respondent has not completed its preparation for the hearing in this matter and has not yet determined each and every person it intends to call in the case in chief. Respondent will supplement this response as required.

INTERROGATORY NO. 5: Identify the custodian of any recorded conversations in which the Complainant was a party relating to the Laredo Departure referenced in paragraphs 4 through 8 of the Complaint.

RESPONSE TO INTERROGATORY NO. 5: With respect to the Laredo Departure referenced in Paragraphs 4 through 8 of the Complaint, copies of the recorded conversations were retrieved and preserved shortly after the events in question. The custodian of these recordings is Michael McAfee, Manager Global Ops Control. Copies of the recorded conversations are also currently maintained by the legal department.

INTERROGATORY NO. 6: Identify any persons involved in the decision to place the Complainant on not qualified (NOQ) status on or about August 5, 2013.

RESPONSE TO INTERROGATORY NO. 6: Respondent identifies the following individuals, who may be contacted through undersigned counsel:

Robert Fisher

William McDonald

Todd Ondra

Robb Tice

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

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

INTERROGATORY NO. 8: Identify all efforts made to preserve recorded conversations between FedEx GOCC, the Flight Duty Officer and the Complainant on April 10, 2013, and record conversations between the Complainant and Manager of A300/310 Fleet Operations, Captain Rob Fisher on August 9, 2013.

RESPONSE TO INTERROGATORY NO. 8: With respect to the April 2013 conversation referred to in Interrogatory No. 8, copies of the recorded conversations were retrieved and preserved shortly after the events in question. Copies of the recorded conversations are currently maintained by the legal department. With respect to the August 9, 2013 conversation referred to in Interrogatory No. 8, after reasonable investigation Respondent is unaware of any recorded conversation between Complainant and Fisher.

INTERROGATORY NO. 9: Identify any persons who prepared or assisted in the preparation of your answers to any of these interrogatories.

RESPONSE TO INTERROGATORY NO. 9: Maryanne Miller, Senior Paralegal Specialist, Labor Relations; Robb Tice, Lead Counsel, Labor Relations; Phil Tadlock, Senior Attorney, Labor Relations.

INTERROGATORY NO. 10: With respect to any denial in response to the Requests for Admissions below, identify the person you intend to call to testify to support your denial.

RESPONSE TO INTERROGATORY NO. 10: With respect to Request No. 6, Respondent intends to call Complainant and Rob Fisher. With respect to Request No. 7, Respondent intends to call Complainant, Rob Fisher, Robb Tice and/or Todd Ondra. With respect to Request No. 8, Respondent intends to call Complainant, Rob Fisher, Robb Tice and/or Todd Ondra. With respect to Request No. 9, Respondent intends to call Complainant, Rob Fisher, Robb Tice and/or Todd Ondra. With respect to Request No. 10, Respondent intends to call Complainant, Rob Fisher, Robb Tice and/or Todd Ondra. With respect to Request No. 11, Respondent intends to call Complainant, Rob Fisher, Robb Tice and/or Todd Ondra. With respect to Request No. 16, Respondent intends to call Robb Tice.

INTERROGATORY NO. 11: Identify all efforts made by you to identify the individual posting as Mayday Mark after August 5, 2013.

RESPONSE TO INTERROGATORY NO. 10: Respondent objects to Interrogatory No. 11 on the grounds that it seeks information not relevant to this matter nor reasonably calculated to lead to the discovery of admissible evidence. Without waiver of the foregoing

objections, Respondent states that, upon learning of the postings, Robb Tice printed copies of them. During the meeting with Complainant on August 9, 2013, Tice asked Complainant if he were the individual posting messages under the name "Mayday Mark." Complainant denied making the postings, and Tice made no further inquiry of Complainant. No further investigation was done.

Respectfully submitted,

s/ David P. Knox
David P. Knox (TN Bar No. 020162)

Federal Express Corporation
3620 Hacks Cross Road, Bldg. B – 3d Fl.
Memphis, Tennessee 38125
Telephone: (901) 434-6286
Facsimile: (901) 434-9279
david.knox@fedex.com

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2014, a copy of the foregoing **Respondent Federal Express Corporation's Responses to Complainant's First Set of Interrogatories** was served upon the following via email and Federal Express overnight letter, postage prepaid:

Lee Seham, Esq.
Seham, Seham, Meltz & Petersen, LLP
445 Hamilton Avenue, suite 1204
White Plains, NY 10601
Telephone: (914) 997-1346
Facsimile: (914) 997-7125
Email: lseham@ssmplaw.com

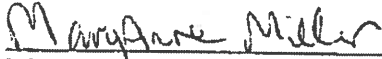
s/ David P. Knox
David P. Knox
Federal Express Corporation

1084903

VERIFICATION

MaryAnne Miller, being of full age, certifies and states that she is authorized to sign the foregoing **Respondent Federal Express Corporation's Responses to Complainant's First Set of Interrogatories** and that she has read and knows the contents thereof, and that the Responses, subject to inadvertent or undiscovered errors, are based upon and, therefore, limited by, the records and information still in existence, presently recollected, and thus far discovered in the course of the preparation of these Responses; that consequently, Respondent reserves the right to amend the Responses if it appears at any time that omissions or errors have been made therein, or that more accurate information is available; that subject to the limitations set forth therein, said Responses are true to the best of her knowledge, information, and belief.

I hereby certify under penalty of perjury that the foregoing statement is true.



MaryAnne Miller
Senior Paralegal Specialist, Labor Relations

CX-23

Capt Rob Fisher FLT Capt for Airbus Jan 2011 to Mar 14.
4/30/2014

MOQ happens once per month I would say.
That is pretty common. Psyc issues - one that
I recall.

If company has reasonable cause to believe Psyc
Issues we can send a pilot for evaluation.
Repayment agreement: Comp. Doc and PDoc
agreed on said Doc agreement.

First learned from Rob Tyce and Bill McDonald.
Got a curvilinear letter. We decided to talk to
him. We got together and he told us his
concerns. He talked about two areas. One was
about tracking vision. One was about Auburn
Calloway. The meeting was very short. He was
placed back on FLT STATUS.

Knowing what I know as a flight mpr,
there was no reason to keep him off FLT Status.

The Corporate Sec. guy left before meeting was
over. In hindsight we probably should have
kept him off FLT Status and conferred with
Todd Ondra rather than make the decision
on our own.

000095

ME 1484

Todd Onda called us back and told us he had to be on 15D psyc.

Rob Tyce: Todd called me and said what concerned him was reference to Andrew Calloway and Al Qaeda.

I acknowledged since this was safety & Security, they had a stake in say of a 15D Referral.

We consult with Harvey Bass in ATL for medical. It keeps flight ops from knowing personal medical information and personal intimate information.

Rob called me and gave me the news.

I had to make the difficult call to Mr Estabrook. I was not completely convinced. I take up to my people. I called Mark and told him in the interest of caution he had to be placed back on NOA. He was very upset. I wrote everything and sent it all to Rob Tyce.

May 2003 I brought Mark in and counseled him about the weather incident.

he tell him when to be @ work He tells us when he is going to move the airplane.

- I did not know Mark filed a written blown complaint until you just told me.

Todd Ontra had no idea he filed a written complaint for the weather incident. He had no reason to know

No knowledge of previous concerns raised in 2002 as he claimed.

I am responsible for 95% pilots. He was another guy in the crowd.

We have 4,500 Pilots now. Absolutely no pilot or any other employee for that matter should believe they can just make a phone call and expect Fred Smith to call him over a security issue.

I think we exercised considerable restraint in that we did not have him go through another USD. Who goes to the a place where was in going on and not being paid to do so. And places his self in the face of danger? We still have an obligation to be safe.

He flew 2 trips before we knew what kind of injuries he had. Being under anesthesia surgery would require him to be cleared by his AME.

As of now he is back on the line and flying.

4/30/2014

NOQ happens once per month I would say. That is pretty common. Psyc issues once that I [need it?]

If company has a reasonable cause to believe psych issues we can send a pilot for evaluation.
Repayment agreement. Comp and CP doc agreed on 3rd doc agreement.

First learned from Rob Tice and Bill McDonald. Got a [illegible] letter. We decided to talk to him. We got together and he told us his concerns. We talked about two areas. One was about tracking issue. One was about Auburn Calloway. The meeting was very short. He was placed back on FLT Status.

Knowing what I know as a flight mgr, there was no reason to keep him off FLT Status. The copriate Sec. guy left before meeting was over. In hindsight we probably should have kept him off FLT Status and conferred with Todd Ondra rather than make the decision on our own.

Todd Ondra called us back and told us he had to have a 15D psyc.

Rob Tice. Todd called me and said what concerned him was reference to Auburn Calloway and al Qaeda.

I acknowledged since this was safety and security, they had a stake in say of a 15D referral.

We consult with Harvey Watt in ATL for Medical. It keeps flight ops from knowing personal medical information and personal intimate information.

Rob called us and gave us the news. I had to make the difficult call to Mr. Estabrook. I was not completely convinced. I take up to my people. I called Mark and told him in the interest of caution he had to be placed back on NOQ. He was very upset. I [wrote?] everything and sent it all to Rob Tice.

May 2013 I brought Mark in and counseled him about the weather incident.

We tell him when to be at work. He tells us when he is going to move the airplane.

I did not know Mark filed a whistleblower complaint until you just told me.

Todd Ondra had no idea he filed a whistleblower complaint for the weather incident. He had no reason to know.

No knowledge of previous concerns raised in 2002 as he claimed.

I am responsibly for 950 pilots. He was another guy in the crowd.

We have 4,500 pilots now. Absolutely no pilot or any other employee for that matter should believe they can just make a phone call and expect Fred Smith to call him over a security issue.

I think we exercised considerable restraint in that we did not have him go through another 15D. Who goes to a place [illegible] was in going on and not being paid to do so. And places himself in the [illegible] of danger? WE still have an obligation to his safety.

He flew two trips before we knew what kind of injuries he had. Being under anesthesia, surgery would require him to be cleared by his AME.

As of now he is back on the line and flying.

CX-27

ALAN ARMSTRONG
ATTORNEY AT LAW

2900 CHAMBLISS-TUCKER ROAD
BUILDING 5, SUITE 850
ATLANTA, GEORGIA 30341

(770) 451-0818
FAX (770) 451-0817

alan@alanarmstronglaw.com
www.alanarmstronglaw.com

August 20, 2013

Via Email
rwtice@fedex.com

Robert Tice, Esq.
Lead Counsel - Labor Relations Law
FedEx Corporation
3620 Hacks Cross Road
Memphis, TN 38125

James H. Ferguson, Esq.
General Counsel
FedEx Corporation
3620 Hacks Cross Road
Memphis, TN 38125

Re: Captain Mark Estabrook

Dear Mr. Tice:

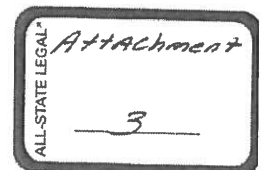
We are in receipt of your letter dated August 16, 2013.

This letter will serve to inform you of my client's intention to proceed with an AIR-21 action pursuant to 49 U.S.C. §42121. This letter shall also serve as a formal grievance pursuant to Section 20 of the Collective Bargaining Agreement (CBA) based on the Company's violation of Captain Estabrook's rights under Sections 15.D and 15.G of the CBA. Pursuant to Section 20.C of the CBA, Captain Estabrook hereby demands that the Company provide him "as soon as practicable" with the names of all witnesses and copies of all documentary information (including all electronic documents and correspondence) that have been, or may be, used to establish a reasonable basis for suspecting that Captain Estabrook is currently suffering from an impairment that would prevent him from performing his duties as a pilot – including, but not limited to, the highlighted postings of "Mayday Mark" that the Company brought to the meeting of August 9, 2013.

Protected Activity

We will first briefly address the disingenuous argument contained in your letter of August 16, 2013, that Captain Estabrook has not engaged in protected activity.

Captain Estabrook is a professional pilot whose first objective has been the safe operation of Company aircraft. His service on the FedEx ALPA Security Committee, Secretary of Transportation Mineta's emergency ad hoc 9/11 Committee, his expressed concerns over the Company's handling of its flight and cargo operations are both well-known and documented. Due to the Company's countervailing interests in meeting its schedule and ensuring profitable



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operation, Captain Estabrook's focus on safety has repeatedly placed him in conflict with FedEx management.

In terms of recent events, on April 10, 2013, Captain Estabrook refused to depart on a FedEx flight because of a severe and solid line of thunderstorms between his departure airport, Laredo (LRD), and scheduled arrival airport of Memphis (MEM). In retaliation for his safety-based determination as Pilot-in-Command, as defined by the Company's own Flight Operations Manual (FOM), and Federal Aviation Regulations (FARs), FedEx commenced disciplinary proceedings against Captain Estabrook. This retaliation caused Captain Estabrook to file AIR-21 Complaint No. 861872 with the United States Department of Labor on April 29, 2013. When the Company subsequently terminated its disciplinary proceedings, Captain Estabrook, being non-litigious in nature, withdrew his AIR-21 action.

Captain Estabrook's zealous advocacy of safety over schedule no doubt left a bitter taste in the mouth of the Company's legal department. This resentment appears to have substantially motivated the threats of psychiatric and medical evaluation, based on shifting pretextual rationales, discussed further below. Nevertheless, federal law strictly prohibits such retaliatory action where an employee:

...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 [49 USCS §40101, et seq.] or any other law of the United States.

49 U.S.C. §42121(a)(2). The temporal proximity of Captain Estabrook's protected activity under §42121(a)(2) to the recent threats of psychiatric/medical evaluations, standing alone, establish a *prima facie* case of discriminatory motive.

Still more recently, on August 9, 2013, Captain Estabrook sought to bring to the Company's attention that FedEx's policy of giving live tracking information relating to packages in transit would, albeit inadvertently, facilitate and maximize the criminal destruction of cargo, aircraft, and human lives, by granting terrorists the ability to carefully select the time of detonation. Your letter of August 16 seeks to preserve FedEx's ability to retaliate against employees' raising these issues by suggesting that FedEx has no affirmative legal obligation to minimize the potential for such terrorist activity. This disturbing piece of sophistry must be laid to rest.

Federal law establishes the duty of every air carrier to:

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.

49 CFR §1544.207(c)(1). This federal aviation safety standard, as it relates to cargo carriers, is reiterated in the following terms:

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, or other destructive substance or item in cargo onboard an aircraft.

49 CFR §1544.205(c). Under federal law, the carrier's objective is "*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.*" 49 CFR §1544.205(a) (emphasis supplied). Under FedEx's federal mandated security program, Captain Estabrook, as an in-flight security coordinator, is directed: if you see something, say something. 49 CFR §§1544.101, et seq.

It cannot be disputed that the meeting of August 9, 2013 was scheduled in response to Captain Estabrook's stated position that the Company's live package and flight tracking practice had the unfortunate result of encouraging terrorists to view FedEx as a particularly effective means of utilizing explosive, incendiary and other destructive devices by placing in the terrorists' hands the ability to select the most optimum timing for detonation. The conclusion that a Company policy that encourages the use of FedEx as a terrorist vehicle violates the carrier's federal legal obligation to prevent and/or deter the carriage of destructive devices appears to be compelled by the plain language of the regulations. At minimum, this conclusion may arise from a good faith reading of the retaliatory language. In either case, the suggestion implicit in your August 6th letter that Fed Ex could retaliate with impunity against a person raising these safety issues is misplaced. 49 U.S.C. §42121(a).

We are also of the opinion that FedEx's retaliatory action in response to a good faith effort by an in-flight coordinator to identify objects in the carrier's security program may violate the Company's obligations under §1540.105 ["No person may: (1) Tamper or interfere with, compromise, modify, attempt to circumvent, or cause a person to tamper or interfere with,

compromise, modify, or attempt to circumvent any security system, measure, or procedure implemented under this subchapter.

Retaliatory Action

As discussed at greater length in our letter to you dated August 13, 2013, Captain Estabrook presented his safety concerns at a meeting August 9, 2013, ostensibly scheduled for that purpose. The recitations in your letter of August 16, 2013, about the events of August 9, 2013 are inaccurate and incomplete. During the meeting of August 9, 2013, you asserted Captain William McDonald, FedEx Managing Director/System Chief Pilot, believed and reported to you that my client was "Mayday Mark." You then explained to my client that you were obligated to explore whether my client was "Mayday Mark." Management representatives made no response to Captain Estabrook's safety concern other than to pepper him with questions concerning his health.

The sole rationale proffered by the Company for these health injuries was the attribution to Captain Estabrook of internet communications by a purported FedEx pilot posting under the sobriquet "Mayday Mark." Management representatives had in their possession numerous pages of highlighted postings and asked pressing questions concerning their contents, including references to a transient ischemic attack. During the entire course of the August 9th meeting, the Company raised no other basis for questioning Captain Estabrook's medical status.

Captain Estabrook denied that he was "Mayday Mark" and the Company's August 16th letter confirms FedEx's abandonment of its efforts to ascribe these postings to Captain Estabrook. Not surprisingly, Captain Rob Fisher, Manager Fleet Operations – A300/310, advised Captain Estabrook at the end of the meeting that he would be returned to flying status.

Notwithstanding the utter implosion of the "Mayday Mark" postings as a rationale for subjecting Captain Estabrook to his removal from flying status and psychiatric/medical evaluation, Captain Estabrook was subsequently telephoned and informed by Captain Fisher that "FedEx Security insisted that his flying status remain suspended until he submitted to a psychiatric evaluation." When my client asked Captain Fisher why Security was asking for this evaluation, after it had been determined earlier in the day that he was being returned to flying status, Fisher responded "all they said was is you know too much." Your August 16th letter also demands that Captain Estabrook submit to a medical evaluation, but provides no explanation for this demand. And then again in a separate letter dated August 16, 2013, and delivered to my client on August 19, 2013, Captain Fisher directed Captain Estabrook to contact Dr. Thomas Bettes regarding a medical appointment no later than Wednesday, August 21, 2013, leaving little time to consult with his legal counsel. Captain Fisher claims in the same letter that FedEx has a "reasonable basis" to direct the medical exam, but does not provide the source or justification of that basis or identify the alleged impairment as required by the Collective Bargaining

Agreement. Captain Estabrook is in possession of a current and valid FAA First Class Medical Certificate, which was submitted to the Company in a timely fashion as per the CBA.

On its face, the Company's actions and demands constitute discriminatory action in response to protected activity under AIR-21.

Contract Violations

Section 15.D provides that specified management representatives may direct a pilot to contact or see the Company's aeromedical advisor if the Company has a "reasonable basis" to question the pilot has an impairment to this ability to perform duties as a pilot. A medical evaluation may only be directed by the aeromedical advisor and only after a meeting with the pilot. Section 15.G provides Flight Management (or anyone other than the Company aeromedical advisor) may not require a pilot to submit to a psychological or psychiatric examination."

The Company sought to compel psychiatric/medical evaluation based on the "Mayday Mark" postings. Now that this justification has been exposed as pretextual, the Company seeks to demand said evaluation without any stated basis whatsoever – reasonable or unreasonable. Moreover, demands for the psychiatric/medical evaluation appear to be emanating from Labor Relations, Flight Management, and Security – anywhere but from the aeromedical advisor after a meeting with Captain Estabrook.

The CBA states clearly that management may only direct the pilot to see the Company aeromedical advisor and that this directive may issue if, and only if, it has a "reasonable basis" for believing that a pilot is suffering from an impairment. Thus, the Company's actions constitute a violation of the CBA, including, but not limited to, Sections 15.D and 15.G. We hereby grieve the Company's actions and request that the Company cease and desist from its actions in violation of the CBA and provide Captain Estabrook with make whole relief, i.e., immediate return to flight status and withdrawing the request for a medical evaluation of Captain Estabrook.

If the Company intends to press forward with its demands for a psychiatric/medical evaluation, we hereby request that it provide a written explanation of its "reasonable basis" for suspecting that Captain Estabrook is suffering from an impairment and identify the witnesses and the documentary information (including all electronic documents and correspondence on which it relies, including, but not limited to those emails from and between Captain William McDonald and Captain Robert Fisher, FedEx Security personnel, FedEx Legal Department and all FedEx management copied in the correspondence involving Captain Mark Estabrook's actions this calendar year). This documentation should include all audiotapes involving Captain Estabrook, the FedEx Duty Officer, the Global Operations Control Center and FedEx management relating to the above referenced incident of April 10, 2013, as well as all audio tape recordings made on

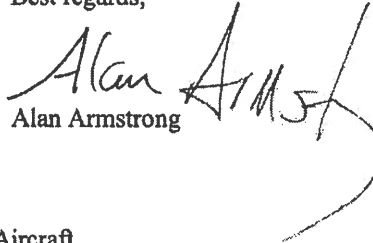
Robert Tice, Esq.
August 20, 2013
Page 6

recorded telephone lines among FedEx management referencing or in discussion about Captain Mark Estabrook during this calendar year.

Notwithstanding the foregoing, Captain Estabrook will comply with the Company's request for a medical examination, but he is doing so under protest and reserving all of his legal rights and rights under the Collective Bargaining Agreement.

Please respond to this letter at your earliest convenience.

Best regards,


Alan Armstrong

AA/kjw
Enclosure

Cc: Rob Fisher, Fleet Captain – Airbus Aircraft
Todd Ondra, Director of Corporate Security
Captain William McDonald, System Chief Pilot
Terrence McTigue, Esq., ALPA
Lee Seham, Esq.

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SEHAM, SEHAM, MELTZ & PETERSEN, LLP

ATTORNEYS AT LAW
445 HAMILTON AVENUE, SUITE 1204
WHITE PLAINS, NEW YORK 10601
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ssmplaw@ssmplaw.com
www.ssmplaw.com

August 27, 2013

Via Email
rwtice@fedex.com

Robert Tice, Esq.
Lead Counsel - Labor Relations Law
Federal Express Corporation
3620 Hacks Cross Road
Memphis, TN 38125

Re: Captain Mark Estabrook

Dear Mr. Tice:

We are in receipt of your letter dated August 23, 2013. Our firm is working as counsel with Mr. Alan Armstrong in representing Captain Estabrook with respect to this matter.

It strikes us more than a little disingenuous that the Company would correspond with Captain Estabrook's legal counsel concerning his purported need for a mental health evaluation, but not accept a grievance submitted by the same counsel on Captain Estabrook's behalf. In our view, such legal obfuscation is inconsistent with the carrier's obligation to make "every reasonable effort" to resolve contract disputes with its employees in a "prompt and orderly" manner. 45 U.S.C. §§ 151a; 152, First. Although we do not believe that any impartial arbitrator would lend credence to the technical objection you have raised, Captain Estabrook will submit to the Company a letter with his signature confirming that the grievance dated August 20, 2013, was submitted by Mr. Armstrong pursuant to Captain Estabrook's directive.

We again demand that the Company disclose the "reasonable basis" upon which it relied for the purpose of compelling Captain Estabrook to submit to a referral to the aeromedical advisor under § 15.D of the CBA.

We also reiterate Captain Estabrook's demand that the Company provide him "as soon as practicable" with the names of all witnesses and copies of all documentary information (including all electronic documents, audiotapes, and correspondence) that have been, or may be, used to establish a reasonable basis for suspecting that Captain Estabrook is currently suffering from an impairment that would prevent him from performing his duties as a pilot - including, but

SEHAM, SEHAM, MELTZ & PETERSEN, LLP

Robert Tice, Esq.
August 27, 2013
Page 2

not limited to, the highlighted postings of "Mayday Mark" that the Company brought to the meeting of August 9, 2013.

We further demand that the Company provide to us all communications sent to medical professionals concerning Captain Estabrook's purported condition, including all communications used to initiate or direct the mental health evaluation of Captain Estabrook.

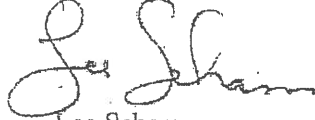
It is abundantly clear to us that the Company has trampled on Captain Estabrook's contractual and federal legal rights. All electronic data relating to this matter must be preserved.

In an attempt to defuse this situation, please consider the attached letters from two highly qualified aeromedical examiners who both affirm that Captain Estabrook is medically qualified for flight.

Finally, Captain Estabrook respectfully requests a response to the security issues that he has raised.

Please respond to this letter at your earliest convenience.

Sincerely,



Lee Seham

cc: ~~Captain Rob Fisher, Fleet Captain - Airbus Aircraft~~
Todd Ondra, Director of Corporate Security
Captain William McDonald, System Chief Pilot
Captain Jim Bowman, Vice President, Flight Operations
Terrence McTigue, Esq., ALPA
Alan Armstrong, Esq.

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Ex F

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

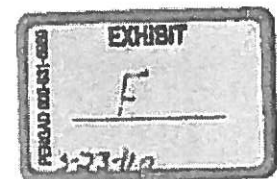
MARK ESTABROOK,)	
)	
Complainant,)	
)	Case No.: 2014-AIR-00022
v.)	Hearing Date: TBA
)	
FEDERAL EXPRESS CORPORATION,)	
)	
Respondent.)	

**RESPONDENT FEDERAL EXPRESS CORPORATION'S RESPONSES TO
COMPLAINANT'S FIRST REQUESTS FOR ADMISSIONS**

Respondent Federal Express Corporation (FedEx), by and through counsel and pursuant to 29 C.F.R. § 18.20, hereby responds to Complainant's First Requests for Admissions to Respondent FedEx as follows:

PRELIMINARY STATEMENT

Respondent has not completed its investigation, discovery, or analysis of all the facts of this case and has not completed preparation for trial. Accordingly, all of the following responses are provided without prejudice to Respondent's right to supplement or amend discovery responses as permitted by the applicable rules, or introduce at trial any evidence that is subsequently discovered relating to proof of presently known facts and to produce and introduce all evidence whenever discovered relating to the proof of subsequently discovered material facts. Moreover, facts, documents and things now known may be imperfectly understood and accordingly such facts, documents, and things may not be included in the following responses. Respondent reserves the right to reference, discover or offer into evidence at the time of trial any



and all facts, documents, and things which it does not presently recall but may recall at some time in the future.

RESPONSES TO REQUESTS FOR ADMISSIONS

REQUEST NO. 1: That Complainant has been employed by you since 1989.

RESPONSE TO REQUEST NO. 1: Admitted.

REQUEST NO. 2: That you have never terminated Complainant.

RESPONSE TO REQUEST NO. 2: Admitted.

REQUEST NO. 3: That you have never suspended Complainant without pay.

RESPONSE TO REQUEST NO. 3: Admitted.

REQUEST NO. 4: That prior to 2013, you have not imposed any discipline on Complainant.

RESPONSE TO REQUEST NO. 4: Admitted.

REQUEST NO. 5: That Complainant's immediate supervisor in 2013 was Captain Rob Fisher.

RESPONSE TO REQUEST NO. 5: Admitted.

REQUEST NO. 6: That on August 9, 2013, in response to Complainant's question as to why he was being required to submit to a psychiatric examination, Captain Rob Fisher stated to the Complainant: "all they said was that you know too much."

RESPONSE TO REQUEST NO. 6: Denied. Captain Fisher has no recollection of making any such statement to Complainant.

REQUEST NO. 7: That the reason for placing Captain Estabrook on NOQ status on or about August 5, 2013, was that you suspected him of being the individual identified as Mayday Mark.

RESPONSE TO REQUEST NO. 7: Denied.

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

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

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

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

REQUEST NO. 10: That at your meeting with the Complainant on August 9, 2013, the Complainant stated his belief that Respondent's practice of providing up-to-date package tracking information had the result of encouraging terrorists to view the Respondent as a

particularly effective means of utilizing explosive, incendiary and other destructive devices by placing in the terrorists' hands the ability to select the most optimum timing for detonation.

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

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

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

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

RESPONSE TO REQUEST NO. 12: Respondent is without knowledge or information sufficient to form a belief about the truth of the contention in Request No. 12 and therefore can neither admit nor deny same.

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

RESPONSE TO REQUEST NO. 13: Respondent is without knowledge or information sufficient to form a belief about the truth of the contention in Request No. 13 and therefore can neither admit nor deny same.

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

RESPONSE TO REQUEST NO. 14: Respondent is without knowledge or information sufficient to form a belief about the truth of the contention in Request No. 14 and therefore can neither admit nor deny same.

REQUEST NO. 15: That, in his capacity as Security Chairman of the FPA, the Complainant met with FedEx Express COO Bill Logue in 2002 and expressed the Complainant's concern that the publication of real-time tracking information in the aftermath of the 9-11 terrorist attacks was the equivalent of providing valuable intelligence to the enemy.

RESPONSE TO REQUEST NO. 15: Respondent is without knowledge or information sufficient to form a belief about the truth of the contention in Request No. 15 and therefore can neither admit nor deny same.

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

RESPONSE TO REQUEST NO. 16: Denied. Respondent provided written responses to Complainant's counsel explaining the basis for its decision. Upon information and belief, Complainant and his counsel are already in possession of these written responses. Additionally,

see documents produced in response to Complainant's Request for Production of Documents, specifically correspondence between Respondent and attorney Alan Armstrong.

REQUEST NO. 17: That your placement of the Complainant on NOQ status on August 5, 2013, resulted in the Complainant's loss of flight privileges and overtime opportunities.

RESPONSE TO REQUEST NO. 17: Respondent can neither admit nor deny Request No. 17. Respondent admits Complainant was restricted from flying FedEx aircraft in any capacity while on NOQ status. However, whether NOQ status resulted in the loss of overtime opportunities is purely speculative.

Respectfully submitted,

s/ David P. Knox
David P. Knox (TN Bar No. 020162)

Federal Express Corporation
3620 Hacks Cross Road, Bldg. B - 3d Fl.
Memphis, Tennessee 38125
Telephone: (901) 434-6286
Facsimile: (901) 434-9279
david.knox@fedex.com

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2014, a copy of the foregoing **Respondent Federal Express Corporation's Responses to Complainant's First Requests for Admissions** was served upon the following via email and Federal Express overnight letter, postage prepaid:

Lee Seham, Esq.
Seham, Seham, Meltz & Petersen, LLP
445 Hamilton Avenue, suite 1204
White Plains, NY 10601
Telephone: (914) 997-1346
Facsimile: (914) 997-7125
Email: lseham@ssmplaw.com

s/ David P. Knox

David P. Knox
Federal Express Corporation

1084971

CX-31

EE

Legal Department
6620 Main Cross Road
Building 6, 3rd Floor
Memphis, TN 38125 US

FedEx

Express

Tel. No. (901) 434-6286

Fax No. (901) 434-9271

January 15, 2015

Via Email and FedEx Delivery

Lee Seham
Seham, Seham, Meltz & Petersen, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601

Re: Mark Estabrook v. Federal Express Corporation
Case No. 2014-AIR-00022
FedEx No. 60-14499

Dear Counsel:

This letter is in response to your earlier correspondence regard Federal Express Corporations' responses to your discovery requests. I apologize for the lengthy delay in getting this response to you. For the reasons set forth herein, FedEx believes its responses were adequate.

Requests for Admissions

RFA 6: The Request has been fully and adequately answered. FedEx is unaware of the existence of any tape recording of the telephone call in question, or of any "policy of taping and retaining teleconferences with its pilots." FedEx has no recording of the conversation in question to review. If you have a recording of the telephone call in question, please produce a copy (as requested in FedEx's discovery requests) and FedEx will review the recording with Captain Fisher, as appropriate.

RFA 8 - 11: FedEx reiterates that it denies the requests as written. FedEx admits Complainant raised safety-related issues associated with the industry's package tracking systems. FedEx also admits Complainant express concern that terrorist groups could use tracking information in carrying out terrorist attacks. FedEx also admits Complainant suggested FedEx ask the Federal Department of Homeland Security to order airlines to cease making tracking information available on-line.



FedEx denies, however, that Complainant used the precise language and terminology set forth in the requests for admission, which is what FedEx was asked to admit. For instance, FedEx does not admit that Complainant said FedEx's "practice of providing up-to-date package tracking information facilitated and maximized the criminal destruction of cargo, aircraft and human lives by granting terrorists the ability to carefully select the time of detonation," as set forth in Request No. 9. Likewise, FedEx does not admit that Complainant said FedEx's "practice of providing up-to-date package tracking information had the result of encouraging terrorists to view the Respondent as a particularly effective means of utilizing explosive, incendiary and other destructive devices by placing in the terrorists' hands the ability to select the most optimum timing for detonation," as set forth in Request No. 10. Consequently, FedEx's denials of the requests "as written" is entirely appropriate. Further, FedEx has specifically referred Complainant to the notes of Todd Ondra (located at FDX 4 – 000060 – 64) for a summary of the conversation.

RFA13: FedEx has properly responded to this request, as it is without knowledge or information regarding the truth of the request. As an initial matter, whether or not Complainant held a position with the FedEx Pilots Association (FPA) at some undefined time between 1996 and 2002 is totally irrelevant to this cause, and there has never been any allegation or suggestion that Complainant's involvement or noninvolvement with the FPA had any bearing on this case whatsoever. Additionally, the FPA was an organization that was separate and distinct from FedEx, and FedEx has no obligation to determine what position, if any, Complainant held with that organization.

Interrogatories

INT3 and INT4: FedEx has properly responded to these requests as, at this point, it has not decided whom it will call as witnesses. As noted, FedEx will supplement these responses as required. Further, FedEx reserves the right to call any witness identified by either party.

INT7: Complainant was placed on NOQ status on or about August 5, 2013 to facilitate scheduling the meeting he had requested as soon as practical, and Complainant expressed his understanding of this. As is clear from his notes (FDX 4 – 000060 – 64), Todd Ondra questioned whether Complainant was fit to fly based upon his observations during the meeting. Based upon Ondra's concerns, FedEx exercised its rights under Section 15.D. of the collective bargaining agreement and referred Complainant to the aeromedical advisor for evaluation. Pending the results of the aeromedical advisor's evaluation, Complainant was placed on NOQ status.

Requests for Documents

Req1: FedEx will not produce any documents withheld on the basis of attorney-client privilege or the work product doctrine. Your contention that the production of Todd Ondra's notes,

Lee Seham
January 15, 2015
Page 3

marked as personal and confidential (documents Bates labeled FDX 4 – 000060 – 64) constitutes waiver of any and all privilege related to the entire process is misplaced. First, Mr. Ondra is not an attorney for FedEx. As noted in response to Interrogatory No. 1, Mr. Ondra is a Managing Director of Aviation and Regional Security. He was not working in any capacity as an attorney during Complainant's interview. Further, the documents you have identified are not attorney-client communications or attorney work product. They are simply Mr. Ondra's handwritten notes and his typewritten summary of the meeting. Although Mr. Ondra marked them as personal and confidential, this does not impute attorney-client privilege and/or work product protection to the documents. Thus, they were produced. Their production is wholly insufficient to waive applicable privileges to communications and other documents prepared by company attorneys in relation to this matter.

Additionally, your characterization of Mr. Tice's role in this matter is incorrect and unsupported by the record. Mr. Tice, a company attorney, attended the meeting Complainant requested and, in the course of that meeting, asked Complainant whether he was "Mayday Mark." Documentation related to that involvement has been produced. While he was involved in the process, he was not "actively involved in the investigation of the Complainant's physical and mental health status" nor did he "play[] a leading role in the interrogation of the Complainant." The record simply contains no evidence of this. His mere participation in the meeting is wholly insufficient to waive any and all privileges and protections to any and all legal advice Mr. Tice may have provided the company.

Req6: FedEx reiterates and incorporates by reference its objections set forth in its original response to Request No. 6. Based upon the additional information provided in your letter, FedEx has located three additional telephone calls related to the Laredo incidents. Copies of these calls are included on the attached CD.

Req7: FedEx reiterates and restates the objections raised in its original response. As an initial matter, the existence or non-existence of documents related to knowledge of terrorist organizations targeting the operations of cargo aircraft operators is irrelevant to whether Complainant raised security-related concerns in the August 9, 2013 meeting. Complainant's concerns are either objectively related to security issues or they are not. They do not become security-related based upon the existence of documents sought in Request No. 7. Further, to the extent any such information exists, it is highly confidential and/or proprietary and would not be produced absent a showing of relevance and entry of an appropriate protective order.

Req8: FedEx's objections are proper. In response to your request that FedEx identify specific documents responsive to Request No. 8, copies of responsive documents include those Bates labeled FDX 4 – 000020 – 23 and FED 4 – 000049 – 59.

Lee Seham
January 15, 2015
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Req10: FedEx's objections are proper. In response to your request that FedEx identify specific documents responsive to Request No. 10, copies of responsive documents include those Bates labeled FDX 4 - 000024 - 48.

Req11: FedEx's objections are proper. In response to your request that FedEx identify specific documents responsive to Request No. 11, copies of responsive documents include those identified as responsive to Request No. 10, Bates labeled FDX 4 - 000024 - 48.

Req12: FedEx's objections are proper. In response to your request that FedEx identify specific documents responsive to Request No. 12, copies of responsive documents include those identified as responsive to Request No. 10, Bates labeled FDX 4 - 000024 - 48.

Req13: In response to your request that FedEx identify specific documents responsive to Request No. 13, copies of responsive documents include those identified as responsive to Request No. 10, Bates labeled FDX 4 - 000024 - 48.

Req14: FedEx's objections are proper. Responsive non-privileged documents have been produced.

Req15: FedEx's objections are proper. In response to your request that FedEx identify specific documents responsive to Request No. 15, copies of responsive documents include those Bates labeled FDX 3 - 000022, 35 and 37; and FDX 4 - 000126, 128-129, 149-150, 171-181 and 222.

Req16: FedEx's objections are proper. In response to your request that FedEx identify specific documents responsive to Request No. 16, copies of responsive documents include those Bates labeled FDX 4 - 000352 - 353.

Req17: FedEx's objections to Request No. 17 are proper and are reiterated herein. As an initial matter, the Request is ridiculously overbroad and unduly burdensome in that it seeks "any correspondence or communication" from January 2008 to the present that references Auburn Calloway in any manner. The Request places no appropriate restrictions or limitations that would suggest the information sought is somehow related to this case. Moreover, the mere fact that Complainant said he had heard rumors that Auburn Calloway had converted to Islam and might be sharing information with al-Qaida is wholly insufficient to put all communications that reference Auburn Calloway over the past six years at issue in this case. Your letter fails to indicate how any such correspondence may be relevant to your client's claim of retaliation, or how failure to produce such information somehow constitutes waiver of FedEx's position with respect to Complainant. FedEx will not produce the requested information, nor does FedEx waive any of its arguments or positions with respect to Complainant.

Lee Seham
January 15, 2015
Page 5

Req18: FedEx's objections are proper. In response to your request that FedEx identify specific documents responsive to Request No. 18, copies of responsive documents include those Bates labeled FDX 4 – 000060, 63, 233, 281, 329, 336-351, and 356-358.

Req19: FedEx's objections are proper. In response to your request that FedEx identify specific documents responsive to Request No. 19, copies of responsive documents include those Bates labeled FDX 4 – 000021, 23, 49, 72 and 90-91.

Req20: FedEx's objections are proper. In response to your request that FedEx identify specific documents responsive to Request No. 20, copies of responsive documents include those Bates labeled FDX 4 – 000060 – 64, 71-72 and 95.

Req22: With respect to Request for Admission No. 6, FedEx did not rely on any documents in denying the request. With respect to Request No. 7, FedEx did not rely on any documents in denying the request. With respect to Request Nos. 8 – 11, see documents Bates labeled FDX 4 – 000060 – 64. With respect to Request No. 16, see documents Bates labeled FDX 4 – 000065 – 70, 74 – 79 and 83.

Req23: FedEx's objections are proper, as these documents are not relevant to the claims at issue and are not likely to lead to the discovery of admissible evidence. FedEx has produced the responsive documents that appear in Complainant's personnel file. FedEx will search for other responsive documents and will produce any additional responsive documents it discovers.

Req25: FedEx's objections are proper. After reasonable inquiry, FedEx has been unable to confirm that Complainant held a position of Security Chairman with the FedEx Pilots Association from 2001 to 2002, Complainant's contention that he did notwithstanding. Complainant is, of course, free to produce documentation establishing his position and his alleged correspondence on the issues identified in Request No. 25. FedEx, however, contends that any such information and/or documentation is irrelevant.

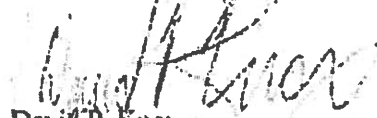
Req27: FedEx has supplemented its response with respect to recorded conversations in April 2013 (See Req6 above). FedEx reiterates that it is unaware of any documents, recordings or EIS related to any call between Complainant and Capt. Fisher on August 9, 2013.

Lee Seham
January 15, 2015
Page 6

Reg29: FedEx's objections are proper. Any documents related to any meeting Complainant may have had with someone in 2002 have absolutely no bearing on or relevance to the claims involved in this matter. Absent a more precise description of the documents sought and an explanation of their supposed relevance, FedEx will not conduct any further investigation related to these documents, if any.

Sincerely,

FEDERAL EXPRESS CORPORATION



David P. Knox
Senior Counsel Legal Litigation

DPK/lhb1090316
Encls.

CX-44

display of the exhibit objects at the National Gallery of Art, Washington, DC, from on or about September 29, 2013, until on or about January 5, 2014, the Metropolitan Museum of Art, New York, New York, from on or about January 27, 2014, until on or about May 4, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202-632-6469). The mailing address is U.S. Department of State, SA-5, L/PS, Fifth Floor (Suite 5H03), Washington, DC 20522-0505.

Dated: August 14, 2013.

Lee Satterfield,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013-20412 Filed 8-20-13; 8:45 am]

BILLING CODE 4710-05-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA-2011-0183]

Access to Aircraft Situation Display to Industry (ASDI) and National Airspace System Status Information (NASSI) Data

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final Notice of the Process for Limiting Aircraft Data Displayed Via ASDI.

SUMMARY: In a proposal published on May 9, 2012, the FAA tentatively identified a process through which aircraft owners and operators could ask the FAA to limit the agency's dissemination of their aircraft data via the FAA's ASDI program.¹ The FAA noted that its final decision on the policy will replace the interim policy to which the FAA has adhered since publishing it on December 16, 2011.² After considering each of the comments submitted to the public docket in response to the proposal, the FAA is issuing this final policy with respect to

the dissemination of aircraft data via ASDI.

If you wish to review the background documents or the comments received in this matter, you may go to <http://www.regulations.gov> at any time and follow the online instructions for accessing the electronic docket. You may also go to the U.S. Department of Transportation's Docket Operations in Room W12-140 on the ground floor of the West Building at 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. **DATES:** The procedures described in this document will take effect on September 20, 2013.

FOR FURTHER INFORMATION CONTACT: You may direct any questions about adding aircraft to and removing aircraft from the ASDI block list to Mr. Damon Thomas by telephone at (202) 267-5300 or by electronic mail at ASDIBlock@faa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On November 18, 2011, the President signed into law H.R. 2112, the "Consolidated and Further Continuing Appropriations Act, 2012," which provided the U.S. Department of Transportation's appropriation for the balance of fiscal year 2012. Section 119A of that statute provided that:

[n]otwithstanding any other provision of law, none of the funds made available under this Act or any prior Act may be used to implement or to continue to implement any limitation on the ability of any owner or operator of a private aircraft to obtain, upon a request to the Administrator of the [FAA], a blocking of that owner's or operator's aircraft registration number from any display of the [FAA's] ASDI and NASSI data that is made available to the public, except data made available to a Government agency, for the noncommercial flights of that owner or operator.³

In light of this appropriation language, the FAA withdrew a prior policy that it published on June 3, 2011, which required owners or operators to submit a Certified Security Concern in order to have their aircraft blocked from the public's view on displays of ASDI and NASSI information. In connection with its withdrawal of the June 3 policy, the FAA published interim procedures by which the owners and operators of aircraft could request that the FAA block information about the operations of their aircraft from release to the public via the FAA's ASDI data feed.⁴ At that time, the FAA noted that it

would propose more detailed procedures for the ASDI blocking program and solicit public comment on the proposal. The FAA published the FAA's proposed procedures on May 9, 2012.⁵ The FAA now summarizes and evaluates the written comments submitted to the public docket in this matter and sets forth the FAA's final decision on its policy related to the blocking of aircraft flight data from the ASDI data feed. In a separate action, the FAA will amend its memoranda of agreement with the subscribers who receive the information to clarify the subscriber responsibilities, consistent with the procedures described here.

II. Summary and Analysis of the Comments

The FAA received eight written comments on the FAA's proposed procedures. Out of the eight commenters, two are generically opposed to blocking aircraft information from the ASDI and NASSI data, and three are generically in favor of the ASDI aircraft blocking program. The three remaining commenters question certain aspects of the program and the FAA's proposal.

The FAA cannot accommodate the two commenters who oppose the blocking of aircraft information from the FAA's ASDI and NASSI data feed. The appropriations provision quoted above clearly precluded the use of appropriated funds to implement or to carry out any limitation on blocking from any display of the FAA's public data feed, on owner or operator request, the aircraft registration number of an aircraft conducting a noncommercial flight. In the absence of appropriated funds, the FAA cannot implement a policy or program that would limit owner or operator ability to block the specified aircraft from the FAA's data feed.

With respect to the commenters who raised questions with respect to the FAA program, an anonymous commenter questions the need and effectiveness of the option to request the blocking of aircraft data at the ASDI subscriber level. This commenter suggests that the convenience of allowing an intermediate level of blocking at the ASDI subscriber level could be counterbalanced by the potential harm from the inadvertent release of ASDI and NASSI data at that level.

In the FAA's notice inviting these comments, the FAA explained the rationale for the ASDI program's two

¹ 77 FR 27,269 (May 9, 2012).

² 76 FR 78,328 (Dec. 16, 2011).

³ Public Law 112-55, § 110A, 125 Stat. 552, 649.

⁴ 76 FR 78,328.

⁵ 77 FR 27,269-71.

levels of aircraft blocking.⁶ In summary, given the technology and the processes in place when the FAA established the ASDI program in 1997, some aircraft owners who desired to track their own blocked aircraft needed to contract with an ASDI subscriber to get that information, because there was no way for them to see the data if it were blocked at the FAA level. The option of requesting aircraft blocking at the ASDI subscriber level remains necessary for this purpose today, and the FAA will retain it. However, the commenter is correct to the extent that the FAA systems that convey aircraft data in the United States are changing rapidly. As a result, the FAA expects to update its data sharing policy as it continues to develop and deploy future systems that handle aircraft operational data.

The National Business Aviation Association (NBAA) inquires about the manner in which the FAA expects to protect blocked aircraft data from subscribers' intentional or inadvertent release. The FAA's agreement with subscribers requires each subscriber to demonstrate to the FAA's satisfaction the subscriber's ability to block selectively the display of any data related to any identified aircraft. In addition, the agreement has historically required ASDI data subscribers to honor the privacy and security interests of airspace system users under the legacy ASDI blocking program. In the notice announcing the FAA's interim policy, the FAA specified that it construes the current agreement to obligate ASDI subscribers to filter any aircraft data at the FAA's direction.⁷ The potential remedy for a subscriber's failure to honor the privacy and security interests of system users has been the FAA's immediate termination of the agreement with that subscriber. This remedy has proven adequate. If any member of the public identifies an aircraft that should be blocked, yet continues to appear in the information that an ASDI subscriber releases, he or she can report the matter to FAA's ASDI program staff by the means identified in the "For Further Information Contact" section of this document.

NBAA also asks the FAA to identify clearly a process for removing aircraft from the ASDI block list. The FAA's May 2012 proposal states that the FAA was proposing that it would use the same process for adding as well as removing aircraft from the ASDI block list.⁸ For example, in detailing the proposed substance of owner/operator

requests, the FAA noted that the completeness of the information submitted could influence the FAA's ability to "add or delete aircraft from the ASDI block list" ⁹ In addition, the information that the FAA proposed for submission included "[t]he registration number(s) of the aircraft to be blocked or unblocked" ¹⁰ The FAA does not perceive that using an identical process to block and to unblock aircraft will be confusing or problematic for requestors, and the FAA will adopt that approach.

NBAA additionally suggests that the FAA should permit associations to consolidate and forward aircraft blocking and unblocking requests to the FAA. In the FAA's May 2012 proposal, the FAA tentatively determined that requests to block aircraft must come to the FAA from aircraft owners, aircraft operators, or their legally authorized agent and not from associations acting on their behalf. The FAA will adhere to this requirement. In proposing a minimum legal relationship between an ASDI block requestor and the aircraft owner or operator, the FAA determined that the requestor, if he or she is not the actual owner or operator, should have a fiduciary duty to adhere to the owner's or operator's express wishes. This is intended to ensure that the requestor has a legal duty to carry out promptly the owner's or operator's request, and the FAA expects this to result in a very close correlation between owner/operator preference and the composition of the ASDI block list. The FAA continues to believe that the threshold identified in the proposal is appropriate and will promote the ASDI block list's ongoing accuracy.

NBAA further notes that the FAA's proposal does not specify a type of documentation that the FAA needs in order to process a request related to aircraft blocking. The FAA did not prescribe a specific form for blocking and unblocking aircraft principally because the FAA intends this process to be as simple as possible; the FAA does not want to suggest that a particular form is necessary to effect the requesting owner's or operator's wishes. The FAA proposed the minimum amount of information that the FAA expects the program will need to process the request.¹¹ Elaborating slightly on the FAA's proposal, the FAA will be best equipped to process the request promptly if the request includes:

- The name of the requestor;
- the registration number(s) of the aircraft to be blocked or unblocked;

- a certification that the requestor is the owner or operator of the specified aircraft or is a legally authorized representative of the aircraft owner or operator;

- a telephone number or electronic mail address to which the FAA can direct any questions about the request; and

- for a request to block one or more aircraft, a statement indicating the requestor's desired level of ASDI blocking—either at the FAA source or at the ASDI subscriber level.

The request must be in writing and delivered either to the designated electronic mail address or to the designated regular mailing address for the ASDI blocking program.

An anonymous commenter asks the FAA to clarify the uses that ASDI subscribers can make of the ASDI data feed. The commenter states that the FAA should permit ASDI subscribers to pass along to "aviation community" users ASDI and NASSI near real time data that is further filtered only to protect basic privacy considerations. The commenter does not consider the aviation community user to correspond to the general public, instead defining the aviation community to include, for example, corporate aircraft operators and fixed base operators and perhaps also including all businesses and commercial entities providing air transportation related services. The commenter also asks that the FAA place no restriction on subscribers' retransmission of historical flight data, including the past operations of aircraft on the ASDI block list.

The permissible uses of ASDI and NASSI data that are subject to subscriber-level blocking is technically a concern that is separate from the present discussion. The notice underlying this matter was limited to the procedures by which aircraft owners and operators can request that the FAA block their aircraft from the ASDI data feed.¹² By contrast, the responsibilities of ASDI subscribers with respect to handling ASDI and NASSI data that is designated as blocked at the subscriber level are contained in the FAA's contractual memorandum of agreement with ASDI subscribers. In an effort that parallels the current procedural policy discussion, the FAA is reviewing its memoranda of agreement to ensure that they comport with the FAA's current overall data sharing policy. The FAA will communicate separately with ASDI subscribers in connection with that effort.

⁶ *Id.*, at 27,270.

⁷ 76 FR 78,328.

⁸ 77 FR 27,260–70.

⁹ *Id.*, at 27,269.

¹⁰ *Id.*

¹¹ *Id.*, at 27,269–70.

¹² *Id.*

Nevertheless, the FAA notes potential pitfalls that could accompany the recommendations of the anonymous commenter. For example, the commenter's definition of an aviation community user could include the flight department of a company that is interested in the aircraft movements of a competitor's aircraft. This could presumably thwart a reason that the competing airspace user sought ASDI blocking in the first place. In addition, the FAA has not previously agreed that ASDI subscribers can display the historical movements of blocked aircraft. Aside from the absence of a clear line as to when such data becomes historical, the FAA did not propose to permit ASDI subscribers to retransmit the historical movements of blocked aircraft, and the commenter's suggestion therefore falls outside the scope of the proposal.

III. Conclusions

With respect to the procedures for aircraft owner and operator requests to block and unblock aircraft from inclusion in the FAA's ASDI data feed, the FAA concludes as follows:

1. *Requestors.* The FAA will honor each written request of an aircraft owner and operator, submitted in accordance with paragraphs 2 and 3 to block or unblock their aircraft's appearance in the FAA's public ASDI data feed. Aircraft owners and operators may submit their request on their own behalf, or they may do so through a legally authorized agent, including an attorney or an aircraft management company with a fiduciary duty to carry out the owner's or operator's express wishes with respect to the aircraft.

2. *Substance of Requests.* To assist the FAA in processing aircraft owner or operator requests promptly, all requests related to an aircraft's ASDI blocking or unblocking must include the following information:

- The name of the requestor;
- the registration number(s) of the aircraft to be blocked or unblocked;
- a certification that the requestor is the owner or operator of the specified aircraft or is a legally authorized representative of the aircraft owner or operator;
- a telephone number or electronic mail address to which the FAA can direct any questions about the request; and
- for a request to block one or more aircraft, a statement indicating the requestor's desired level of ASDI blocking—either at the FAA source or at the ASDI subscriber level.

3. *Addresses.* The FAA's primary electronic mailbox for all aircraft

blocking and unblocking requests and for related inquiries directed to the ASDI blocking program is ASDIBlock@faa.gov. The FAA also will accept aircraft block and unblock requests submitted by regular mail at: FAA ASDI Blocking Request; ATO System Operation Services, AJR-0; Wilbur Wright Building, Room 3E1500; 600 Independence Avenue SW; Washington, DC 20597.

4. *FAA Monthly Implementation.* The FAA implements the ASDI block list updates on the first Thursday of each month. As a result, requests that the FAA receives on or before the 15th of the preceding month are likely to be processed in time to take effect in the month after the FAA receives them. However, it is possible that the volume of requests in a given month, a requestor's timeliness, or issues with the completeness and accuracy of the information that the FAA receives could preclude the FAA from processing some requests in time for them to take effect in the month following their submission. In that event, the FAA will process all requests in the order in which the FAA receives them, to the extent that it is possible.

5. *FAA Treatment of Aircraft That Are Currently Blocked.* Any aircraft that is currently on the ASDI block list, either by virtue of a certified security concern submitted after June 3, 2011, or a request submitted under the FAA's interim ASDI block policy, will remain indefinitely on the ASDI block list when the policies in this document take effect. It is not necessary for the owners or operators of these aircraft to resubmit their requests, unless they wish to change the blocking status of their aircraft or amend the level at which their aircraft is blocked.

Issued in Washington, DC, on August 14, 2013.

J. David Grizzle,

Chief Operating Officer, ATO.

[FR Doc. 2013-20375 Filed 8-20-13; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Certification and Operations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. 14 CFR part 125 prescribes requirements for issuing operating certificates and for appropriate operating rules. In addition to the statutory basis, the collection of this information is necessary to issue, reissue, or amend applicant's operating certificates and operations specifications.

DATES: Written comments should be submitted by October 21, 2013.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepo at (405) 954-9362, or by email at: Kathy.DePaepo@faa.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120-0085.

Title: Certification and Operations.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: 14 CFR part 125 prescribes requirements for leased aircraft, aviation service firms, and air travel. A letter of application and related documents which set forth an applicant's ability to conduct operations in compliance with the provisions of 14 CFR part 125 are submitted to the appropriate Flight Standards District Office (FSDO). Inspectors in FAA FSDO's review the submitted information to determine certificate eligibility.

Respondents: Approximately 163 certificated operators.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 1.33 hours.

Estimated Total Annual Burden: 61,388 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepo, Room 126B, Federal Aviation Administration, AES-200, 6500 S MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your

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PRIVILEGED
AND
CONFIDENTIAL

August 9, 2013

AOD-Flight Hearing; Mark Estabrook

Robb Tice-Legal, Rob Fisher-Fleet Captain, Todd Ondra-Security, Mark Estabrook, Crew Member

Privileged

The following is the recap of our discussions with Mark Estabrook:

On the above date a meeting was scheduled with the above mentioned employees. The goal of this meeting was to hear from Mark Estabrook; #88775, Crew Member, concerning an email note that Estabrook had sent to Bill McDonald, System Chief Pilot, on August 4, 2013. In this note, Estabrook wrote "Bill, 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 Bill Henrickson 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".

Rob Fisher coordinated this meeting which took place at the Air Operations Building on Friday, August 9, 2013. Following introductions Estabrook opened the meeting by sharing that he is well versed concerning intelligence/information sharing and that he understands how this works. Estabrook advised this was the reason he requested such a small audience. Estabrook went on to say that his experience in this area dates back to his childhood when his father helped individuals escape from Cuba after Castro gained control of the country. Estabrook went on to say that he had been arrested when he was eighteen (18) by the secret police in Hungary and added that he had been chased all around Russia.

Estabrook then told us how he was proud of his accomplishments within Air Operations and that he had helped to develop the recall procedures in ACARS, adding that Billy Wilson took his suggestion and ran with it. Estabrook also told us that he had developed a website that was utilized by FedEx crew members to communicate and promote the crew members union at FedEx (airlinepilots.com). Estabrook told us that he no longer owned this website, adding that he has since sold this website for \$25K.

Estabrook then make three points: Point one, regarding 9-11, Estabrook told us that he was bringing this subject up now, because while recently surfing the internet due to the recent travel and threat alerts throughout the U.S. he noticed that al-Asiri was still very active. Estabrook talked about the previous bomb attempts targeted for cargo aircraft in October of 2010. He went on tell us that they wanted our live tracking information. Estabrook went on to say that Fred (Mr. Smith), needs to consider going to the other CEO's, ATA, and Homeland Security, and tell customers they can no long receive tracking information. Estabrook told us this was critical because previous shipments had been sent related to the October bombings to test the system and time lines. Estabrook advised the only scans on shipments should be the pick-up and the deliver scan. He went on to say that it is his belief al-Asiri is currently training dozens of replacements and that everyone needs to make sacrifices like giving up data base apps related to aircraft system tracking capabilities, e.g. being able to track aircraft while in flight.

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Mark Estabrook Meeting Recap

August 9, 2013

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Point two, Estabrook advised the next thing that he wants to tell Fred is that he needs to pump some significant money in to an operations research staff hiring thirty (30) or so of the best and the brightest. Estabrook told us these individuals need to be well versed in statistics, math, war games, neural networks, and tied to the intelligence community, Homeland Security, and other companies. Estabrook told us that we cannot rely on the government alone and that FedEx needs to start making plans to now.

Point three, Estabrook told us he wanted to share with Fred that he has heard twice in the past six (6) months that Auburn Calloway has converted to Islam. Estabrook told us that if this is true that we should go to the Department of Justice and request eavesdropping on his jail cell. Estabrook went on to tell us that Calloway attacked the cockpit and that this was followed by the Mohammed Atta attack. Estabrook told us that there appears to be an emphasis on us (FedEx) for some reason. Estabrook told us there is a Muslim emphasis, adding that he is not sure, but that Calloway may be using a communication path to al Qaeda. Estabrook went on to tell us that when al Qaeda fails, they come back and that they know how the system works.

Estabrook thanked us for our time and the meeting concluded.

Regards,

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AGREEMENT

between

FEDERAL EXPRESS CORPORATION

and

THE AIR LINE PILOTS

in the service of

FEDERAL EXPRESS CORPORATION

as represented by

THE AIR LINE PILOTS ASSOCIATION, INT'L

FEBRUARY 28, 2011

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February 28, 2011

SECTION 15

MEDICAL STANDARDS

A. General

1. Pilots shall meet the medical standards and possess a valid medical certificate consistent with the FAA standards including its waiver, limitations, restriction, special issuance and related FAA policies for the class of medical certificate required for the pilot's crew seat.
2. Each pilot shall validate, through VIPS, the issuance of his new medical certificate not later than the earlier of the following:
 - a. 48 hours prior to the end of his due month; or
 - b. 0900 LBT the day prior to the start of any trip(s) scheduled to terminate either:
 - i. after the expiration of the pilot's medical certificate; or
 - ii. within 48 hours of the expiration.
3. While a VIPS notification(s) of a pilot's pending FAA medical certificate expiration is provided to each pilot, it is the pilot's responsibility to know and meet the medical standards by possessing a valid FAA medical certificate. Failure of a pilot to receive a VIPS notice shall not excuse the pilot's failure to maintain his/her valid FAA medical certificate. If a pilot fails to provide the Company with confirmation via VIPS that he has a valid medical certificate as required by this paragraph, before 0900 LBT on the day prior to the showtime of a trip or R-day scheduled to start within the time period as stated in Section 15.A.2., the trip or R-day shall be removed without pay, and the pilot shall not be eligible for make-up. Trip(s) or R-day(s) shall no longer be removed after the pilot provides the Company with the required validation.

B. Company Payment of FAA Medical Exam Expenses

1. The Company shall cover an active pilot's cost of annual or semiannual FAA medical examinations including the cost of a required EKG, up to an annual maximum of \$275, which shall increase to an annual maximum of \$300 on January 1, 2014. The pilot shall use the Company issued travel card if accepted by the provider. If the provider does not accept the Company issued credit card, the pilot must comply with normal non-travel reimbursement procedures that require an itemized list of the services performed by the FAA physician (i.e., FAA physical, EKG if any, physician's office, date, charge).
2. If an active pilot incurs medical expenses in order to qualify for an FAA medical certificate, which are not covered by Section 15.B.1., the following shall apply:
 - a. If submitted within 90 days after having incurred the expense, the Company shall reimburse such pilot for the non-routine medical expenses if:

- i. the expenses were incurred at the direction of either:
 - (a) the FAA; or
 - (b) an FAA designated Aviation Medical Examiner (AME) who reasonably concluded that, in light of FAA requirements, it was necessary to perform a non-routine medical procedure in order for the active pilot to obtain or maintain his FAA medical certificate; or
 - ii. the expenses were incurred in order to obtain a special issuance FAA medical certificate, as required by the FAA.
- b. A pilot who incurs medical expenses covered by Section 15.B.2. shall submit or cause to have submitted a medical insurance claim for any such expenses that are covered by insurance. The pilot shall provide a copy of any response(s) to the medical insurance claim to his flight manager (currently titled Assistant Chief Pilot) within a reasonable time after receiving same. The pilot shall remit to the Company the amount of any insurance claim that was both paid by the Company and reimbursed by the insurance plan. The primary purpose of Section 15.B.2.b. is to allow any group health insurance discount to be recognized for medical charges that arise out of this section and to avoid any double payment being made for the same service. If a pilot gets reimbursed from both the Company and the service is also covered and paid through the group health plan, the pilot may receive a reimbursement from the health care provider for an overpayment that actually belongs to the Company. In this case, a pilot should remit or cause to have remitted the extra monies paid back to the Company.

C. Alcohol and Drug Testing

The Company may test pilots for drugs and alcohol only in accordance with the following:

1. The Company shall maintain the drug and alcohol testing programs that are in use on the effective date of this Agreement, as long as such testing is mandated by law or regulation. The term "programs" includes the type of specimen collected, substances for which a pilot is tested, the methods of testing and the thresholds at which testing is conducted.
 - a. If any change in a testing program is mandated by law or regulation and the law or regulation does not afford multiple options of compliance, the Company shall give the Association notice and shall consult with the Association at a mutually agreeable time and location concerning such change.
 - b. If a law or regulation mandates that a testing program be changed, but affords multiple options by which compliance can be achieved, then the Company and the Association shall meet to discuss the available alternatives. The initial meeting shall commence no later than 60 days following the date the final rule regarding the alternative methods is published in the

Federal Register. Should the parties be unable to mutually agree on an alternative testing method within 60 days, then each side may elect to advocate an alternative before a mutually selected arbitrator from the non-disciplinary panel. The parties' presentations shall be in writing unless either party elects an in-person hearing. The arbitrator shall select the method of testing from the two alternatives presented. If the Company is required to implement a change prior to the conclusion of the process described in this paragraph, nothing in this paragraph shall prevent it from doing so (subject to change depending on the outcome of the Section 15.C.1.b. process).

- c. The Company may implement a non-mandatory change in a testing program only with the written consent of the Association.
 2. The Company shall maintain the FedEx Drug and Alcohol Rehabilitation and Recertification Plan for Flight Crewmembers (HIMS program) that complies with FAA directives regarding pilots who require an Authorization for Special Issuance of a Medical Certificate. Such Plan shall continue to contain full Company participation (including monitoring) in rehabilitating, and returning to work, those pilots who need professional treatment, along with insurance coverage for medical and associated bills in accordance with the terms of those plans as provided in Section 27. Such Plan shall continue to contain payment by the Company of the initial evaluation and the associated psychiatric/psychological evaluation required in conjunction with the petition for a Special Issuance Medical Certificate as provided in Appendix H of the FOM.
 3. If the Company has a reasonable basis to believe that a pilot's ability to perform his duties is impaired for reasons relating to substances not covered by the legally mandated drug testing programs referred to above, the pilot's case shall be handled as provided in Section 15.D.
- D. Company Mandated Medical Examinations
1. The VP of Flight Operations, the System Chief Pilot, a Regional Chief Pilot, or a Chief Pilot may direct a pilot to contact or see the Company's aeromedical advisor if the Company has a reasonable basis to question whether a pilot has developed or recovered from an impairment to his ability to perform his duties as a pilot.
 2. A pilot in an active pay status who is directed to contact or see the Company's aeromedical advisor, shall be removed from any conflicting scheduled activities with pay until the aeromedical advisor determines whether the pilot is fit for flight duty.
 3. After the Company's aeromedical advisor consults and/or meets with the pilot, by written notice, he may require the pilot to undergo a test(s), medical examination(s), and/or an evaluation(s) by the advisor or a physician designated by the aeromedical advisor. Upon the pilot's request, the aeromedical advisor shall consult with the pilot to review

- and discuss the aeromedical advisor's rationale for his concerns and the necessity of the prescribed examinations/evaluations.
4. The Company shall pay for all examinations, tests or evaluations performed or directed by its aeromedical advisor. If the pilot needs to travel from the pilot's permanent, primary address in connection with a Company directed examination(s), test(s) and/or evaluation(s) pursuant to this paragraph, the Company shall provide and arrange transportation, lodging and per diem as provided in Section 5.
 5. Following the Company's aeromedical advisor's review of the results of the examination(s), test(s) and/or evaluation(s), a determination and written notice of same shall be sent to the pilot. The notice shall state the specific grounds for the determination. The determination shall be made in accordance with the following:
 - a. If the Company's aeromedical advisor finds the pilot fit for duty, and the pilot agrees, the pilot shall remain on or return to active flight status without loss of pay.
 - b. If the Company's aeromedical advisor finds the pilot not fit for duty, and the pilot agrees, he shall be placed on sick leave, disability or medical leave of absence, as applicable.
 - c. If the Company's aeromedical advisor finds the pilot fit for duty, and the pilot disagrees, then:
 - i. if the pilot supplies the Company's aeromedical advisor with medical documentation substantiating his disagreement, he shall be placed or remain on sick leave, disability or medical leave of absence, as applicable. He shall remain in that status until his case is resolved as provided in Section 15.D.7. (below).
 - ii. if the pilot does not supply medical documentation supporting his disagreement within 30 days from receipt of the Company's aeromedical advisor's determination, he shall be placed on personal leave of absence. If warranted by extenuating circumstances, the System Chief Pilot shall extend the 30 day period. If the pilot subsequently supplies the required documentation, his status shall be determined pursuant to Section 15.D.5.c.i. (above).
 - d. If the Company's aeromedical advisor finds the pilot not fit for duty and the pilot disagrees, the pilot shall be placed or remain on sick leave, disability or medical leave of absence, as applicable, until the Company's aeromedical advisor determines the pilot to be fit for duty, or his case is resolved as provided in Section 15.D.7. (below).
 6. The Company shall give written notice to ALPA that the Company's aeromedical advisor has issued a direction to a pilot under Section 15.D.3 or that the Company's aeromedical advisor has issued a determination to a pilot under Section 15.D.5. Such notice shall occur as close in time to the Company's aeromedical advisor's notice to the pilot as is reasonably practical under the circumstances.

7. If the pilot disagrees with the Company's aeromedical advisor, the pilot shall engage, at his expense, a second physician to evaluate his medical condition. Unless otherwise agreed to on a case-by-case basis, the second physician shall be a physician designated as the Association's Aeromedical Advisor or a physician qualified to diagnose and treat the pilot's underlying medical condition. If the pilot fails to provide the second physician's evaluation within 30 days following the Company's aeromedical advisor's determination, the pilot may remain on sick, disability or medical leave or be placed on personal leave of absence, as applicable, until he provides the second physician's evaluation to the Company's aeromedical advisor. If warranted by extenuating circumstances, the System Chief Pilot shall extend the 30 day period.
 - a. If the second physician agrees with the opinion of the Company's aeromedical advisor, the pilot shall return to active flying status or remain or be placed on sick leave, disability or medical leave of absence consistent with the Company's aeromedical advisor's findings.
 - b. If the second physician disagrees with the opinion of the Company's aeromedical advisor, a Medical Review Panel (hereinafter MRP) shall be convened to decide whether the pilot, in their opinion, meets the standards for holding and exercising the privileges of the pilot's medical certificate. Pending the MRP's determination, the pilot shall be placed or remain on sick leave, disability or medical leave of absence, as applicable.
 - i. An MRP shall be composed of the Company's aeromedical advisor, the physician engaged by the pilot as provided Section 15.D.5. (above), and a third physician qualified to determine the medical issue in question. The third physician shall be selected by agreement between the Company's aeromedical advisor and the pilot's physician.
 - ii. As soon as practicable, the MRP shall consult and determine whether the pilot, in their opinion, meets the standards for holding or exercising the privileges of the pilot's medical certificate.
 - (a) Questions regarding the pilot's medical condition shall be resolved based on the MRP's determination. The pilot shall remain on or return to active flight status, sick leave, disability or medical leave of absence consistent with the MRP's determination as applicable.
 - (b) If the MRP rules that a pilot is fit for duty and the pilot still disagrees, the pilot shall be placed on personal leave of absence.
 - (c) If the MRP's determination disagrees with the opinion of the Company's aeromedical advisor, then:
 - (1) the Company shall make adjustments, including retroactive adjustments (e.g., back pay or restoration

of sick leave), if applicable, that are necessary to make the pilot whole consistent with the MRP's determination; and

- (2) the Company shall reimburse the pilot for all reasonable costs and expenses he incurred in connection with the determination of his medical condition pursuant to Section 15.D.7. (this paragraph).

8. Questions regarding the medical condition of a pilot who has applied for or is receiving a benefit(s) pursuant to Section 27 or 28 shall be resolved in accordance with the provisions of the applicable benefit plan(s).

E. Medical Examination Documentation

Upon request, the Company's aeromedical advisor, the pilot and the pilot's physician or a physician associated with the Association's aeromedical office, as applicable, shall be provided a copy of any report or medical record relating to any medical examination, test or evaluation of that pilot conducted pursuant to this Section. However, in cases where the Company's aeromedical advisor believes that direct pilot access to information contained in the medical records regarding a specific diagnosis of a terminal illness or a psychiatric condition could be detrimental to the pilot or the pilot's health, the aeromedical advisor may inform the pilot that access will only be provided to a designated representative of the pilot having specific written consent.

F. Effect on Certain Legal Rights

Nothing in this Section shall be construed to guarantee, deny or limit a pilot's right to FAA, NTSB or judicial appeal procedures, nor shall it preclude the Company from assisting a pilot with medical problems to regain his medical certificate and return to flight status. This assistance may also include directing the pilot to challenge or appeal the results of adverse findings to the Federal Air Surgeon. All costs of any Company directed challenge/appeal shall be paid by the Company.

G. Limitation of Medical Procedures

1. Flight Management shall not require a pilot to submit to a psychological or psychiatric examination. However, flight management may refer a pilot to the Company's aeromedical advisor in accordance with Section 15.D.1. (reasonable basis to question fitness). A pilot may be required to undergo a psychological/psychiatric examination if directed by the Company's aeromedical advisors based on their independent evaluation, in accordance with Section 15. The evaluation conducted by the Company's aeromedical advisors is expected to include contact with the pilot and any other preliminary evaluation that is necessary in order to reach an independent, informed decision as to the need for further testing.
2. Nothing contained in this Section shall be construed to permit the Company to require a pilot to submit to any medical treatment or invasive procedure which is not consistent with reasonable and

Sec. 15.G.2. (continued)

current medical practice or which poses an unreasonable threat to the pilot's health. This paragraph shall not be construed to prohibit testing for drugs, alcohol and, if applicable, other substances pursuant to the provisions of Section 15.C. (above).

- a. If the Company's aeromedical advisor determines that a treatment, procedure or evaluation is appropriate in the circumstances of a case, he shall consult with the pilot's physician or a physician associated with the Association's aeromedical office, as applicable, for the purpose of determining the permissibility of that treatment, procedure or evaluation under the provisions of Section 15.G. (this paragraph). The issue shall be resolved by mutual agreement of those 2 physicians.
- b. If the 2 physicians cannot agree, the matter shall be submitted immediately to a third physician selected by the Company and the Association. The Company, the Association and the pilot shall be bound by the findings of the third physician. The fees and expenses of the third physician shall be shared equally by the Company and the Association or the pilot; provided, however, that if the third physician agrees with the pilot, the Company shall reimburse the pilot for all reasonable costs incurred in connection with this paragraph.

H. Confidentiality of Medical Information

All reports and records of any medical examination, test or evaluation of a pilot pursuant to this Section shall be strictly confidential between the Company's aeromedical advisor and the pilot. Those reports and records shall not be divulged, except in the administration of this Agreement on a "need to know basis" or as required by law, to any other person or entity without the written permission of the pilot. If required by law to divulge, the Company shall provide the pilot notice of such, and upon the request of the pilot, provide the pilot with a copy of such records and reports, unless prohibited by law from doing so. If the final determination of a pilot's medical condition pursuant to this Section is that the pilot is not medically fit for duty, the Company's aeromedical advisor may provide a report regarding the pilot's medical condition to officials in the Benefits Department on a "need to know" basis. Those officials shall receive only as much information as is necessary for them to perform their job functions.

I. General

Nothing in Section 15 shall be construed to limit the Company's authority to act in accordance with Section 19. Disciplinary issues arising out of the application of Section 15 shall be handled in accordance with Sections 19 and 21.

RX-7

Maryanne Miller

From: Tina Benjamin
Sent: Thursday, August 22, 2013 10:35 AM
To: Shelia Voye; Cindy Sartain; Jennifer Crisp
Subject: FW: Mark Estabrook EE: 88775
Attachments: Estrabrook Company Mand ltr Aug 16, 2013.pdf

FYI

Tina Benjamin #85842
FedEx Express
Flight Operations Admin/MEM
Fleet Air Operations/PAC
901.434.5000 Office
901.492.5205 Fax
tmbenjamin@fedex.com



From: Christopher Johnson [<mailto:cjohnson@harveywatt.com>]
Sent: Thursday, August 22, 2013 10:33 AM
To: Tina Benjamin
Subject: FW: Mark Estabrook EE: 88775

From: Christopher Johnson
Sent: Thursday, August 22, 2013 11:29 AM
To: 'cargopilot@gmail.com'
Cc: Tom Bettes, MD
Subject: Mark Estabrook EE: 88775

Captain Estabrook,

I hope you are doing fine I am assisting Thomas N. Bettes, MD, MPH with your case. The purpose of this e-mail is to provide you with the information that will be needed to support your return to work with Fed-ex when you are ready. Dr. Bettes will contact today via telephone.

PLAN OF ACTION:

As previously discussed with Dr. Bettes, he recommended a medical evaluation (s) to assess your ability to perform flight duties as a pilot. FedEx management has a reasonable basis to question whether you have developed an impairment. FedEx Management and Harvey W. Watt's Senior AME, Dr. Bettes, have recommended an evaluation at Talbott Recovery Campus, Atlanta GA <https://www.talbottcampus.com/>. FedEx management has instructed that I schedule your evaluation as soon as possible. At this time, your evaluation is scheduled for Aug 26, 2013. Please arrange with the Pilot Administration Center Manager your travel arrangements.

This is for evaluation only, and not treatment (4 to 5 days), beginning on Monday Aug 26, 2013. Talbott staff will pick you up from Hartsfield. If you have any questions, please do not hesitate to contact our office.

SheliaVoye@fedex.com

Phone (901) 434-8498

Mobile: (901) 417-1472

Fax: (901) 492-9005

Christopher A. Johnson
Aeromedical Consultant
Harvey W. Watt & Co.
800-241-6103 ext: 244
(404) 404-767-7501 (Main)
(404) 334-4600 (FedEx Fax)
(404) 768-5594 (Alt Fax)
HarveyWatt.com

SERVING PILOTS SINCE 1951



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The contents of this communication, including any attachment(s), are confidential and privileged and are for use only by the intended recipient. If you are not the intended recipient (or are not receiving this communication on behalf of the intended recipient), please notify the sender immediately and delete or destroy this communication without reading it, making, forwarding, or retaining any copy or record of it or its contents. Note: We have taken precautions against viruses, but take no responsibility for loss or damage caused by any virus that may be present.

RX-8

Maryanne Miller

From: Rob Fisher
Sent: Wednesday, April 24, 2013 10:17 AM
To: Cindy Sartain
Subject: FW: Cap Mark Estabrook #88775 Flight 1317/11 LRD-MEM
Attachments: F1317 Sherrie first conversation.wav; F1317 Estabrook Crook conversation.wav; F1317-2 Sherrie second conversation.wav

Cindy.....Here they are.....rob

From: Mark Crook
Sent: Wednesday, April 10, 2013 11:46 PM
To: William McDonald; Rob Fisher; FODO; Michael Speer
Subject: Cap Mark Estabrook #88775 Flight 1317/11 LRD-MEM

Received a call at 0215Z from the LRD ramp manager informing me that the crew for FDX 1317/11 was not at the ramp and they were due out in 10 minutes. This was the first I had heard of any problem so I immediately called the Captain, Mark Estabrook. Cap Estabrook told me he had coordinated staying at the hotel with the dispatcher Sherrie Hayslett and was not going to operate an aircraft through any line of thunderstorms. I asked if Sherrie and he had agreed to delay the flight. He told me that he was delaying the flight.

I went over and talked with Sherrie. She told me she had no idea the crew was still at the hotel. When the Captain told her they were going to be late, she assumed the Captain meant that the flight was going to be delayed into MEM due to the MEM weather.

At the scheduled arrival time of FDX 1317 (0412Z), 40 aircraft were on the ground in MEM and no holding was in progress in any quadrant by MEM approach control.

At 0317Z a first tier ground stop was announced for MEM. Since LRD is in Houston Center, this included flight 1317. This ground stop was 52 minutes after the scheduled block time for flight 1317 and should have never included them.

I've attached Sherrie's first conversation with Cap Estabrook, my conversation and then Sherrie's second conversation. This Cap accuses me of pilot pushing and ordering him to takeoff during Sherrie's second conversation. At no time did that ever happen in my conversation with Cap Estabrook.

In my 2+ years as a DO, I have never had a Captain take it upon himself to delay a flight without coordinating and coming to an agreement with the dispatcher. Cap Estabrook was directive to Sherrie and told her how it was going to be. Cap Estabrook also never took it upon himself to touch base with the weather department. He became the sole source of weather by looking at the weather plot on intellicast and delayed the flight by that sole source of information.

Over to you guys but this Captain is on his own program in a system that runs by time not much slop.

Cap Mark Crook
ACP/Flight Operations Duty Officer

RX-10

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

MARK ESTABROOK,)
)
 Complainant,)
)
 v.) Case No.: 2014-AIR-00022
) Hearing Date: TBA
)
 FEDERAL EXPRESS CORPORATION,)
)
 Respondent.)

AUDIO RECORDINGS

4/11/2013 Captain to Dispatcher; 1:25:35 am; 4/10/13; 8:25 pm

Sherrie: GOC this is Sherrie.

Estabrook: Hey Sherrie, this is Mark Estabrook on, what are we, 1317.

Sherrie: Laredo - Memphis

Estabrook: Laredo to Memphis that's correct. I'm just giving you a heads-up, it looks like we're going to be late tonight.

Sherrie: Oh yea, I think many will be late. But you're speaking in reference to the weather.

Estabrook: Yea.

Sherrie: Yea

Estabrook: I just, I you know, I hate to assume anything so I just wanted to give you a heads-up, but we're on top of it. Right now we're still at the hotel.

Sherrie: OK

Estabrook: We're going to get a taxi here as we watch the weather in the lobby on Intelecast.

Sherrie: Un-hum

Estabrook: But I wanted to let you know where we were and not to panic.

Sherrie: OK, well let's see. Have you had a chance to look at your [*unintelligible*]?

Estabrook: My FO is doing that downstairs right now. I'm just getting my bags.

Sherrie: OK.

Estabrook: So we will keep an eye on it and you've got my cell phone number if you have any reason to contact me.

Sherrie: Let me write that down, 230-4933

Estabrook: Correct and it's Mark

Sherrie: All right, Mark. I'll be happy to call you with any updates. But you know with the weather moving in, sometimes, with adjacent center metering, the other towers actually hear things before the dispatchers do because the center is constantly changing stuff.

Estabrook: Right.

So if you hear something and you haven't heard from me if you'd drop me an [*unintelligible*] real quick with an update.

Estabrook: I mean, you know it might be hail in Memphis when we take off from Laredo because we're going to try to time it so we get there just at the right time.

Sherrie: That would be perfect

Estabrook: It may not look good outside, but you don't have a window anyway, do you?

Sherrie: Yes

Estabrook: (Laughter) I thought they took your windows away until morale improved.

Sherrie: (Laughter) No. They were kind enough to leave us with windows, in the hopes that it would improve morale.

Estabrook: Oh, Ok. All right. Thanks, Sherrie

Sherrie: You're welcome. I'll give you a call if I hear anything.

Estabrook: All right bye-bye.

Sherrie: All right, bye.

###

4/11/2013 Ramp to Duty Officer 2:14:04 am; 4/10/13; 9:14 pm

Crook: Duty officer Mark Crook

Robert: Hello sir. I'm calling from Laredo. This is Robert at the LRD Ramp

Hey Sir, I don't know if this is the right number but the flight crew for flight 1317 hasn't shown up, and they're supposed to fly out of here in about 10 minutes.

Crook: 1317 and they haven't shown up?

Robert: Laredo to Memphis. Yea. I [*unintelligible*] the hotel but I, you know, I just barely noticed that they're not here.

Crook: OK. Hold on just a moment. Hey Mike, the 1317 crew down in Laredo hasn't shown up to the ramp and they're supposed to block in about 10 minutes.

Unintelligible (between Crook and Mike)

Crook to Mike: I don't know. The ramp is calling in now.

Unintelligible (between Crook and Mike)

Unintelligible (between Robert and someone else)

Crook: Did you call, did you try to call the Captain.

Robert: Are you asking me?

Crook: Yes.

Robert: I don't have a number for him. Do you have a number for him?

Crook: No. I'll try to call him. Give me your number at the ramp.

Robert: OK 956-523-3927

Crook: 3927. And what was your name?

Robert: Robert. Do you know what hotel they're staying at? I know they used to stay at Homewood Suites I think. It's . . .

Unintelligible (Robert to someone else)

Crook: Give me the flight number again. 1317?

Robert: Yea. 1317 Laredo Memphis.

Unintelligible (Robert to someone else)

Robert: Yea!
Crook: They're staying at the Fairfield Inn and Suites.
Robert: Fairfield.
Crook: I'll call the captain right now.
Robert: Ok. Thank you, sir.

###

4/11/2013 Duty Officer to Captain; 2:16:49 am; 4/10/13; 9:16 pm

Estabrook: Hello.
Crook: Mark, hey Mark Crook, duty officer sir. How are you?
Estabrook: Good.
Crook: Hey, are you guys at the ramp yet.
Estabrook: No we're sitting in the lobby at the hotel watching Intelecast.
Crook: Watching what?
Estabrook: Intelecast. Are you familiar with Intelcast?
Crook: Yes, I, I thought you said the broadcast
Estabrook: Oh no, no, uh, Sherrie who is working the flight she's working, what is it, 1317.
Crook: Yes.
Estabrook: She is our dispatcher and she's aware of it. I called her an hour ago and she and I are on the same page
Crook: Ok, what was the decision? What's going on?
Estabrook: We're on a weather hold. We're not going to fly through a line of thunderstorms.
Crook: OK. They put you on a weather hold?
Estabrook: No. I put myself on a weather hold. I am not going to fly though a line of thunderstorms.
Crook: OK.

Estabrook: Have you looked at the radar?

Crook: Mark, I'm very familiar with it, but you know typically, we just found out that you guys are supposed to push in 10 minutes and you're not at the ramp. So this is the first I've heard of it.

Estabrook: OK. Somebody in GOC is not talking to the woman that's working the flight. Somebody got involved and they don't know what's going on. And I made sure over an hour ago that they knew what was going on. And she agreed with me. She said there's no way.

Crook: Ok.

Estabrook: I said I know. So we're waiting for the weather to push through, and we'll, if we can, time it right, we'll arrive right as it has ended up on the east side of Memphis.

Crook: So what time are you planning to take off?

Estabrook: I don't have a time. We're watching the weather.

Crook: OK. The weather has sped up. They're expecting it to move through here about 30 minutes earlier than they expected before.

Estabrook: I'll make that determination at the ramp. But we're not, I don't see us, taking off in 30 minutes.

Crook: I didn't say take off in 30 minutes. I just told you the weather has sped up 30 minutes.

Estabrook: OK. But I want you to know that I'm on top of it and Sherrie's on top of it.

Crook: All right

Estabrook: All right. Thank you.

###

4/11/2013 Sherrie Second Conversation with Estabrook; 2:39:41 am; 4/10/13; 9:39 pm

Sherrie: GOC this is Sherrie

Estabrook: Hey Sherrie this is Mark Estabrook.

Sherrie: Yes

Estabrook: There's a lot of people that are calling me tonight panicking, doing pilot pushing and all of that crap. Do you know who started that?

Sherrie: No. I'm not sure. I know that the ramp was looking for you and they were wondering why you were late and I told them that you called and said you'd be running late, but -

Estabrook: They're calling me again on the other line

Sherrie: Ah

Estabrook: First I had crew scheduling call me and I said no we're waiting for weather in Memphis. And then a few minutes later the duty officer called me and was chewing me out saying I needed to take off. And I go, no I'm not taking off and he goes, well GOC wants to know why you're not taking off. And I said, well I talked to Sherrie over an hour ago and let her know that we were on a weather delay.

Sherrie: No, actually when you said that you were running late I was under the impression that you meant that you thought that you'd be late into Memphis. I didn't realize that you meant you were staying at the hotel.

Estabrook: Oh, well, that's what we were doing. We were just waiting for the weather, watching the radar screen.

Sherrie: And, I thought that meant that you were going to be waiting at the airport. I didn't realize you meant -

Estabrook: Yea, but then see when the duty officer continued this conversation and I told him we were on weather hold. And he says, well you're a no show at the ramp. And I go I let Sherrie know we were going to be late.

Sherrie: Right, But that didn't -

Estabrook: Well let me finish what I was saying. And then he transitions to, you need to take off and I go no I'm not going to take off. And he says, well everyone else is

taking off. You know, trying the old you know the crowd theory. You're the only one that's not taking off. And I go look I'm not [unintelligible] 50,000 feet I'm not going to climb over it, and even if I did, when I got there it would be right there in Memphis. So, I'm waiting and, you know, he wasn't too pleased with that. So that's the part of the conversation, I can understand the breakdown in communication about show time at the ramp and all that. That's not a problem. I get it. But you know trying to push the pilot to take off when he says he's not going to do it, that's just not satisfactory. And I know you; you were not like that at all. In my conversation with you, you were completely understandable, but the duty officer pissed me off.

Sherrie: I'm sorry to hear that, but unfortunately I've got another call so

Estabrook: All right Sherrie. I just wanted to make sure we're on the same page.

Sherrie: Right. Actually, I guess we kinda weren't because I didn't realize you were staying at the hotel but.

Estabrook: Well that's just a breakdown in communication. I don't have a problem with that.

Sherrie: All right, well, I'll probably talk to you later.

Estabrook: All right, bye Sherrie.

Sherrie: Bye.

###

4/11/2013 Duty Officer Voicemail (Hang-up); 2:42:41 am; 4/10/13; 9:42 pm

Your call has been forwarded to an automated voice messaging system. 90

Hang-up

###

4/11/2013 GOC Manager to Dispatcher; 2:42:50 am; 4/10/13; 9:42 pm

Sherrie: GOC. This is Sherrie

GOC Mgr.: Hey Sherrie. When you talked to that captain was it on the 8025 or was it a different phone line?

Sherrie: It was probably 8025 but he just called back.

GOC Mgr.: Oh good.

Sherrie: Yea, but you know I made it again when he asked me you know why is he being pushed to leave. I told him well

GOC Mgr.: It's his damn job, that's one thing

Sherrie: I just mentioned to him that apparently there was some sort of miscommunication because when he said he was running late I was never under the impression that meant that he would be at the hotel.

GOC Mgr.: Yea

Sherrie: And he conceded that you know that that was obvious that he wasn't you know going to be staying that he didn't say that he'd be at the hotel.

GOC Mgr.: He danced around with mark. He knows he's in the wrong.

Sherrie: Did you find it.

GOC Mgr.: No I'm still trying to find it. But he knows he's in the wrong. (*unintelligible*)

Sherrie: It was probably about an hour ago but yea it is, and now you know he's upset because he says he feels like the duty officer is trying to make him go.

GOC Mgr.: OH. Let me find that recording too. Thank you.

Sherrie: I mean just minutes ago. I was listening I was listening to him because I wasn't allowed to speak.

GOC Mgr.: Ah. Ok. We'll find that nice recording of him.

###

4/11/2013 **Captain to Dispatcher, 2:52:05 am; 4/10/13; 9:52 pm**

Sherrie: GOC this is Sherrie.

Estabrook: Hey Sherrie, this is Mark again.

Sherrie: Yes.

Estabrook: Can you send me a new flight plan coming in from the west instead of going through it and coming in from the east.

Sherrie: Yes, yes I can.

Estabrook: OK. Thanks.

Sherrie: Umhum, Bye.

###

RX-12

U.S. Department of Labor

Occupational Safety and Health Administration
Atlanta Regional Office
Sam Nunn Federal Center
61 Forsyth Street, SW Room 6T50
Atlanta, Georgia 30303
(678) 237-0400
(678) 237-0447 FAX



May 2, 2013

FedEx Express
Attn: Legal Department
3610 Hacks Cross Road
Memphis, TN 38124

RECEIVED
RISK MANAGEMENT

MAY - 3 2013

Dwayne S. Byrd
Managing Director

Re: FedEx Express/Estabrook/Case No 4-1760-13-080

Dear Sir or Madam:

The complaint in the above-captioned matter has been withdrawn from our office. With this withdrawal, the case in this matter is closed.

If at any time you have any questions or require any information regarding employee rights and employer responsibilities under the whistleblower protection statutes administered by OSHA, please feel free to contact this office by mail or telephone.

Sincerely,

Matthew E. Robinson
Regional Supervisory Investigator

RX-13

From: Cargo Pilot [mailto:cargopilot@gmail.com]
Sent: Sunday, August 04, 2013 08:00 AM
To: William McDonald
Subject: Fred Smith

Bill,

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 Bill Henrickson 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.

Mark Estabrook
C 901-230-4933
H 512-772-1605

RX-14

Phil Tadlock

From: William McDonald
Sent: Tuesday, August 06, 2013 7:56 PM
To: John Maxwell; Jim Bowman; Todd Ondra
Cc: Robb Tice; Rob Fisher
Subject: Fw: Fred Smith

Mark's response to my email.

I have not responded. Will confer with Rob to ensure that there will be a face to face meeting with Mark and Rob and Todd.

Bill

Captain William McDonald
Managing Director
System Chief Pilot
901.224.5525

From: Mark Estabrook
Sent: Tuesday, August 06, 2013 06:58 PM
To: William McDonald
Subject: RE: Fred Smith

Thanks, Bill. I placed a call to Rob this afternoon and left a message. I really wanted to fly that trip to Panama so I wish we could have talked before I got removed. But having said that, I understand why you did what you did.

If I could arrange a conference phone call with the head of corporate security and Fred, I think this could take less than 15 minutes.

Mark

From: William McDonald
Sent: Monday, August 05, 2013 2:11 PM
To: Mark Estabrook
Cc: Rob Fisher; Todd Ondra; Robb Tice; Jim Bowman
Subject: FW: Fred Smith

Mark,

I have read your email and have some concerns about the issue you raised. I would like for you to meet with your Fleet Captain, Robb Fisher, as well as the Director of Corporate Security, Todd Ondra. I will have Rob contact you to arrange this meeting. Until that time I have directed that you be removed from flight status, with pay (NOQ).

I hope that in this way we will be able to resolve your concerns.

Thanks for your patience,

Bill

Captain William McDonald
System Chief Pilot
Managing Director/Flight Operations

Office: 901.224.5525
Mobile: 901.326.4175
wwmcdonald@fedex.com

From: Cargo Pilot [<mailto:cargopilot@gmail.com>]

Sent: Sunday, August 04, 2013 08:00 AM

To: William McDonald

Subject: Fred Smith

Bill,

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 Bill Henrickson 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.

Mark Estabrook
C 901-230-4933
H 512-772-1605

**RESPONDENT'S
MOTION FOR
SUMMARY
DECISION**

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

MARK ESTABROOK,)	
)	
Complainant,)	
)	
v.)	Case No. 2014-AIR-00022
)	Administrative Law Judge Scott R. Morris
FEDERAL EXPRESS CORPORATION,)	
)	
Respondent.)	

RESPONDENT'S MOTION FOR SUMMARY DECISION

Respondent, Federal Express Corporation, files this Motion for Summary Decision as to all claims asserted by Complainant against Respondent pursuant to 29 C.F.R. § 18.72 and 49 U.S.C. § 42121. The pleadings, depositions, supporting documents and supporting declarations demonstrate that there are no genuine issues of material fact and Respondent is entitled to a decision as a matter of law. A Memorandum of Points and Authorities setting forth the factual and legal basis for this Motion has been filed contemporaneously herewith and is specifically incorporated by reference into this Motion.

WHEREFORE, Respondent respectfully requests an Order granting its Motion for Summary Decision and dismissing all of Complainant's claims against Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on April 21, 2016, Respondent's Motion for Summary Decision was filed via FedEx with Judge Scott R. Morris with the U.S. Department of Labor's Office of Administrative Law Judges and served via FedEx, upon:

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

MARK ESTABROOK,)	
)	
Complainant,)	
)	
v.)	Case No. 2014-AIR-00022
)	Administrative Law Judge Scott R. Morris
FEDERAL EXPRESS CORPORATION,)	
)	
Respondent,)	

**RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION FOR SUMMARY DECISION**

Respondent, Federal Express Corporation ("FedEx"), submits this Memorandum of Points and Authorities in support of its Motion for Summary Decision pursuant to 29 C.F.R. § 18.72, and states as follows:

I. INTRODUCTION

In April 2013, Estabrook failed to arrive at the Laredo airport by the requisite "showtime" and as a result was required to meet with his manager who wanted to figure out what happened. He was not disciplined and did not lose any pay. In August 2013, Estabrook sent an email to his manager's manager, asking him to have Fred Smith, the CEO and Chairman of the Board for the parent company of FedEx, call him to discuss "something related to 9-11." He went on to explain that he was about to go to sleep and that he shuts his cellphone off when he is sleeping. Estabrook was granted a meeting instead with his manager, a senior level manager in the Aviation Security Group and an in-house attorney. One of the concerns raised in that meeting was that Auburn Calloway, a former pilot who had been in prison for the last twenty

years had converted to Islam and therefore may be communicating FedEx secrets to Al Qaeda. Accordingly, Estabrook suggested that FedEx approach the Justice Department to plant listening devices in his prison cell. The Security manager believed those statements, together with his behavior during the meeting, were strange and out of touch, and recommended to Flight management that he be evaluated. Estabrook was evaluated by three physicians in accordance with the parties' Collective Bargaining Agreement, with one physician concluding he was not fit for duty and two physicians concluding that nothing was abnormal with his mental or emotional state and that he was fit for duty. As a result, he was returned to active flight status. Estabrook was not disciplined in any way and was paid throughout medical examination process.

The Department of Labor investigated Estabrook's claims and found no merit to them. Despite the absence of an adverse employment action or the incurrence of damages, Estabrook appealed his claim to this forum. As demonstrated in the Motion and Memorandum, there are no genuine issues of disputed facts and Estabrook's retaliation claims must be dismissed as a matter of law.

II. STATEMENT OF FACTS

A. Company Background and Policies

Federal Express Corporation ("FedEx") is an airline in the express transportation and delivery business based in Memphis, Tennessee.¹ As an airline, it is heavily regulated by various government law enforcement agencies, including the Federal Aviation Administration.

FedEx maintains a Code of Business Conduct and Ethics policy that encourages all employees to report legal or ethical violations to their manager, human resources department, legal department or through the FedEx Alert Line. [Code of Conduct, p. 2, 5, 9]. FedEx's

¹ Federal Express Corporation is a wholly owned subsidiary of FedEx Corporation.

policies also explicitly prohibit retaliation against employees who report in good faith known or suspected misconduct. [Id. p. 8].

FedEx has a Security Department with groups focused on international, domestic and aviation security. [See e.g. Ondra Dep. p. 10-12, 61-64]. The Aviation Security group works to ensure the safety and security of its employees and planes. [See e.g. Ondra Dep. p. 61-63, 70]. The Security Department also encourages employees to file Aircrew Security Reports (“ASRs”). [Yannizzi Decl. ¶ 3]. Since 2012, FedEx has received close to 1,000 ASRs. [Id. ¶ 4]. Due to the regulatory nature of the airline industry, the Federal Aviation Administration and the Transportation Security Administration dictates, evaluates and audits FedEx’s security measures. [See e.g. Ondra Dep. p. 61-63, 70; Estabrook Dep. p. 95-96].

B. The Collective Bargaining Agreement and 15D Examinations

The FedEx pilots are represented by the Air Line Pilots Association (“ALPA”). [Estabrook Dep. p. 57-58, 62; Ondra Dep. p. 21-22]. The Collective Bargaining Agreement between FedEx and ALPA, in relevant part, provides that Flight Management may direct a pilot to see the company’s aeromedical advisor, Harvey Watt & Company, if the company has a *reasonable basis* to question whether the pilot has developed an impairment to his abilities to perform his duties as a pilot. [See Collective Bargaining Agreement § 15D]. A pilot who is referred to Harvey Watt is removed from any conflicting scheduled activities *with pay* (“NOQ Status”) until the aeromedical advisor determines whether the pilot is fit for flight duty.² [Id.] Once referred, Harvey Watt may require a pilot to undergo a test, medical exam or evaluation by an aeromedical advisor or a physician they select. [Id.] FedEx pays all expenses related to this process. [Id.] If after an evaluation, Harvey Watt determines that the pilot is unfit for flight duty, the pilot may engage a second physician to evaluate his or her medical condition. [Id.] If

² NOQ status may be used in a many other situations.

the second physician disagrees with the first physician, the pilot is evaluated by a third physician or a medical review panel. [Id.] If the third physician determines that the pilot is fit for duty, the pilot is returned to active flight status and, if necessary, is made whole in terms of lost pay, sick leave or expenses. [Id.]

C. Estabrook's Employment with FedEx

Estabrook applied to work for FedEx as a pilot in April 1988. [Estabrook Dep. p. 24 and Ex. 1 thereto]. In doing so, he voluntarily agreed that he would submit to medical examinations as often as requested during his employment. [Id. p. 7, "Agreement" ¶ 6]. FedEx hired Estabrook as a pilot in 1989, and currently employs him as a Captain of A300 planes. [Estabrook Dep. p. 28].

During the relevant time period, Estabrook reported to A300 Fleet Captain Rob Fisher. [Id. p. 85-90]. Fisher reported to the System Chief Pilot Bill McDonald. [Id.] 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.³

As a FedEx pilot, Estabrook receives recurrent training from the Flight Training Department, including computer training every three to four months on such things as ethics, corporate policies, and flight systems. [Estabrook Dep. p. 45-46]. Additionally, pilots typically undergo training in a flight simulator every six months. [Id.] Pilots also must obtain and maintain a medical certificate. [Id. p. 48-54]. To maintain their certification, pilots must pass a comprehensive evaluation by an FAA-approved medical examiner every six months. [Id. p. 51-53].

³ As discussed later in this brief, Fred Smith is the CEO and Chairman of the Board for the parent company, FedEx Corporation.

In 2001, the FedEx pilots were represented by the FedEx Pilots Association (“FPA”). [Id. p. 58, 62]. During a portion of that time period, Estabrook served as the head of the security committee for the FPA. [Id. p. 62-63]. In that role, pilots would approach him with safety and security concerns and he would advocate those concerns on behalf of the pilots to the union leadership, FedEx’s management, security and legal counsel, and government officials. [Id. p. 64-68].

On or about 2001 and 2002, as the head of the FPA security committee, Estabrook raised concerns with FedEx and the FAA over the publication of real-time flight tracking data of FedEx planes by FedEx to the FAA. [Estabrook Dep. p. 66-71]. According to Estabrook, the FAA requires FedEx, as well as all U.S. airlines, to provide this tracking data of its planes to the FAA, including the planes’ position, heading, altitude, and airspeed.⁴ [Id.] The FAA then publishes that data in various forums, including providing it to certain websites. [Id. p. 69-70, 161-162]. Estabrook explained that he was concerned that terrorist could use this data published by the FAA to strategically time the detonation of bombs. [Id. p. 68].

On or about 2001, Estabrook raised this concern through face-to-face meetings with FedEx’s Flight Management and senior Security Managers. [Estabrook Dep. p. 65-66, 72, 75-77]. Additionally, on or about 2001 and 2002, Estabrook submitted written communications and had face-to-face meetings with representatives of the FAA, including the FAA Administrator. [Id. p. 66, 81-83]. Significantly, Estabrook does not allege that he suffered any form of retaliation for raising these security concerns in 2001 and 2002. Estabrook ultimately stepped down from the position as the head of the FPA’s security committee, and never voiced any additional security issues between 2002 and 2013. [Id. p. 93].

⁴ This data is distinguishable from the package tracking data FedEx publishes for its customers on its website. That data only includes certain package scans, such as delivery and pick-up scans. [Estabrook Dep. p. 68-69, 71-72]. It does not publish any flight information or flight tracking data. [Id.]

D. The Laredo Incident

Pilots are required to arrive at the airport by their “showtime,” which is one hour before their scheduled departure time. [Estabrook Dep. p. 104-105]. Once there, the pilot has the ultimate authority to determine whether it is safe to fly the plane. [Fisher Dep. p. 14-15]. Furthermore, a duty officer cannot force a pilot to fly in unsafe conditions. [Estabrook Dep. p. 123; Fisher Dep. p. 14-15, 30-31; McDonald Dep. 22-23].

In April 2013, Estabrook was the captain of a FedEx flight from Laredo, Texas to Memphis, Tennessee. [Estabrook Dep. Ex. 5]. After learning of a line of storms from Houston, Texas to Canada, and concluding that it was unsafe to fly through those storms, Estabrook made the decision to delay the flight. [Id. p. 102-103]. There was no weather in Laredo area or the area directly north of Laredo. [Estabrook Dep. p. 105-107]. Estabrook critically made this decision from his hotel and in doing so elected not to report to the Laredo airport by his requisite “showtime.” [Id. p. 102-103].

After Estabrook made the decision to delay the departure, he contacted the FedEx Dispatch Department and spoke with Dispatcher Sherrie Hayslet. [Id. p. 103, 105; Fisher Dep. p. 20-27]. He told her “I’m just giving you a heads-up, it looks like we’re going to be late tonight.” [Transcript of Audio Recordings]. He advised her that he was at the hotel getting his bag; and that he and his first officer were getting a taxi as they watched the weather in the hotel lobby. [Id.] The Dispatcher asked him to keep her updated. [Id.]

Approximately one hour later, Estabrook still had not arrived at the airport. As a result, a member of FedEx’s ramp operations at the Laredo airport contacted FedEx’s Duty Officer, Mark Crook, to inquire as to the whereabouts of Estabrook. [Id.] Crook contacted Estabrook to

determine his location and status. [Id.] Although the telephone recordings do not substantiate his allegation, Estabrook alleges Crook pressured him to depart.⁵ It is undisputed, however, that Crook could not force Estabrook to fly in unsafe conditions, and at no point did a member of Flight management instruct Estabrook to fly in unsafe conditions. [Estabrook Dep. p. 123; Fisher Dep. p. 14-15, 30-31; McDonald Dep. 22-23]. Ultimately, Estabrook went to the airport, departed Laredo and arrived in Memphis after the storms cleared. [Estabrook Dep. p. 116-117].

As a result of Estabrook's late arrival at the Laredo airport, his supervisor, Fleet Captain Rob Fisher, set up a meeting with him on May 1. [Id. at Ex. 5]. This meeting was explicitly designated as a 19D "investigatory" meeting. [Id.] Under the Collective Bargaining Agreement, a 19D meeting is not disciplinary or punitive, but rather is designed to investigate and understand a pilot's performance and conduct. [Collective Bargaining Agreement § 19; Fisher Dep. p. 15; McDonald Dep. p. 23, 28, 31]. If discipline may be warranted, the company concludes the 19D meeting and institutes 19E proceedings, which include advanced notice and a hearing. [Id.]

On May 1, Estabrook met with Fisher and they discussed the events that took place in Laredo. [Estabrook Dep. p. 102; Fisher Dep. p. 24-25]. The meeting lasted less than 15 minutes, and at the conclusion of the meeting, Fisher confirmed that it was the Captain's duty to determine if it was safe to fly, but asked Estabrook to "promise that he would show up to work on time." [Estabrook Dep. p. 113-115; Fisher Dep. p. 30-31]. No discipline was issued and Estabrook lost no pay as a result of this incident. [Estabrook Dep. p. 114, 118].

A day prior to the meeting, Estabrook filed an AIR21 complaint. [Estabrook Dep. p. 121]. However, when Estabrook realized Fisher was not planning to discipline him, Estabrook

⁵ Calls made to the Dispatch Department are automatically recorded. Estabrook claims that at least four recordings from this incident were deleted. [Estabrook Dep. p. 107-109; Fisher Dep. p. 80].

withdrew his complaint. [Id.] The OSHA investigator acknowledged the withdrawal and closed the case on May 2, 2013. [Id.; Closure of AIR21 Complaint].

E. The Fred Smith Email

On August 4, 2013, over a decade since he served in any sort of security role for FedEx, Estabrook sent an email to the System Chief Pilot Bill McDonald. [Estabrook Dep. p. 127-128, 133 and Ex. 8 thereto]. In this email, Estabrook asked McDonald to have FedEx Corporation's CEO, Chairman of the Board and founder Fred Smith call him on his cell phone to discuss "something related to 9-11." [Id.] Oddly, Estabrook mentioned to McDonald that he was about to go to sleep and that he turns his cell phone off when he sleeps. [Id.] According to Estabrook, he had been up all night reading about a "printer bomb" designated for shipment on a FedEx plane out of Yemen three years earlier in 2010, and concedes that it was possible that he had been consuming alcohol. [Id. p. 133-135].

McDonald was not sure if Estabrook was serious or whether he was joking; he thought the email was odd and unusual. [McDonald Dep. p. 56-58; Fisher Dep. p. 69]. Nevertheless, as a result of this email, McDonald set up a meeting with Estabrook, Rob Fisher, in-house counsel Robb Tice, and the Managing Director of Aviation Security, Todd Ondra. [Estabrook Dep. p. 149]. To facilitate the scheduling of this meeting, McDonald placed Estabrook on an Administrative "NOQ" status effective August 5. [Id. p. 138-139; Supp. Ans. To Int. No. 7]. The purpose and effect of this status was to clear Estabrook's work schedule to conduct this meeting and to prevent the scheduling of conflicting activities. [Supplemental Answer to Interrogatory No. 7; McDonald Dep. p. p. 60-62; Fisher Dep. p. 53; Tice Dep. p. 24].

The meeting was conducted on August 9. [Estabrook Dep. p. 149; Tice Dep. p. 30-32]. During that meeting, Estabrook mentioned something to the effect that he had chased Russians

through Europe. [Estabrook Dep. p. 21, 152-153]. Ondra's recollection, substantiated by his notes, was that Estabrook referenced "being in Europe with his father, being chased around Hungary and Russia trying to free people and was thrown in jail at the age of 18 trying to do some of those things over in Europe." [Ondra Dep. p. 54, 56, 85 and Ex. K thereto].

Estabrook then expressed concerns over the disclosure of real-time flight tracking data of FedEx planes to the FAA (the same concerns he raised to FedEx and the FAA in 2001 and 2002). [Estabrook Dep. p. 82-83, 150-151, 161-162]. He believed FedEx was not doing enough to *improve* security. [Id. p. 150-151].

Estabrook then told the group that he had heard rumors that Auburn Calloway had converted to Islam. [Estabrook Dep. p. 153-155; Ondra Dep. p. 54-57, 82-85; Fisher Dep. p. 69; Tice Dep. p. 68]. Calloway is a former FedEx pilot who attacked a flight crew with a hammer and spear gun while he was "jump seating" in April 1994. [Ondra Dep. p. 76-80]. Calloway was subsequently convicted of attempted murder, among other crimes, and has been in prison since that time. [See e.g. Ondra Dep. p. 84-85]. Estabrook feared that, solely because Calloway had converted to Islam, he may attempt to share FedEx information with Al Qaeda. [Ondra Dep. p. 82-85; Estabrook Dep. p. 155]. As a result, Estabrook suggested that FedEx approach the Justice Department to install listening devices in Calloway's jail cell. [Id.]

Finally, Estabrook suggested that FedEx create an "operations research group" within the Flight Operations Department that would be comprised of pilots and security personnel. [Estabrook Dep. p. 174].

Ondra had to exit the meeting near its conclusion. [Fisher Dep. p. 60-61]. In his absence, Robb Tice asked Estabrook if he was "Mayday Mark." [Estabrook Dep. p. 156; Tice Dep. p. 19-21; Fisher Dep. p. 61-62]. Mayday Mark is an anonymous individual who had posted comments

on a FedEx pilot blog. [Tice Dep. p. 18-19]. This individual made references on that blog that he had suffered a stroke. [Id.; Estabrook Dep. p. 156]. Estabrook stated that he was not that individual and the meeting concluded. [Tice Dep. p. 21].

At the conclusion of the meeting, with no consultation with Ondra, Fisher told Estabrook that he would return him to active flight status. [Estabrook Dep. p. 157; Fisher Dep. p. 66; Tice Dep. p. 76-77]. Ondra, however, called Bill McDonald after the meeting and advised McDonald that he had concerns with Estabrook's behavior during the meeting. [Ondra Dep. p. 57; McDonald Dep. p. 37-39]. In particular, Ondra found Estabrook's comments about chasing Russians and about Auburn Calloway to be strange. [Ondra Dep. p. 54-56, 85-86, 90-91]. He also thought the initial email requesting a meeting with Fred Smith to be strange and "out of sorts." [Id. p. 52, 85-86]. As a result, Ondra recommended that McDonald refer Estabrook for "some kind of evaluation." [Id. p. 57-58, 92-93, 96-97, 103; McDonald Dep. p. 37].

McDonald routinely relies on Ondra's advice and counsel, and therefore conveyed those concerns to Fisher. [McDonald Dep. p. 38]. Fisher acknowledged and understood Ondra's concerns and agreed that a 15D medical evaluation would be appropriate. [Fisher Dep. p. 50-51, 66-72]. Accordingly, Fisher returned Estabrook to NOQ status, and referred him to the company's aeromedical advisor, Harvey Watt & Co.⁶ [Estabrook Dep. p. 168; Tice Dep. p. 77-80; Fisher Dep. p. 48-51]. At the request of Harvey Watt, Fisher provided a statement of why he was referring Estabrook for a 15D evaluation. [Fisher Statement; Fisher Dep. p. 75-76]. In doing so, he noted the strange nature of Estabrook's August 4 email and the strange nature of Estabrook's concerns relating to Auburn Calloway, and concluded that while "he may very well

⁶ To be clear, NOQ status is a paid status. A pilot is paid as if he is operating his normal line of flying. He just does not have to do the work.

be fine. . .” “in the interest of flight safety,” he recommends Estabrook undergo “an evaluation of his fitness for duty.” [Fisher Statement; Fisher Dep. p. 69].

Harvey Watt communicated with Estabrook as well, and then referred him to Dr. George Glass who performed an evaluation. [Estabrook Dep. p. 176-177]. Based on Glass’s conclusions, Thomas Bettes, the aeromedical advisor assigned to this matter, concluded that Estabrook was not fit for flight duty. [Id. Ex. 15].

Pursuant to the Collective Bargaining Agreement, Estabrook offered conclusions from his physician, who disagreed with Glass’s conclusions. [Id. p. 178-180, Ex. 12]. Because of the conflicting conclusions, Bettes referred Estabrook to a third physician, who evaluated him and concluded that he was fit to fly. [Id. p. 188-190]. Accordingly, Bettes informed FedEx that Estabrook was fit to return to active flight status and he was returned to work, effective October 30, 2013. [Id. Ex. 18]. Pursuant to the Collective Bargaining Agreement, he was made whole for any used sick time.

Estabrook filed a second AIR21 complaint on October 3, 2013 while he was proceeding through the 15D process. [Second AIR21 Complaint]. The DOJ investigated his complaint and concluded it was without merit. [DOJ Determination]. Estabrook objected to the investigator’s conclusions, and his complaint was referred to the Office of Administrative Law Judges. [Notice of Appeal].

III. LEGAL ARGUMENT

Estabrook asserts multiple claims of retaliation under AIR21. He alleges FedEx retaliated against him for refusing to depart from Laredo in April 2013 and for raising security concerns about the publication of real-time flight tracking data in his meeting with Ondra, Fisher and Tice in August 2013. As demonstrated below, these claims must be dismissed.

A. Estabrook's Claims Are Moot

Under Article III of the Constitution, the jurisdiction of federal courts extends only to actual cases and controversies. Lane v. Roadway Express, Inc., No. 03-006, 2004 DOL Ad. Rev. Bd. LEXIS 22, *3-4 (Feb. 27, 2004). A federal court may not adjudicate disputes that are moot. Id.; see also McPherson v. Mich. High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 458 (6th Cir. 1997). Although administrative proceedings are not bound by the constitutional requirement of a "case or controversy," the Administrative Review Board has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot. Id.; see also Agee v. ABF Freight Sys., Inc., No. 04-182, 2005 DOL Rev. Bd. LEXIS 143, *4-5 (Dec. 29, 2005); United States Dep't of the Navy, ARB No. 96-185, 1997 DOL Ad. Rev. Bd. LEXIS 22, *3-5 (May 15, 1997); Thomas Sysco Food Servs. v. Martin, 983 F.2d 60 (6th Cir. 1993).

Estabrook filed his first AIR21 complaint in April 2013 and then immediately withdrew it once he determined that he would not be disciplined. Estabrook filed his second AIR21 complaint in October 2013 while he was undergoing a 15D medical exam and on NOQ status. Following that complaint, he was removed from NOQ status and returned to active flight duty effective October 30, 2013. Furthermore, it is undisputed that Estabrook was paid for the time period in which he was on NOQ status and participated in the 15D process. Consequently, Estabrook testified that he only is seeking damages for alleged emotional distress and attorneys' fees. His testimony, however, negates his emotional distress claim.

First, Estabrook testified that he was evaluated by several doctors who, based on their medical opinion, concluded that Estabrook had no mental or emotional problems. Dr. Nugent evaluated Estabrook in person in July 2013 and over the telephone in August 2013. [Estabrook

Dep. p. 178-180, Ex. 12]. Dr. Nugent did not notice anything unusual or abnormal with Estabrook, and had no concerns with his mental or emotional state. [Id.] Estabrook was examined by Dr. Leonard in August 2014, and he concluded that Estabrook had no issues with his mental or emotional state. [Id. p. 181]. Finally, Estabrook was examined by Dr. Green in October 2013, and he concluded that Estabrook was "absolutely normal." [Id. p. 188-189]. Dr. Green did not see any evidence of any abnormal mood symptoms. [Id. p. 189-190]. As a result, his doctor evaluations show no signs that he was suffering from any sort of emotional distress following his placement on NOQ and his referral to Harvey Watt for a medical exam.

Second, Estabrook testified that, during the 15D process, he agreed with his doctors that he had no problems with his mental or emotional state. [Estabrook Dep. p. 180, 181, 183-184, 190]. Of course, when specifically asked about the damages he is seeking in this case, he explained he was under stress during the 15D process, but conceded that it abated once the process concluded. [Id. p. 209, 211]. He also conceded that his aeromedical advisor was not concerned with his stress and advised him that the stress was normal. [Id. p. 209]. Indeed, he was cleared for duty by his aeromedical advisor in January 2014. [Id. p. 52].

Notwithstanding his self-serving testimony that he experience stress during the 15D process, even Estabrook testified that he did not believe he suffered from any sort of mental or emotional problem or impairment. Based on Estabrook's testimony, he cannot maintain a claim for emotional distress damages.

Other than emotional distress damages, Estabrook seeks his attorneys' fees. This claim, however, will not save his case from mootness. An "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." Lewis v. Continental Bank Corp., 494 U.S. 472, 480 (1990); Agee, 2005 DOL Rev. Bd.

LEXIS 143, *4-5 (affirming the dismissal of an appeal as moot when the complainant's only damages are attorneys' fees and expenses).

Since there is no case or controversy, Estabrook's complaint is moot and his case must be dismissed.

B. Elements of an AIR21 Complaint

Assuming, *arguendo*, that Estabrook's case is not moot, it still must be dismissed because Estabrook cannot meet his legal burdens under AIR21. Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121, prohibits discharge or discrimination against an employee because the employee provided the employer or the Federal Government information relating to any violation or alleged violation of an FAA order, regulation or standard, or a violation of any other provision of Federal law relating to air carrier safety. See 49 U.S.C. § 42121(a)(1).

AIR21 claims are evaluated under the *McDonnell Douglas* burden-shifting framework. Ameristar Airways, Inc. v. Admin. Review Bd., 650 F.3d 562, 566 (5th Cir. 2011); Peck v. Safe Air Int'l, Inc., No. 02-028, 2004 DOL Ad. Rev. Bd. LEXIS 10, *21-22 (Jan. 30, 2004). To establish a prima facie case, the complainant must demonstrate that (1) he engaged in protected activity; (2) the employer had knowledge of this activity; (3) the complainant suffered an unfavorable personnel action; and (4) the circumstances raise the inference that the protected activity was a contributing factor in the unfavorable action. Ameristar Airways, 650 F.3d at 566-67.

If the complainant demonstrates those elements, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the unfavorable employment action. Id. at 567. *The employer's burden is one of production, not persuasion.* Id. Once the employer

supplies the permissible justification, the burden shifts back to the complainant to show that the employer's explanation was pretextual and not the true reason for its unfavorable personnel decision. Id. The complainant retains the ultimate burden of persuading the trier of fact that his protected activity was a contributing factor in the personnel action. Id.

If the complainant can establish his prima facie burden and establish that the employer's legitimate, nondiscriminatory reason is pretextual, the employer still avoids liability if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B).

C. The Laredo Incident

Estabrook alleges that he refused to depart from Laredo due to storms and unsafe conditions over Memphis in April 2013, and that FedEx initiated a disciplinary action against him in May 2013 in retaliation for that decision. [Estabrook Dep. p. 191].

1. Claim Is Not Subject To Review

This discrete retaliation claim is not subject to review. Estabrook filed an AIR21 complaint on April 30 related to this incident, but withdrew that complaint on May 2. The DOL accepted that withdrawal and closed the case. [DOL Closure Letter]. Estabrook did not appeal the closure of this complaint or otherwise request a hearing within 30 days of that closure. A person seeking review of an order dismissing an AIR21 complaint must file a request for a hearing within 30 days of the DOL investigator's order. See 29 C.F.R. § 1979.106. If no timely objection is filed, the findings become the final decision of the Secretary and are not subject to judicial review. See 29 C.F.R. § 1979.106(b)(2). Since he did not timely appeal the closure of his first AIR21 complaint, it is not subject to review.

2. This Claim Is Untimely

Estabrook filed a second AIR21 complaint on October 3, 2013, in which he alleged, in part, the same retaliation claim relating to the May 1 meeting with Fisher. [Second AIR21 Complaint]. Even though his second AIR21 complaint is subject to judicial review, his retaliation claim relating to the May 1 meeting is untimely. A person who believes he or she has been discharged or discriminated against in violation of AIR21 must file a complaint within 90 days of the alleged violation. 49 U.S.C. § 42121(b)(1). Estabrook's second AIR21 complaint was filed *155 days* after the May 1 meeting and therefore is untimely. Accordingly, this discrete retaliation claim must be dismissed.

3. Complainant Cannot Establish His Legal Elements To This Claim

Even if Estabrook's retaliation claim relating to the May 1 meeting is subject to review and timely, it must be dismissed, because he did not suffer an adverse employment decision, FedEx had legitimate, nondiscriminatory reasons for its employment decisions, and FedEx would have made those decisions even in the absence of any protected activity.

First, Estabrook did not suffer an adverse personnel decision. Fisher specifically scheduled the May 1 meeting as a "19D" meeting under the Collective Bargaining Agreement. [Estabrook Dep. Ex. 5]. 19D of the agreement provides for non-disciplinary fact-finding meetings, whereas 19E of the agreement provides for disciplinary hearings. [Collective Bargaining Agreement § 19]. During this meeting, Fisher listened to Estabrook's side of the story, confirmed with him that he has the final authority on whether or not it is safe to fly, and reminded him to show up to work on time. [Estabrook Dep. p. 111-116]. The meeting took less than 15 minutes. Estabrook did not receive a disciplinary letter, lose any pay or otherwise suffer any adverse effect to any of the terms, conditions or privileges of employment. Compare West

v. Kasbar, No. 04-155, 2005 DOL Rev. Bd. LEXIS 131, *7-8 (Nov. 30, 2005) (oral or written reprimands are not adverse employment actions; job-related criticism can prompt an employee to improve his performance and thus lead to a new and more constructive employment relationship); Shelton v. Oak Ridge Nat'l Labs, No. 98-100, 2001 DOL Rev. Bd. LEXIS 23, *13-21 (Mar. 30, 2001) (oral reprimands without a tangible job consequence are not adverse employment actions; employer criticism, like employer praise, is an ordinary and appropriate feature in the workplace); Simpson v. United Parcel Serv., No. 06-065, 2008 DOL Ad. Rev. Bd. LEXIS 37, *13-14 (Mar. 14, 2008) (ARB precedents have held that warning letters do not meet the adverse action requirement of the whistleblower statutes because they do not have tangible job consequences); Agee, 2005 DOL Rev. Bd. LEXIS 143, *4-5 (a written warning is not an adverse employment action within the meaning of STAA absent evidence of a tangible job consequence).

Not only did the meeting not result in a tangible job consequence, but it did not have the effect of dissuading Estabrook from bringing future claims. Compare Burlington Northern & Santa Fe Railroad Co. v. White, 548 U.S. 53, 68 (2006) (finding that a plaintiff must show that the challenged action would have dissuaded a reasonable worker from making or supporting a charge of discrimination). Indeed, Estabrook was not dissuaded from filing additional AIR21 complaints as demonstrated by the fact that he filed one approximately three months later. As a result, the May 1 meeting with Fisher was not an adverse employment decision as a matter of law.

Second, even if the May 1 meeting was an adverse employment decision, FedEx had a legitimate, non-discriminatory reason for conducting this meeting, and would have conducted this meeting even in the absence of protected activity. It is undisputed that pilots are required to

arrive at the airport one hour before their scheduled departure time. It is undisputed that Estabrook violated that rule. His misconduct warranted a discussion with his supervisor. Compare Yadav v. L-3 Communs. Corp., No. 10-3249, 2012 U.S. App. LEXIS 2841, *10 (6th Cir. Feb. 13, 2012) (employer terminated employee not for reporting legal violation but for refusing direct orders, failing to perform his clearly assigned duties and falling below performance expectations).

Since he did not suffer an adverse employment action and since FedEx had legitimate, nondiscriminatory reasons for its employment decisions, and would have made those decisions even in the absence of any protected activity, Estabrook's retaliation claim related to the May 1 meeting with Fisher must be dismissed.

D. The Fred Smith Email

On August 4, 2013, Estabrook sent an email to Bill McDonald asking McDonald to have Fred Smith call him on his cell phone. [Estabrook Dep. Ex. 8]. This email set in motion events that form the basis of Estabrook's remaining retaliation claims. Estabrook alleges he engaged in protected activity when he refused to timely depart in Laredo in April 2013, when he filed and subsequently withdrew his first AIR21 complaint in April/May 2013, and when he raised his concerns with the publication of real-time flight tracking data. [Id. p. 191-193].

For purposes of this Motion only, FedEx does not dispute that Estabrook's alleged refusal to depart in unsafe conditions⁷ and his first AIR21 are protected activities; however, Estabrook's concerns over real-time flight tracking data was not protected activity. As he described in his deposition, Estabrook had concerns with FedEx's sharing of this data with the FAA. [Estabrook Dep. p. 67-71]. He conceded that every airline shares this data with the FAA *at the FAA's*

⁷⁷ Notably, FedEx management never challenged Estabrook on his decision not to fly in unsafe conditions. The record reflects that it only took issue with his failure to timely report to the airport.

request. [Id.] Estabrook's concern was that a terrorist could use this data to time the detonation of a bomb. [Id.] Estabrook did not raise concerns about the screening of packages prior to loading them on planes and never claimed that FedEx was violating FAA or other Federal laws relating to screening procedures. [Id.] Instead, by his own admission, he was attempting to "improve" FedEx's security measures by approaching the FAA and persuading them to stop publishing this data to third parties, including public websites. [Id. p. 150, Ex. 9, p. 1 ¶4]. Since he did not complain of a *violation* of an FAA order or regulation, or a *violation* of any Federal law relating to air carrier safety, his concerns over real-time flight tracking data are not protected under AIR21.

Assuming, arguendo, that he engaged in protected activity in April and August 2013, his remaining retaliation claims still must be dismissed. In retaliation for his alleged protected activity, Estabrook claims that FedEx retaliated against him by (1) placing him on NOQ status on August 5, 2013; (2) referring him for a 15D evaluation on August 9, 2013; and (3) shortened his flight simulator training in November 2013. [Estabrook Dep. p. 193-197].

1. Placement on NOQ Status

As an initial matter, the decision to place Estabrook on NOQ status on August 5 was not an adverse employment decision. The purpose was merely to facilitate the meeting that he requested in his August 4 email, and he was paid for his time on NOQ. [Supp. Ans. To Int. No. 7; Fisher Dep. p. 53; McDonald Dep. p. 60-62; Tice Dep. p. 24]. This action also did not dissuade Estabrook from filing a subsequent AIR21 complaint. Compare Burlington Northern & Santa Fe Railroad Co., 548 U.S. at 68.

Even if the placement on NOQ was adverse, his claim must be dismissed because he cannot demonstrate that the protected activity contributed to the adverse employment decision.

Estabrook alleges he was placed on NOQ status on August 5 in retaliation for the Laredo incident three months earlier. [Estabrook Dep. p. 193]. However, this allegation is based purely on his own personal beliefs and speculation. His only basis for this allegation is his belief that McDonald was disappointed that he was not disciplined for the Laredo incident. [Id. p. 193-194]. However, there is no record evidence that suggests McDonald was upset with Estabrook's concerns related to the danger of flying through severe thunderstorms. [See e.g. Fisher Dep. p. 20]. Instead, all of the evidence demonstrates that McDonald simply wanted Estabrook to come to work by his required showtime. [Id. p. 122]. Thus, other than his own speculation, Estabrook cannot demonstrate that he was placed on NOQ status in August 2013 in retaliation for refusing to fly in unsafe conditions in April 2013. In responding to a motion for summary decision, a complainant cannot rely on speculation, but must set forth specific facts that could support a finding in his behavior. See Alexander v. Atlas Air, Inc., No. 12-030, 2012 DOL Ad. Rev. Bd. LEXIS 95, *9 (Sept. 27, 2012).

Even if he could establish a causal connection, FedEx's decision to place him on NOQ status was legitimate and nondiscriminatory. Estabrook requested a meeting with Fred Smith to discuss "issues relating to 9-11." While acknowledging that Mr. Smith does not take such meetings, Bill McDonald agreed to schedule a meeting with Estabrook, his manager, a senior manager in the Aviation Security Group and an in-house counsel. To facilitate the scheduling of that meeting, McDonald placed him on administrative NOQ status so that flight schedules would not conflict with this meeting.

Estabrook cannot demonstrate that FedEx's reasons for placing him on NOQ status on August 5 were pretextual. It is undisputed that Estabrook requested a meeting, and that had a

flight schedule that would have prevented a meeting that week. Accordingly, to facilitate that meeting, he needed to be removed from the flight schedule (with pay).

2. 15D Evaluation

Estabrook alleges he was referred to a 15D medical evaluation because he raised concerns regarding real-time flight tracking data. [Estabrook Dep. p. 197-198]. This claim must be dismissed because he did not suffer an adverse employment decision. It is undisputed that Estabrook voluntarily agreed to submit to medical exams when requested. [Estabrook Dep. at Ex. 1, p. 7 “Agreement” ¶ 6]. It also is undisputed that the Collective Bargaining Agreement 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. Estabrook was paid during the 15D process and ultimately returned to active flight status without any loss of benefits or seniority.

Even if the 15D referral was considered an adverse employment decision, Estabrook cannot demonstrate that his protected activity contributed to the decision to refer him for a 15D evaluation. First, Estabrook previously raised the same concerns in 2001 and 2002 and was not referred for a medical examination. Furthermore, FedEx regularly receives security and safety complaints from pilots and does not retaliate against those individuals through the referral to 15D examinations. [Yannizzi Decl. ¶¶ 3-5]. These facts demonstrate that his concerns about real-time flight tracking data had no impact on the decision to refer him for a 15D medical examination.

Furthermore, Estabrook testified that he believes the decision was retaliatory because of his *personal interpretation* that FedEx was trying to ground him by sending him to a psychiatrist and his *belief* that McDonald was attempting to “get back at him” for the Laredo incident. [Estabrook Dep. p. 198]. Estabrook cannot rely on speculation to survive a motion for summary

dismissal as a matter of law See Alexander, 2012 DOL Ad. Rev. Bd. LEXIS 95, *9. Therefore, Estabrook cannot demonstrate a prima facie case and his claim must be dismissed.

Even if Estabrook could establish a prima facie case, FedEx had legitimate, nondiscriminatory reasons for its decision. Certain actions and comments by Estabrook were extremely strange. [See e.g. Fisher Dep. p. 66-72, 85]. He initially asked his *manager's manager* to have Fred Smith call him on his cell phone to discuss "issues relating to 9-11." There were several more reasonable and appropriate avenues for him to express his concerns, including directly to a member of Flight Management, Security or Human Resources. Even within his own management chain, it would have been more appropriate to share his concerns with the Fleet Captain, the Regional Chief Pilot, the System Chief Pilot, the Vice President of Flight Operations, the Senior Vice President of Flight Operations, the Executive Vice President of Air Operations or the CEO of his operating company than with Fred Smith.⁸ Moreover, in making this request for the CEO's time, he also noted that Mr. Smith should be aware of his sleeping schedule. In all respects, this request was odd.

His strange behavior was compounded when he shared concerns 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. Ondra, who specializes in aviation safety and security, believed these comments plus his physical behavior during the meeting were strange and out of touch. As a result, he recommended that Estabrook undergo "some sort of evaluation."

Even if he could establish his prima facie case and demonstrate pretext, FedEx would have taken the same action even in the absence of his protected conduct based on this strange

⁸Estabrook likely will argue that he previously reported his concerns to Flight Management to no avail. This argument is misplaced because he had not attempted to raise these concerns in more than ten years and had not approached the current Flight management team or any of its officers.

behavior. FedEx would rather be safe and send a pilot for an evaluation if there are any suspicions relating to the pilot's fitness for duty than risk a tragedy like the Calloway incident. Indeed, FedEx regularly refers pilots for 15D evaluations for a variety of safety reasons. [See e.g. McDonald Dep. p. 17-22].

Since Estabrook cannot satisfy his prima facie burdens or prove that FedEx's legitimate, nondiscriminatory reason is pretextual and that the true reason was unlawful retaliation, and because FedEx can demonstrate that it would have referred him for a medical evaluation even in the absence of his alleged protected activity, this retaliation claim must be dismissed.

3. Flight Simulator Training

Estabrook alleges that pilots returning to active flight status typically are allowed three flight simulator exercises before they are evaluated. [Estabrook Dep. p. 204-207]. In this case, the Training Department only gave him one opportunity in the flight simulator before he was evaluated. [Id.] He does not know who made the decision and cannot state whether that unknown individual knew of any of his alleged protected activity. [Id.] Nevertheless, he passed his evaluation and was returned to active flight status. [Id.] He cannot demonstrate that he suffered an adverse employment decision or that his alleged protected activity contributed to the alleged adverse employment decision. Instead, he bases this claim purely on speculation, which is insufficient to survive summary dismissal. Accordingly, this retaliation claim must be dismissed.

IV. CONCLUSION

As a matter of law, Estabrook cannot establish the essential elements of his AIR21 retaliation claims. Accordingly, FedEx's Motion for Summary Dismissal should be granted, and Estabrook's AIR21 Complaint should be dismissed in its entirety.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned certifies that, on April 21, 2016, Respondent's Motion for Summary Decision was filed via FedEx with Judge Scott. R. Morris with the U.S. Department of Labor's Office of Administrative Law Judges and served via FedEx, upon:

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**SUMMARY
JUDGMENT
DECISION**



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 FedEx² 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 status³ 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 meeting⁴; 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,

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.

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 Parcel 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 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, 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 McCuiston 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

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

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).

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*, 536 U.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 of 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

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 remainder 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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