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

Phil Seubert, Complainant, v. Federal Express Corp., Respondent.	CASE NO. 2023-AIR-00003
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COMPLAINANT’S POST-TRIAL BRIEF

I. INTRODUCTION

Captain Phil Seubert hereby files his post-trial brief in the matter of *Phil Seubert v. Federal Express Corp.* For months on end, FedEx left Captain Seubert twisting in the wind. Although he had been flying nearly all of his life, suddenly and without explanation, Captain Seubert was tethered to the ground. The professional and psychological toll exacted on a pilot kept from flying is widely understood and has been acknowledged by this Tribunal in particular. In Captain Seubert’s case, the uncertainty created by his employer had devastating consequences for his health that may prevent him from ever flying again. For those reasons, and as a matter of public policy, the decision to ground a pilot for an extended period requires a legitimate explanation. FedEx has offered no such explanation here.

In the lead-up Captain Seubert’s scheduled Section 19.E disciplinary hearing, FedEx withheld key information necessary for preparation. That withholding of information reflects both a continuation of FedEx’s campaign of retaliation and the absence of any legitimate explanation for the disciplinary process. FedEx has been forced to identify some explanation for the chain of adverse actions imposed on Captain Seubert only through litigation. The explanations it provided are inherently connected to Captain Seubert’s attempts to raise concerns regarding the accuracy of FedEx weight and balance systems. They rely on unsubstantiated reports from junior first officer (“FO”) who were actively solicited by FedEx senior management. And reflected in all of FedEx management’s decisions is a callous indifference to Captain Seubert’s safety and well-being, as well as the ultimate safety of all FedEx crews.

Captain Seubert has satisfied the elements of his prima facie case. He reported confirmed violations of Federal Aviation Administration (“FAA”) regulations. He suffered repeated and continuous retaliation, culminating in FedEx’s Section 19.E threat of termination. The causal nexus between these events is confirmed by the falsity and pretext of the explanations offered by FedEx as well as temporal proximity. Because of that same falsity and pretext, FedEx cannot establish its same-action defense by clear and convincing evidence.

Captain Seubert asks for judgment in his favor and an order imposing requested remedies.

II. FACTUAL BACKGROUND AND EVIDENCE

A. The FedEx Culture of Fear

The Tribunal held hearings in this matter on May 21-25 and June 12-13, 2024. A thick atmosphere of fear pervaded those proceedings. It was reflected in the testimony of FedEx witnesses and reinforced by the actions of FedEx’s legal representatives.

Three separate FedEx FOs testified regarding their deep reluctance to come forward about issues that allegedly jeopardized the safety of FedEx flight operations and placed their own lives at risk. (Cardona Tr. 301:11-302:7; Signaigo Tr. 647:4-15; Mihalick Tr. 766:12-767:9). One FO, overcome by either the shame of his silence or of his false testimony in this case, was reduced to tears on the witness stand. (Mihalick Tr. 761:15-762:17). Notably, management offered protection to the FOs who agreed to come forward against Captain Seubert, but offered no similar protections to Captain Seubert when he raised safety concerns. (*See* Russell Tr. 879:7-10). The inadequacies of FedEx's safety culture are well documented. FedEx provides no training on federal whistleblower protections. (Whearty Tr. 1331:8-14). This Tribunal previously condemned FedEx for their indiscriminate use of the Section 15.D process, observing that it could not help but have a chilling effect on safety culture. *Estabrook v. Federal Express Corp.*, Case No. 2014-AIR-00022 at 61 (May 16, 2017). Captain Seubert's repeated attempts to address safety issues and the causes of the adverse actions he later suffered must be measured against this backdrop.

FedEx's culture of fear was reinforced by its own legal representatives and their actions throughout the hearing. FedEx counsel directly interfered with the Tribunal's exercise of its right to question witnesses. (Whearty Tr. 1480:21-1481:21). Its corporate representative disobeyed orders from the Tribunal that the Company should not discuss trial testimony with its witnesses prior to the conclusion of proceedings. (Reeves Tr. 1589:12-1592:14) (Judge Morris: "This is on very thin ice about having the corporate representative talk to a witness during a break . . ."). Fulfilling threats conveyed by ALPA that FedEx would "go after" Captain Seubert, FedEx counsel's questioning during cross-examination forced Captain Seubert, a current employee, to invoke Fifth Amendment protections. (Seubert Tr. 329:11-17; 398:19-399:25). The Tribunal heard testimony that members of FedEx B-767 fleet management had instructed an FO to provide

false statements in the course of other proceedings. (Seal Tr. 131:2-133:19). Together, fleet management and the FedEx legal department are tasked with ensuring that the Company adheres to the contractual protections found at Section 15 and 19 of the collective bargaining agreement (“CBA”). (Graham Tr. 1130:20-1131:9; 1088:2-14; Whearty Tr. 1454:5-7; 1457:24-1459:1). Their willingness to abuse these processes was on display throughout the proceedings.

B. Complainant’s Aviation Experience

Phil Seubert is a Captain within the FedEx B-767 fleet. (Notice of Proposed Facts ¶¶ 7, 2). The position is the culmination of a lengthy and distinguished career. Captain Seubert was Fighter Aircraft Rated and Board selected for one of the first classes of undergraduate pilots to fly the B-1 for the United States Airforce, where he also served as an instructor pilot on the T38. (Seal Tr. 77:8-25; Seubert Tr. 159:5-8). In 1999, Captain Seubert began his commercial flying career at Delta Airlines where he flew the MD-88/90, B-737, B-757, and B-767. (Seubert Tr. 160:2-23). At Delta, Captain Seubert received commendations for rescuing a disabled individual during a fire at a layover hotel. (Seubert Tr. 165:25-166:18).

Captain Seubert began his employment at FedEx in 2010 as a Professional Instructor. (Seubert Tr. 162:21); *see also* Notice of Proposed Facts ¶ 4 (Apr. 14, 2023).¹ His tenure as an instructor was remarkable for the fact that none of his students ever failed a check ride. (Seubert Tr. 166:24-167:4). For his efforts, Captain Seubert was named Instructor of the Quarter and received FedEx’s Bravo Zulu Award. (Seubert Tr. 167:5-11; CX-2).

In March 2012, Captain Seubert was hired as a FedEx line pilot. (Seubert Tr. 168:21-23). As a line pilot, Captain Seubert underwent repeated check rides and recurrent training events and did not fail a single one. (Seubert Tr. 169:6-170:4). Captain Seubert flew those evaluation events

¹ Between Delta and FedEx Captain Seubert also flew DC10-30, B767/757. (Seubert Tr. 162: 18-25).

in exactly the same way that flew his daily flights. (Seubert Tr. 170:5-18). In the course of his flying career with FedEx, and his entire 45-year career as a professional aviator, Captain Seubert has never had an airspace violation, FOQA debrief, departure deviation, arrival deviation, approach deviation, clearance deviation, enroute airspace deviation, Ground Proximity Warning System (“GPWS”) event, runway incursion, limitation exceedance, hail damage event, accident, incident, violation, or negative record of any kind. (Seubert Tr. 170:23-175:11). He has never received formal discipline at FedEx or elsewhere. (Seubert Tr. 168:24-169:1; 165:23-24).

Captain Seubert’s approach to flying is informed both by his own experiences and lessons from the aviation industry. (Seubert 175:24-176:9). His father, also a pilot, died when a micro-burst pushed his aircraft down 5,000 feet into mountains below. (Seubert Tr. 178:9-21). When an adverse weather event arises in the course of a flight, Captain Seubert deviates early and generally upwind of any storm. (Seubert Tr. 176:10-177:21). In both the Air Force and at FedEx, Captain Seubert successfully addressed bird-strikes that disabled his aircraft’s engines. (Seubert Tr. 182:20-183:14). When briefing a flight with his FO, Captain Seubert adopts the most conservative plan. (Seubert Tr. 180:14-21). During the take-off maneuver in the B-767, Captain Seubert prefers a smooth rotation that guards against potential inaccuracies in flight data. (Seubert Tr. 201:1-19).

C. Report of Weight and Balance Issues

On May 31, 2021, Captain Seubert operated a trip with an initial leg of Memphis to Toluca. After landing in Toluca, he was approach by a ramp representative, who indicated that there was something Captain Seubert needed to see. (Seubert Tr. 211:20-25). The two walked to the back of the aircraft where Captain Seubert confirmed the presence of an undocumented 5,000 lbs. weight cart against the aft wall of the lower cargo hold. (Seubert Tr. 212:1-4). Under 14 CFR § 121.693, an aircraft must maintain a load manifest reflecting the accurate weight of the aircraft

including its cargo and baggage. The manifest must provide evidence that the aircraft has been loaded in a way that ensures that its center of gravity (“CG”) is within approved limits. (*Id.*) Omission of the weight cart from the load manifest constituted a per se violation of Federal Aviation Regulations (“FAR”). The specific location of the weight cart (aft) caused additional concerns. More so than a forward CG, an aft CG affects the recoverability of the aircraft. (Seubert Tr. 202:22-203:19; 204:12-22). Additionally, because of the tendency of commercial carriers to place more load in the rear of the aircraft, the margin of error for aft CG in commercial aviation is exceedingly small. (Seubert Tr. 204:18-25). The presence of an undocumented weight cart jeopardized the safety of the flight. (Zavala 385:10-16; Seubert 202:22-203:19).

Captain Seubert called the duty officer to the report the undocumented weight cart and received a chilling response – “Oh that’s been happening a lot lately.” (Seubert 212:4-15; Seubert 213:4-7). Such a cavalier statement resonated particularly with Captain Seubert. Pilots on the left seat of the B-767 have access to a pitch limit indicator on their headsup display (“HUD”) that indicates the aircraft’s proximity to a tail strike event during the course of takeoff. (Seal Tr. 108:13-109:71). While proximity to tail strike may reflect an overly aggressive rate of rotation during takeoff, it also indicates an overweight takeoff scenario, especially when combined with pitch and airspeed information. (Seubert Tr. 199:2-14; 191:7-19) (CX-41 at -401) (identifying “the wrong weights, or an incorrect center of gravity” as a tail strike risk factor). Captain Seubert had seen the pitch limit indicator reflect near tail strikes during multiple FO takeoffs, potentially reflecting inaccurate weight and balance information. (Seubert Tr. 215:10-23; 192:17-193:6). His report to the duty officer was relayed to the B-767 Fleet Chief, Captain Whearty, as well as the FedEx Chief Pilot, Captain Sebasco. (JX-B) (Sebasco Tr. 1538:16-1539:5).

The trip proceeded with a flight from Toluca to Queretaro and then from Queretaro to

Memphis. (Seubert Tr. 213:8-13). On his takeoff from Queretaro, Captain Seubert rotated to eight degrees of pitch and, although the aircraft speed exceeded V2+20, it failed to achieve lift off. (Seubert Tr. 213:8-22). Failure to achieve liftoff at that speed and pitch indicates that the aircraft is heavier than indicated on its load manifest. (Breuer Tr. 54:10-14; Seal Tr. 109:8-15; Seubert Tr. 216:7-17; Whearty Tr. 1337:22-1338:14). To correct the error, Captain Seubert froze his rotation and continued to accelerate until the aircraft achieved liftoff. (Seubert Tr: 213:18-20). After cleanup, Captain Seubert confirmed that the flight data had been entered correctly, eliminating the possibility that pilot error had caused the delayed takeoff. (Seubert Tr. 214:4-13).

Captain Seubert was scheduled to fly one more trip immediately following the Toluca and Queretaro incidents. (Seubert Tr. 1665:5-1666:15.) On returning to Memphis in early June 2021, Captain Seubert sought an in-person meeting with Captain Whearty. (Seubert Tr. 219:24-220:1). Over the course of the meeting, Captain Seubert recounted the undocumented weight cart incident and the concerning response that he had received from the duty officer. (Seubert Tr. 220:2-8). He discussed additional experiences where he believed the weight and balance information for his aircraft had been inaccurate. (Seubert Tr. 220:8-14). Specifically, Captain Seubert described his recent take-off from Queretaro to Memphis during which the pitch limit indicator showed a near tail strike, resulting in a delayed lift off. (Seubert Tr. 221:1-5). Captain Seubert shared his conclusion that the aircraft on that flight had been heavier than indicated on its load manifest. (Seubert Tr. 221:5-20). To mitigate the potential consequences of an overweight aircraft, Captain Seubert informed Captain Whearty that he always emphasized a smooth rotation to simply fly the aircraft off the runway as opposed to forcing a potentially premature liftoff, as he had demonstrated on every takeoff, including training/evaluations, throughout his 45-year career. (Seubert Tr. 221:21-222:6). Captain Whearty did not indicate that Captain's Seubert's takeoff technique

violated any FedEx manual or operating procedure, and his reaction mirrored the feedback Captain Seubert had received after every evaluation throughout his career. (Seubert Tr. 222:7-14).

Over the course of the same meeting, Captain Seubert also requested permission to use the balance of his vacation during the upcoming summer months. (Seubert Tr. 222:15-22). Captain Seubert's oldest son, Benjamin, had been tragically killed just weeks earlier, and Captain Seubert needed time to be with his family. (Seubert Tr. 222:22-25). Astoundingly, Captain Whearty resisted the request, stating that FedEx needed its pilots flying and moving freight. (Seubert Tr. 222:25-223:5). Captain Seubert ultimately secured approval for a vacation from mid-June through the end of August, when he returned to active duty. (Seubert Tr. 224:25-225:5; 1666:4-7).

D. Adverse Actions and Additional Protected Activity

Captain Seubert's next contact with FedEx fleet management occurred on December 18, 2021, when in a short telephone call, Captain Whearty told Captain Seubert that he would "be on the beach." (Seubert Tr. 225:11-20). On December 21, 2021, Captain Seubert received a phone message from Captain Whearty stating only that Captain Seubert would have to submit to a Section 15.D evaluation. (Seubert Tr. 225:23-226:3). Section 15.D of the FedEx-ALPA CBA sets forth a process whereby a pilot may be referred to an Aeromedical Examiner ("AME") who, in turn, determines the pilot's fitness for duty. (JX-A at -0234). Captain Whearty never told Captain Seubert why he had been referred to the Section 15.D process, but Captain Seubert nevertheless attended an examination by AME Dr. Fred Tilton. (Seubert Tr. 229:2-8; 230:9-17; 231:9-15; JX-B). On January 3, 2022, Dr. Tilton declared Captain Seubert fit for duty. (CX-13).

Following his initial removal from active service, Captain Seubert was placed on Not Operationally Qualified ("NOQ") status. (Seubert Tr. 226:8-18). Captain Seubert received no explanation as to why he was on NOQ nor any explanation of the limitations attached thereto.

(Seubert Tr. 315:14-20). NOQ is a commonly used designation and may be applied to pilots awaiting additional training. (Seubert Tr. 226:14-18; Seubert Tr. 228:15-19). A pilot's NOQ status is reflected on their VIPS scheduling page, which does not state the reason for nor the nature of the NOQ status. (Sebasco Tr. 1552:14-24). Captain Seubert was due for recurrent training in January 2022 and expected to come off NOQ status once he had been scheduled for and had completed the training. (Seubert Tr. 230:18-231:1; 231:20-232:1). But he heard nothing from FedEx in January. Nothing from FedEx in February. (Seubert Tr. 236:2-4).

In March 2022, Captain Seubert was invited by his friend and mentor Captain J.D. Seal to participate in a security briefing on the FedEx campus along with fellow pilots Michael Shay and Robert Shaw. (Seal Tr. 142:23-2; Seubert Tr. 315:6-13). Participant names were submitted to corporate security. (Seal Tr. 128:21-25). Like Captain Seubert, Captain Shay was designated NOQ. (Seubert Tr. 315:6-13). Prior to the meeting, Captain Seal received a call from Captain Sebasco probing him on the purpose of the meeting. (Seal Tr. 129:1-8). On the day of the meeting, all four pilot participants proceeded through the initial checkpoint on the FedEx campus, scanned their employee badges at readers by the building entrance, and proceeded to the meeting location. (Seubert Tr. 317:23-318:3). At a third checkpoint, Captain Seubert alone was stopped by armed guards and was escorted to the parking lot and then out of the campus. (Seubert Tr. 318: 3-9).

Captain Sebasco testified that he had ordered security to remove Captain Seubert from the property. (Sebasco Tr. 1523:16-20). His explanation that the removal was based on Captain Seubert's "NOQ Admin" status quickly disintegrated at trial. As the name suggests, "NOQ Admin" is a basic administrative status that has no bearing on a pilot's ability to access FedEx property. (Sebasco Tr. 1550:21-1552:3; CX-68). FedEx provided no explanation to Captain Seubert for his removal and no further directives regarding his access to FedEx property. (Seubert

Tr. 318:10-14). Nothing in March.

On April 11, 2022, Captain Seubert sent an email with an attached letter to FedEx management representatives including Captain Whearty and Captain Sebasco. (Seubert Tr. 321:10-17; 326:7-8; CX-4). The letter expressed concerns with FedEx's "non-compliance with federal aviation standards concerning weight and balance and related aircraft operations." (CX-4, -005). Captain Seubert had received no indication that FedEx was addressing the concerns he had raised in June. (Seubert Tr. 322:24-323:4). The letter again identified issues related to FedEx's non-compliance with 14 CFR § 121.693. (CX-4, -005). Captain Seubert recounted his May 2021 trip from Memphis to Toluca to Queretaro to Memphis, describing both the undocumented weight cart incident and overweight takeoff from Queretaro. (*Id.* at -005-006). He confirmed that he had discussed the incidents during a meeting with Captain Whearty. (*Id.* at -006).

Captain Seubert additionally described conversations with FedEx Instructors and Line Check pilots who advocated for a careful or slow rotation and who recommended that pilots observe a 2.5 degree-per-second rotation rate as a maximum. (*Id.*) Given that consensus, Captain Seubert again advised Captain Whearty of his technique of "rotat[ing] carefully at a uniform rate." (*Id.*) To address what he viewed as systemic non-compliance with 14 CFR § 121.693, Captain Seubert recommended modifications to the FedEx pilot training program. (*Id.* at -006-007). In answer to Captain Seubert's four-page letter documenting serious and persistent safety issues at FedEx, Captain Whearty responded with a single sentence confirming receipt. (*Id.* at -001).

Captain Seubert heard nothing from FedEx in May. Nothing in June. Nothing in July. In August, Captain Seubert received calls from ALPA representatives conveying a broad threat, "FedEx will do anything . . . including go after you for . . . taxes and call the IRS and all that." (Seubert Tr. 329:6-19). On a subsequent call, ALPA representatives raised concerns that Captain

Seubert had undergone a medical treatment while on NOQ and advised him that, because he was no longer medically fit for duty, he should go on sick leave. (Seubert Tr. 329:22-330:6).

On September 3, 2022, Captain Seubert received a box from FedEx containing a Notice of Hearing issued pursuant to Section 19.E.1 of FedEx-ALPA CBA. (Seubert Tr. 332:14-18; JX-A at -257). Dated August 8, 2022, the Notice set an August 17, 2022 date for a 19.E hearing, two weeks before Captain's Seubert had any notion that would be subject to the 19.E process. (JX-C at -001). The Notice stated that the hearing would address "non-standard procedures" Captain Seubert was alleged to have engaged in on flights occurring on six (6) dates, some over two years prior to the scheduled hearing. (*Id.*) It raised the possibility that the hearing would also address issues that occurred on other dates. (*Id.*) The hearing would determine whether there had been a violation of the "CBA, the Company's Personnel Policy and Procedures manual, the Company's Flight Operations Manual (FOM), the Company's Flight Training Manual (FTM), and relevant Federal Aviation Regulations (FARs)." (*Id.*) The Notice also came with an explicit threat: "If violations did occur, you may be subjected to discipline, up to and including termination." (*Id.*)

Prior to a Section 19.E hearing, and pursuant to the CBA, the Company must send a Notice to the pilot subject to the hearing containing a "statement of facts and specific subject matter(s)" that will be addressed along with "relevant documents." (JX-A at -0257-0258). The Notice must be sent to the pilot a reasonable amount of time prior to hearing "considering the time needed to prepare as well as the interest in concluding the matter without undue delay." (JX-A at -0257) (emphasis added). As confirmed by FedEx's 767 Fleet Chief Sidney Graham, the purpose of the Notice is to provide the pilot subject to the hearing with an opportunity to prepare. (Graham Tr. 1091:17-20). If the pilot has been accused of misconduct, the Company will identify the misconduct. (Graham Tr. 1091:21-24). And if the pilot is accused of flying in an unsafe manner,

the Company will tell the pilot what he did that was unsafe. (Graham Tr. 1091:25-1093:4).² As this Tribunal observed, there is no contractual provision that authorizes FedEx to withhold witness identities or redact documents provided with the Notice. (Whearty Tr. 1480:17-20) (“Judge Morris: So, where does it say that you can redact the information? [Section 19.E] talks about the statement, it doesn’t talk about other information. The Witness: It doesn’t, you’re right.”).³

It was impossible for Captain Seubert to prepare for the 19.E hearing with the information that FedEx included with its Notice. (Seubert Tr. 338:25-339:11). Enclosed with the Notice were the twenty-nine (29) manual sections already in Captain Seubert’s possession. (JX-C at -005-190; Seubert Tr. 336:19-20). The sections covered such amorphous topics as “Safety and Crewmember Responsibility,” “Flight Deck Authority,” and “Airplane Control.” (JX-C at -001-002). They provided no new information. Also enclosed were six (6) trip recaps, altered to remove the name of the FO assigned to the respective trip. (JX-C at -192-202; Seubert 337:20-338:5).⁴ Neither FedEx, nor any of the FOs involved in this matter, had previously advised Captain Seubert of an issue on any of the identified flights. (Seubert Tr. 337:13-19). A FedEx pilot may have multiple flights in a single day and utilizes an “unquantifiable” number of procedures. (Seubert Tr. 333:20-23; Graham Tr. 1098:15-18). Completely absent from the Notice were the “specifics,” required by CBA, that would have enabled Captain Seubert to prepare for the hearing. (Seubert Tr. 333:20-24) (“What I didn’t see in here were specifics. I didn’t see any specific statements of fact. I didn’t

² At trial, Captain Graham testified that the Notice of Hearing is intended to give a pilot a “broad brush of concerns.” The testimony is flatly contradicted by Captain’s Graham deposition testimony that the Notice of Hearing must give the pilot an opportunity to prepare and his prior deposition testimony. (CX-63 at 34:22-25 (marked for identification)) (Q: And if a pilot is accused of flying in an unsafe manner, the Company will tell him what he did that was unsafe, correct? A: As I read it, yes.)

³ Opposing counsel additionally conceded that the Company was not authorized to redact information provided with a Section 19.E Notice. (Tr. 1483:1-2) (Judge Morris: . . . Where does it say you can redact the information? Mr. Douglas: Well, it’s not in there, Your Honor.”)

⁴ The trip recaps reflect that they had were retrieved by FedEx access on May 19, 2022, after the date of Captain Seubert’s last protected activity. (JX-X at -192-202).

see any charges or any evidence to back up any of the charges. So, I had nothing to prepare with....”). Captain Whearty, at trial, confirmed that he both reviewed and signed the Notice before FedEx sent it to Captain Seubert. (Whearty Dep. Tr. 1454:1-4).⁵

After receiving the packet, on September 9, 2022, Captain Seubert sent a letter to Captain Graham describing aspects of Captain Seubert’s protected activity and suffered adverse actions. (Seubert Tr. 590:3-8; 593:16-594:3; RX-31 (marked for identification)). The letter requested suspension of the Section 19 process and resolution of outstanding issues through the Professional Standard (“Pro Stand”) process. (Seubert Tr. 600:14-602:19). Captain Seubert received no response. On October 6, 2022, Captain Seubert sent Captain Graham another letter requesting the disclosure of all relevant facts and documents prior to any further disciplinary proceedings. (Seubert Tr. 604:1-25). On October 12, 2022, Captain Graham sent a reply letter and, by way of explanation for the eight-month delay, stated that FedEx’s “initial investigation did take some time to complete.” (Seubert Tr 611:4-17; RX-33 at -2). That assertion is not supported by the trial record. FedEx provided no further information on the basis for the Section 19.E hearing.

Captain Seubert filed his initial AIR-21 OSHA complaint on October 18, 2022. *See Seubert v. Federal Express Corp.*, 2023-AIR-0003, Order Denying the Respondent’s Motion for Summary Decision, at n.2 (Jan. 25, 2024).

D. FedEx’s Campaign Against Captain Seubert

FedEx’s attempts to deprive Captain Seubert of important information, both in the Section 19.E Notice and in the eight (8) months that preceded the Notice, stand in stark contrast to its attempts to discredit Captain Seubert, which leveraged all available internal and external sources.

⁵ While Captain Whearty testified that “someone from the Labour Relations” may have made the decision to redact the Notice (Whearty Tr. 1481:24-1482:1), the testimony was contradicted by Captain Graham who confirmed that he both discussed the Notice with Captain Whearty and witnessed flight management representatives prepare the document. (Graham Tr. 1055:17-1056:19).

FO Matthew Mihalick flew three separate trips with Captain Seubert in 2021: October 5-6, October 16-17, and November 7-9. Over the course of those trips, Captain Seubert relayed his May 31 experience with the undocumented weight cart. (Mihalick Tr. 750:20-23) (Q: And Captain Seubert told you about an experience where a weight cart was on one of his flights, but wasn't [ac]counted for. A: He described something like that, yes."). Captain Seubert also relayed his experiences with takeoffs during which the plane felt "heavy." (Mihalick Tr. 751: 7-10) ("A: He described it as a feel that you get when you're trying to take the plane off the runway and you could tell if its heavy or not."). As result of these experiences, Captain Seubert stated his preference for a slow rotation. (Mihalick Tr. 751:15-17) ("Q: And he described how because of that experience, it was his preference to rotate late, correct? A: Yes.").

In the weeks that followed the trips with Captain Seubert, over the course of a layover, FO Mihalick discussed Captain Seubert's rotation technique with Captain John Russell. (Mihalick Tr. 736:23-737:3). Although he had never flown with Captain Seubert, Captain Russell indicated that he had heard of Captain's Seubert rotation technique from a FedEx duty officer. (Russell Tr. 889:17-21; Mihalick Tr. 737:1-24). Following the shared flight, Captain Russell called FO Mihalick to tell him that Captain Whearty wanted to talk to him about his experiences with Captain Seubert. (Mihalick Tr. 717:25-719:14.)

Responding to the request, FO Mihalick's call to Captain Whearty was returned by B-767 Assistant Fleet Captain Corey Franklin. (Mihalick Tr. 769:9-770:1). Over the course of the call, FO Mihalick gathered that management was already aware of Captain Seubert's rotation technique. (Mihalick Tr. 774:9-11). FO Mihalick stated that he knew FO Michael Cardona had had similar experiences with Captain Seubert. (Mihalick Tr. 774:12-14). At the request of Captain Franklin, FO Mihalick agreed to send a written summary of his alleged experiences with Captain

Seubert. (Mihalick Tr. 770:8-11; RX-12). FO Mihalick additionally called FO Cardona and conveyed that fleet management wanted to speak to him. (Mihalick Tr. 774:18-25).

FO Mihalick's written report addressed Captain Seubert's weight and balance concerns and resultant rotation technique. The mention of Captain Seubert's weight and balance concerns set off a flurry of activity at FedEx. A prior complaint filed by FO Cameron Borman, initially received and reviewed by fleet management on November 10, 2021, was resurrected. (Whearty Tr. 1389:10-15; CX-5). At the request of Captain Whearty, Captain Franklin asked for another copy of the email directly from FO Borman. (Whearty Tr. 1389:19-2; CX-6). Reviewing this complaint for a second time, the only responses from fleet management related to Captain Seubert's weight and balance concerns and rotation technique. (CX-6; CX-7).

Captain Franklin obtained a written report from FO Cardona on December 18, 2021. (CX-10). At trial, FO Cardona confirmed that he had only submitted the report at Captain Franklin's request. (Cardona Tr. 279:18-20). Like FO Mihalick, FO Cardona's report discussed Captain Seubert's rotation technique and preference for a slow rotation. (CX-10). FO Cardona testified that he did not believe Captain Seubert would face discipline for the events described in the report. (Cardona Tr. 298:19-21).

Captain Franklin was also out on the line soliciting complaints about Captain Seubert from additional FOs. On a flight with FO Joseph Chance, Captain Franklin indicated that the Company was "finally going after" Captain Seubert and that there was a plan "already in motion." (CX-65; Elliott Tr. 815:21-24). Captain Franklin asked FO Chance to put him in contact with other FOs who had flown with Captain Seubert. (CX-65). He told FO Chance, falsely, that issues with Captain Seubert had been addressed through the Pro Stand process. (*Id.*) At Captain Franklin's request, FO Chance approached FO Chad Elliott and encouraged him to contact Captain Franklin

about his experiences with Captain Seubert. (Elliott Tr. 815:25-816:1). Again, FO Elliott's written complaint addressed Captain Seubert's slow rotation technique. (Elliott Tr. 883:4-6; CX-11).

FedEx's campaign against Captain Seubert had additional internal and external components. Captain Whearty requested Captain Seubert's personnel files as well as input from B-767 Fleet Manager David DeBerry, who offered to "keep digging" through Captain Seubert's attendance records to find whatever Captain Whearty needed. (Whearty Tr. 1423:15-1424:19; CX-17; CX-18). At the request of Captain Whearty, Technical Aircraft Advisor Captain Doug Howard used his wife to obtain Captain Seubert's employment history at Delta Airlines. (Howard Tr. 1022:16-22; 1027:19-23). Captain Howard additionally put together a report summarizing the FO complaints against Captain Seubert, submitted on January 30, 2024. (CX-15). Completely absent from this process was any attempt to verify the contents of the complaints, either through objective data or by speaking directly with Captain Seubert. (Franklin Tr. 1210:13-1211:19).

During his deposition, Captain Whearty testified that he made the decision to refer Captain Seubert to a Section 19.E in May/June 2022. (CX-66 at 175). At trial, management witnesses, including Captain Whearty, testified that the decision was made at the same time as the Section 15 referral or in February 2022. (Whearty Tr. 1457:8-1459:4; 1284:12-24; Sebasco Tr. 1532:3-8). Setting aside the contradictory nature of the testimony, it is a jaw-slackening confession that FedEx knew it would send Captain Seubert to a Section 19.E, but waited over six (6) months to tell him.

III. LEGAL STANDARD

Under AIR 21, the 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. § 42121(b)(2)(B)(iii); 29 CFR § 1979.109(a)). If complainant establishes this initial burden, 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)).

IV. ARGUMENT

Captain Seubert has satisfied each element of his prima facie case. FedEx cannot demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of Captain Seubert's protected activity.

A. Captain Seubert Engaged in Repeated Protected Activity

A complainant engages in protected activity when he provides to his employer information relating to any violation or alleged violation of an FAA regulation. 49 U.S.C. § 42121 (a)(1). The Administrative Review Board has held that the complainant must also demonstrate that the reported violation was both subjectively and objectively reasonable.⁶ *Benjamin v. Citationshares Mgmt., L.L.C.*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at *12 (ARB Nov. 5, 2013) (“The fact that management agrees with an employee’s assessment and communication of a safety concern . . . is evidence that the employee’s disclosure was objectively reasonable.”). A complainant need not prove an actual violation. *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at *9 (ARB June 30, 2010).

It is undisputed that the presence of an undocumented weight cart on the March 31, 2021 flight to Toluca violated FAA regulations. The load manifest for the flight did not provide an

⁶ The Fifth Circuit has questioned the validity of the Board’s standard for protected activity as imposing requirements beyond those provided in the AIR-21 statute. *Estabrook v. Admin. Review Bd.*, 814 F. App'x 870, 873 n.1 (5th Cir. 2020).

accurate total weight and did not establish that the aircraft was loaded in manner that ensured that its center of gravity was within approved limits. It therefore violated the express requirements of 14 CFR § 121.693. FedEx's management representatives testified, although without documents substantiating the testimony, that the Company reported the violation to the FAA. (Sebasco Tr: 1539:19-1540:14; Reeves Tr. 1538:22-1539:14). Management witnesses also confirmed that the presence of an undocumented weight cart in the farthest aft section of the lower cargo hold could, in fact, pose a threat to flight safety. (Whearty Tr. 1333:7-10). Captain Seubert's report of the undocumented weight cart was both subjectively and objectively reasonable.

Captain Seubert again engaged in protected activity during his meeting with Captain Whearty in early June 2021. The meeting addressed not only Captain Seubert's report of the undocumented weight cart on the Memphis-Toluca flight, but also Captain Seubert's concerns over weight and balance issues that occurred on the Queretaro-Memphis flight. Failure to achieve liftoff under the conditions experienced by Captain Seubert on that flight indicates that the aircraft was heavier than reflected on its load manifest. (Whearty Tr. 1337:22-1338:14). Again, it is undisputed that an inaccurate load manifest violates 14 CFR § 121.693. Captain Seubert's good faith belief in the reported safety issues is reflected in the additional discussions he had both before and after meeting with Captain Whearty. Before the meeting Captain Seubert approached check airmen to discuss the problems that he had had with overweight flights. (Seubert Tr. 217:14-218:6). After the meeting, Captain Seubert discussed his experiences with FOs on assigned trips and explained that, as a result of his experiences, he preferred a careful rotation. (Mihalick Tr. 750:20-23; Mihalick Tr. 751: 7-10; Mihalick Tr. 751:15-17).

Although in the course of the June 2021 meeting, Captain Whearty raised the possibility that a pilot could request reweigh of the aircraft on landings, that option was not covered in

FedEx's pilot training programs. (Seubert Tr. 570:17-571:13; Whearty Tr. 1375:7-11) (CX-4 at -006). Moreover, post-landing reweighs did not solve the problem of how to identify and address overweight conditions during the course of the takeoff. (Seubert Tr. 325:17-326:1). Following the June 2021 meeting, Captain Seubert waited patiently, but received no indication that FedEx sought to address overweight takeoffs on a system-wide level. (Seubert Tr. 322:24-323:4).

In a letter sent on April 11, 2022, Captain Seubert elevated his concerns to a larger group of fleet management representatives. (Seubert Tr. 326:2-21). To this group, Captain Seubert recounted his experiences with the inaccurate weight and balance information and explained that an inaccurate load manifest violated 14 CFR § 121.693. (CX-4 at -005-006). He encouraged the group to address the issue on a system-wide level through training on awareness and response to overweight takeoff scenarios. (CX-4 at -006-007). Captain Seubert thus raised objectively reasonable concerns regarding FedEx's violations of FAA regulations. After receiving no response from fleet management addressing his system-wide concerns, Captain Seubert's elevation of the concerns to a broader group was subjective reasonable.

The only dispute FedEx has offered with respect to Captain Seubert's protected activity is that he should have filed an ASAP or Flight Safety Report ("FSR") in the immediate aftermath of his May 2021 trip. Participation in the ASAP program is voluntary. *See* 14 CFR Part 193. It cannot be used both as both a shield for employers and a sword against whistleblowers. (Morris Tr: 14:5-7). Captain Seubert testified at trial that his past participation in the FedEx ASAP program had produced minimal results. (Seubert Tr. 208:21-210:16). FedEx's policy on FSRs states that reports to the duty officer are "the preferred method of notification for an event that is a significant threat to safety," and Captain Seubert understood that his report of the weight cart event to the duty officer, as a significant threat to flight safety, was all that was required. (Seubert

Tr. 430:12-19) (RX 56). Captain Seubert testified that he believed reports to the duty officer would be forwarded to the FAA and FedEx safety department. (Seubert Tr. 434:20-435:9). At no point did FedEx contact Captain Seubert to tell him that he must complete an FSR for the undocumented weight cart event. (Seubert Tr. 221:21-222:6; Reeves Tr. 1628:22-1630:12). FedEx Managing Director of Safety Scott Reeves confirmed that the absence of an FSR did not prevent an investigation into the event. (Reeves Tr. 1632:6-1633:10) (CX-69).

B. Captain Seubert Suffered Multiple and Continuous Adverse Actions

The Board has held 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.” *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003 at slip op. *17 (citing *Williams v. American Airlines*, ARB No. 09-018, slip op. at 10-11 n.51 (Dec. 29, 2010)). It 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 has further observed that “even paid administrative leave may be considered an adverse action under certain circumstances.” *Id.* at 14 (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998)). This Tribunal has found that both a pilot’s placement on NOQ and referrals to a medical evaluation may constitute adverse actions. *See Petitt v. Delta Air Line, Inc.*, 2018-AIR-00041, slip op. *71 (ALJ Dec. 21, 2020); *Estabrook*, 2014-AIR-00022, slip op. *51.

The Tribunals’ Order Denying Respondent’s Motion for Summary Decision found that FedEx’s referral of Captain Seubert a Section 19.E Disciplinary hearing constituted a timely adverse action under the AIR-21 statute. *See Order* at 4 (February 25, 2024) (“Accordingly, the

Tribunal finds that the Notice of Preliminary Hearings was an adverse action.”). FedEx, at trial, offered no evidence to rebut the Tribunal’s conclusion. The Order additionally found that Captain Seubert’s other suffered adverse actions were “intertwined” with the Section 19.E referral so as to constitute relevant evidence of retaliation. *Id.* The multiple and continuous adverse actions suffered by Captain Seubert are briefly identified below.

Captain Seubert was been on NOQ since December 18, 2021. (Whearty Tr. 1346:1-10). His income has been significantly reduced as a result of the designation. (Seubert Tr. 359:20-360:8). He has not been able to attend recurrent training or remain current. (Seubert Tr. 237:4-17). On December 21, 2021, Captain Seubert was referred to a Section 15.D evaluation with no cogent explanation for the referral. (Seubert Tr. 229:2-8; CX-13). In March 2022, Captain Seubert was denied access to FedEx property with no legitimate explanation, and in fact, no explanation at all. (Sebasco Tr. 1550:21-1552:3; Seubert Tr. 318:10-14). On September 3, 2022, Captain Seubert received letter from FedEx, dated August 8, 2022, referring him a Section 19E hearing where he would face potential discipline. (Seubert Tr. 332:14-18; JX-C).

C. Captain Seubert Has Satisfied the Contributing-Factor Standard

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, ALJ No. 2008-STA-52, slip op. at 5 (ARB Jan. 31, 2011). The Board has observed “that the level of causation that a complainant needs to show is extremely low” and that an ALJ “should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.” *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ Case No. 2014-FRS-154, slip op. at 15 (ARB Sept. 30, 2016). ALJs may rely on circumstantial evidence in terms of satisfying the contributing factor test because direct evidence of a retaliatory motive is

“rare.” See *Armstrong v. Flowsolve US, Inc.*, ARB Case No. 14-023, ALJ Case No. 2012-ERA-017, slip op. *7 (ARB Sept. 14, 2016). “Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent applications of employer’s policies, shifting explanations for its action, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. *7 (ARB Feb. 29, 2012).

i. Direct Evidence of Causation

A respondent’s admission that protected activity was a factor in an employment decision is direct evidence of causation. *Dick v. Tango Transport*, ARB No. 14-054; ALJ No. 2013-STA-060, slip op. 28 (ARB Aug. 30, 2016) (finding direct evidence of causation where communications cited by respondent as the basis for its employment decision contained protected and unprotected subject matter); see also *Thorstenson v. BNSF Ry Co.*, ARB Nos. 2018-0059, 0060, ALJ No. 2015-FRS-00052, slip op. at 10 (ARB Nov. 25, 2019) (“[A]n ALJ may find that an adverse action and protected activity are intertwined such that contributing factor causation is factually established.”).

FedEx baldly asserts that the reports submitted by FOs Mihalick, Cardona, Elliott, and Borman precipitated the chain of adverse actions suffered by Captain Seubert. But reflected in those reports are Captain Seubert’s concerns about FedEx’s inaccurate weight and balance systems – the exact same concerns that Captain Seubert raised to FedEx management on multiple occasions. The statements of FO Cardona and FO Elliott both identify Captain Seubert’s preference for a slow, deliberate rotation. At trial, Captain Whearty conceded the connection between Captain Seubert’s rotation technique referenced in the FO complaints and his weight-and-balance concerns. (Whearty Tr. 1362:19-23). FO Mihalick’s report goes further, recounting

specific conversations with Captain Seubert about the latter's weight and balance concerns. At trial, Captain Whearty also confirmed his understanding that the FO reports generally repeated Captain Seubert's concerns over FedEx weight and balance calculations. (Whearty Tr. 1362:14-18) (Q: Do you recall that that issue was addressed in the first officer reports, that Captain Seubert had concerns with FedEx weight and balance calculations? A: I recall them making anecdotal statements, yeah, that he opined about that, yes.”)

Although opaque, the Section 19.E Notice stated that the hearing would address “non-standard procedures” alleged to have occurred on Captain Seubert's trips. (JX-D). With hindsight, it is clear that those “procedures” included Captain Seubert's weight and balance concerns. Captain Whearty testified to his expectation that Captain Seubert would have raised his weight and balance concerns over the course of the Section 19.E hearing. (Whearty Tr: 1308:20-23); (Whearty Tr. 1362:24-9) (Q: So, in terms of Captain Seubert's justification for his slow rotation, you expected him, at the 19E hearing to discuss his concern with FedEx's weight and balance system, is that right? A: . . . I would have asked him why he was doing that, and ask him to explain his methodology and thought process for delaying rotation well beyond VR, and see where the information took us.”). The testimony also reflects FedEx's misguided safety culture wherein a pilot is expected to criticize operational practices while also defending his continued employment.

ii. Falsity of Explanation

“[T]he appropriate inquiry in an initial examination of the respondent's reasons is whether the complainant has proven any of them false or insufficient to explain the challenged action.” *Majali v. Airtran Airlines*, ARB Case No. 04-163, ALJ Case No. 2003-AIR-045, slip op. *35 n.15 (ARB Oct. 31, 2007); *see also Menefee v. Tandem Transport Corp.*, 2008-ST-00055, slip op. *8 (ALJ Jan. 7, 2009) (“An employee can demonstrate pretext by showing that the proffered reason:

(1) has no basis in fact, (2) did not actually motivate the defendant’s challenged conduct, or (3) was insufficient to warrant the challenged conduct.”).

a. The Section 19.E Hearing Would Have Focused on Captain Seubert’s Weight and Balance Concerns

Captain Whearty testified that it was a “culmination” and a “theme throughout the [FO] statements” that prompted the series of adverse actions against Seubert. (Whearty Tr. 1279:4-8). That testimony is contradicted by the record. Not only were Captain Seubert’s weight and balance concerns a focus of the Section 19.E hearing, his concerns would have been the focus of the hearing. Throughout its campaign against Captain Seubert, FedEx remained fixated on his weight and balance concerns and the rotation technique he employed to mitigate those concerns.

FedEx dismissed complaints by FOs that did not address the issue of Captain Seubert’s rotation technique, such as the one submitted by FO Borman. Captain Franklin received FO Borman’s complaint on November 10, 2021. (CX-5). There is no record of any communication between Captain Franklin and FO Borman, or any other FO, for over a month after Captain Franklin received the complaint. Captain Franklin acknowledged that, based FO Borman’s account, he did not have concerns that Captain Seubert posed a threat to flight safety. (Franklin Tr. 1183:18-1184:12). He additionally testified that FO Borman gave him the names of the other FOs who Captain Franklin then contacted and who submitted additional complaints against Captain Seubert. (Franklin Tr. 1156:1-11). To a man, all the identified FOs testified that they did not know FO Borman. (Mihalick Tr. 694:2-22; Cardona Tr. 255:23-256:3 Elliott Tr. 792:22-24).

Instead, fleet management’s response to the FO reports focused exclusively on Captain Seubert’s weight and balance concerns. Responding to the second version of FO Borman’s report, Captain Whearty asked Captain Franklin whether FO Borman had addressed Captain Seubert’s rotation technique. (CX-6). Captain Franklin responded that while FO Borman had not addressed

the rotation technique, FO Mihalick had provided contacts, and speculated that maybe those FOs would have something to report on that issue. (*Id.*) Also at the request of Captain Whearty, Captain Franklin wrote back to FO Borman on December 21, 2021, and posed two questions: “Did [Captain Seubert] rotate after you called ‘rotate’? Or talk about the weight and balance system?” (Franklin Tr. 1189:21-24) (CX-7). FO Borman could not provide additional information on Captain Seubert’s weight and balance concerns and received no further follow-up.

b. Captain Seubert’s Weight and Balance Concerns and Rotation Technique Were Not Legitimate Disciplinary Issues

For months prior to the Section 19.E referral, FedEx was aware of both Captain Seubert’s weight and balance concerns and related rotation technique, but did nothing. Captain Seubert addressed both his weight and balances concerns and his rotation technique in the course of his June 2021 meeting with Captain Whearty. He did not receive any indication that either his concerns or technique were inappropriate or grounds for discipline. FO Mihalick testified to his understanding that, at the time of his December 2021 call with Captain Franklin, fleet management was already aware of Captain Seubert takeoff technique. (Mihalick Tr. 774:9-11). Captain Seubert raised the same issues in his April 11, 2022 letter to fleet management. If Captain Seubert’s stated approach to flying was dangerous or even incorrect, Captain Whearty had an obligation to immediately correct the issue. Captain Whearty’s only response was an acknowledgment of receipt. The delay between FedEx’s knowledge of Captain Seubert’s concerns and rotation technique and the Section 19.E referral shows that those issues were not legitimate explanations for the referral or for the discipline threatened in the Section 19.E Notice.

c. FedEx Has Offered Shifting Explanations for Its Adverse Actions

In an attempt to justify the delay in setting Captain Seubert Section 19.E hearing, Captain Graham’s October 12 letter cited the length of the initial investigation. (RX-33 at -2) (“[T]he initial

investigation did take some time to complete.”) Contradictorily, Captain Whearty testified that no investigation occurred after February 2022, six months before FedEx issued the 19.E Notice. (Whearty Tr. 1460:6-9). Captain Whearty even suggested that no “investigation” had occurred prior the hearing and that FedEx would have used the Section 19.E process to conduct its investigation. (Whearty Tr. 1290:14-19). It is patently absurd that FedEx would wait eight (8) months to schedule a hearing, and then further delay the hearing to complete its investigation. Captain Whearty blamed COVID for the delays in scheduling the hearing, before conceding that COVID was an issue throughout the relevant time period. (Whearty Tr. 1291:17-1293:16; 1357:4-8). He also confirmed his general apathy to the consequences of a Captain Seubert’s prolonged NOQ status. (Whearty Tr. 1357:9-1358:1). Additionally, Captain Whearty sought to use ALPA as an excuse for the delayed Section 19E hearing, although he acknowledged that he had no idea if ALPA’s actions produced the delay. (Whearty Tr. 1359:12-20). FedEx’s shifting explanations for the delayed Section 19.E hearing establish that its explanations are false.

If FedEx had legitimate concerns regarding Captain Seubert’s conduct and performance, it could have addressed those concerns much earlier and without resorting to the disciplinary process. The alternatives included additional training, Pro Stand, and a Section 19.D investigation. Captain Whearty testified that he had opted to use the Section 19.E disciplinary process because it provided Captain Seubert with additional “protections.” (Whearty Tr. 1294:2-16). The FOs would have “go[ne] on record . . . transcribed.” (*Id.*) Captain Seubert would have been represented by ALPA and could have paused the hearing at any point. (Whearty Tr. 1295:18-20).

Captain Whearty’s explanations, however, for selecting the Section 19.E process are demonstrably false. The FOs were not informed that they would have to testify at Captain Seubert’s Section 19.E hearing. (Cardona Tr. 298:11-14; Whearty Tr. 773:18-20; Elliott Tr.

838:20-23). They would not have “gone on record.” Furthermore, a FedEx pilot is entitled to ALPA representation during the alternative, non-disciplinary Section 19.D process. (Whearty Tr. 1348:25-1349:2). As the Tribunal remarked, nothing prevented Captain Whearty from denying a future request to pause the Section 19.E hearing. (Whearty Tr. 1298:10-23). FedEx repeatedly abused Section 19.E requirements that provide for an expedited hearing and notice to the pilot of the claims against him. The requirements found at Section 19.E only provide “protections” if the Company adheres to those requirements.

d. The Underlying FO Reports Did Not Provide a Basis for Discipline

In addition to the plain falsity of FedEx’s explanations, the FO reports that allegedly precipitated Captain Seubert’s suffered adverse actions are, on their face, non-credible. The reports allege that Captain Seubert’s actions during the various trips were unsafe. Yet, despite universally confirming their familiarity Safety Management System (SMS) requirements, the FOs waited weeks, months, and sometimes years to reports the alleged unsafe events. (Cardona Tr. 274:8-13; Mihalick Tr: 712:4-11; Elliott Tr: 881:12-17). The FO reports allege that Captain Seubert engaged in fast taxiing, unannounced course and speed deviations, and under-rotated takeoffs.⁷ Captain Seubert was not advised with respect to issues on any of his flights, by either the FOs, fleet or safety management, Air Traffic Control, or the FAA. (Seubert Tr. 339:6-11). Captain Seubert has repeatedly demonstrated his techniques and professional abilities in the course of multiple line check and recurrent training over the course of many years. He has not failed a single evaluation event. (Seubert Tr. 169:6-170:18). Disingenuously, fleet management credited the isolated, alleged experiences of junior FOs above the expertise of its own training department.

The FO reports contain a series of unsupported complaints with the way that Captain

⁷ The FO reports never specified an unannounced course or flight path change, and no violations occurred for such and unauthorize change.

Seubert conducted his flights, which at trial, fleet management acknowledged could not have formed the basis for discipline. Management conceded that FedEx pilots regularly use profanity and discuss politics in the cockpit. (Franklin Tr. 1181:14-22). There is no requirement that a captain meet the FO in a designated location before the flight. (Graham Tr. 1006:8-12). Pilots are not required to fly through the flight director. (Graham Tr. 1096:18-24). A captain can designate the completion of the write up to the FO. (Graham Tr. 1097:3-6).

iii. Withheld Explanations

Board precedent provides that an adverse inference may be drawn against the legitimacy of respondent-proffered rationales where those rationales were not provided at the time of the adverse personnel action. *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010). In the instant matter, Captain Seubert heard not a word from FedEx from December 2021 through September 2022. The Company withheld its rationale for placing Captain Seubert on NOQ, for referring him to a Section 15.D process, for removing him from FedEx property with armed guards, and for referring him to the Section 19.E process. What explanation Captain Seubert did receive by way of the Section 19.E Notice lacked the details necessary for Captain Seubert to understand the rationale for the referral and that would have allowed him to prepare for the Section 19.E hearing.

iv. Inconsistent Application of Employer Policies

If the FOs had legitimate disputes with Captain Seubert, by established practice, FedEx was obligated to refer those disputes to the ALPA Pro Stand committee rather than the Section 19.E process. (Seubert Tr. 601:4-602:19) (“A: That is what it normally does.”). Captain Franklin, in fact, forwarded FO Borman’s complaint to the Pro Stand representative because he believed that the issue could be addressed through that process. (Franklin Tr.1224:25-1225:3; CX-58). He

could not explain why the complaint was not resolved through Pro Stand. (Franklin Tr. 1225: 4-8). FO Elliott testified that he was advised by senior pilots to raise his issues with Captain Seubert through Pro Stand and, in fact, attempted to contract Pro Stand before abandoning the process because “life got busy.” (Elliott Tr. 799:19-801:8). ALPA’s code of ethics requires pilots to first raise issues to the Union before going to the Company. (RX-23-14).

Even assuming that Captain Seubert was eligible for referral to a Section 19.E process, FedEx failed to adhere to the contractually mandated procedures. The FedEx-ALPA CBA acknowledges that the hearing should be conducted “without undue delay.” (JX-A at -257). Captain Seubert’s hearing was delayed by up to eight (8) months. A Section 19.E Notice must provide adequate details that allow a pilot to prepare for the hearing. (Graham Tr. 1091:21-1093:4). No such details were provided to Captain Seubert. The Notice contained vague accusations that Captain Seubert engaged in unspecified, non-standard procedures over a non-exhaustive list of dates. FedEx impermissibly redacted the documents that it did provide with the Section 19.E Notice. (Whearty Tr. 1480:17-20). Those deviations from standard practices and policies are evidence of pretext.

v. Increased Scrutiny of Captain Seubert

An employer’s “hyper focus” on an employee in the wake of protected activity demonstrates its intent to find pretext for later adverse actions. *March v. Metro-North Commuter Railroad Co.*, ARB Case No. 2021-0059, ALJ Case Nos. 2019-FRS-00032, 00035 (January 21, 2022) (holding that respondent’s change in attitude and “hyper focus” on the complainant supported the ALJ’s finding of causation); *Riddell v. CSX Transportation, Inc.*, ARB Case No. 2019-0016; ALJ Case No. 2014-FRS-00054 (affirming ALJ’s finding of causation where respondent manager approached employees “seeking statements against [c]omplaint” only after

complainant engaged in protected activity).

Searching for a pretext by which to retaliate against Captain Seubert, FedEx looked under every rock. Captain Whearty first ordered a review of Captain Seubert's personnel files and attendance records and inappropriately sought Captain Seubert's employment history at Delta. (Whearty Tr. 1423:15-1424:19; CX-17; CX-18) (Howard Tr. 1022:16-22; 1027:19-23). Those documents had no bearing on whether Captain Seubert deviated from standard procedures on trips identified in the Section 19.E Notice. Instead, the requests reflect that Captain Whearty was "digging" for a pretext to discipline Captain Seubert. Captain Whearty asked Captain Franklin to obtain written statements each FO that he contacted. (Whearty Tr. 1400:1-5). Not content to collect evidence through passive means, Captain Franklin also personally and directly soliciting statements from FOs. (Elliott Tr. 815:25-816:1). Captain Franklin confirmed the Captain Whearty oversaw these efforts to collective evidence. (Whearty Tr. 1179:23-1181:11).

FedEx's approach to Captain Seubert's case was markedly different from the way that it had investigated other complaints made by FOs against their Captains. At trial, FedEx management witnesses identified two other Captains, Dale Mancusco and Jason Campbell, who had been the subject of FO complaints. (Franklin Tr. 1222:15-25). Responding to the Tribunal's Discovery Order, dated October 6, 2023, requiring the production of correspondence and documents concerning contemplated discipline against these Captain, FedEx confirmed that no such documents existed. (Tr. 1218:18-1220:7; 1220:8-1222:12); *see also Order Granting in Party Complainant's Motion to Compel Discovery*, 2023-AIR-00003 (Oct. 5, 2023). No written statement had been collected from these FOs. No Section 15.D or 19.E referrals were issued. With respect to Captain Campbell, Captain Franklin testified that no efforts were made to identify if other FOs had complaints against the captain. (Franklin Tr. 1220:1-7). He additionally testified

that management had contacted Captain Campbell directly to address the complaints. (Franklin Tr. 1219:7-14). FedEx provided no such opportunity to Captain Seubert.

vi. Animosity Toward Complainant

A change in employer's attitude following an employee's protected activity supports a finding of causation. *March*, slip op. *23. Personally hostile statements or actions by managerial personnel also demonstrate retaliatory animus. *Melendez v. Exxon Chemical Americas*, ARB Case No. 96-051, ALJ Case No. 93-ERA-00006, slip. op. *81 (ARB July 14, 2000).

Fleet management exhibited consistent hostility towards Captain Seubert in the wake of his protected activity. In the same meeting where Captain Seubert raised his weight and balance concerns to Captain Whearty, Captain Whearty resisted Captain Seubert's request to use vacation time following the death of his son. (Seubert Tr. 222:25-223:5). Fleet management appeared gleeful at the prospect of Captain Seubert's pending disciplinary hearing and rejoiced when Captain Seubert ultimately went on medical leave to address his worsening sleep disorder. (CX-19). Captain Graham joked to Captain Whearty that if he had received Captain Seubert's Section 19.E Notice he would have crapped his pants. (*Id.*) On August 8, 2022, Captain Whearty and Captain Graham were advised by email that Captain Seubert's Section 19.E Hearing would be canceled. (CX-20). In response, Captain Graham wrote to Captain Whearty, "You are off the hook brother!! You think he will ever be back?" Captain Whearty speculated to Manager DeBerry that ALPA had advised Captain Seubert to go on sick leave to avoid his upcoming hearing, even though Captain Seubert had not received the 19.E Notice at the time he went on leave. (CX-21).

vii. Temporal Proximity

Although in deposition, Captain Whearty testified that the decision to refer Captain Seubert to a Section 19.E process had been made in May/June 2022, at trial, management witnesses

alternatively testified that the decision was made either in December 2021, at the same time as the Section 15 referral, or in February 2022. (Whearty Tr. 1457:8-1459:4; 1284:12-24; Sebasco Tr. 1532:3-8). Even should the Tribunal accept the legitimacy of this changed testimony, it does not help FedEx avoid the issue of causation. Captain Seubert engaged in confirmed protected activity on May 31 and early June, 2021, at most ten (10) months before FedEx's claimed decision.⁸ Captain Seubert's April 11th protected activity is also temporally proximate to his actual receipt of the Section 19.E Notice, the contents of which deviated from contractual requirements, and the continued delay in scheduling the Section 19.E hearing.

The consensus in whistleblower cases is that temporal proximity of up to ten (10) months is sufficient to raise an inference of causation. *See Folger v. SiplerGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-42, slip op. at p. 5, n.10 (Feb. 18, 2016) (citing, with approval, appellate case law indicating that 8-10 month gap sufficient to establish causation); *Brown v. Lockheed Martin*, ARB No. 10-050, ALJ No. 2008-SOX-049 (ARB Feb. 28, 2011) (ten months temporal proximity was circumstantial evidence of causation); *Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-036 (Sec'y Apr. 7, 1992), *rev'd on other grounds sub nom. Ebasco Constructors, Inc. v. Martin*, 986 F.2d 1419 (5th Cir. 1993) (seven to ten months temporal proximity sufficient to raise inference of causation). Temporal proximity calculations may be tolled where, as was the case for Captain Seubert in summer 2021, an employee is absent from work for an extended period. *See Helgeson v. SOO Line Railroad Company*, 2016-FRS-84, slip op at *47 (ALJ Apr. 25, 2019).

⁸ Although Captain Seubert did not receive the Section 19.E Notice until September 2022, the Tribunal has found that "Respondent cannot simply wait until after the 90-day period has run and then seek protection from the Act because it takes adverse action against an employee for events that would otherwise be protected. Allowing otherwise would be contrary to the purpose of the Act." *Seubert*, 2023-AIR-0003, Order Denying the Respondent's Motion for Summary Decision, at 5 (Jan. 25, 2024).

The relevant decisionmakers also knew about Captain Seubert’s protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) (requiring complainant demonstrate temporal proximity and knowledge before a tribunal may find causation). Both Captain Whearty and Captain Sebasco—who ordered the removal of Captain Seubert from FedEx property—were aware of Captain Seubert’s report of the undocumented weight cart. (JX-D). Captain Seubert met with Captain Whearty about his weight and balance concerns. Captain Whearty ultimately took responsibility for the Section 15.D referral, Section 19.E referral, and Captain Seubert’s placement on NOQ. (Whearty Tr. 1457:1-7). Having established temporal proximity and knowledge, Captain Seubert has carried his burden to prove causation.

D. FedEx Cannot Establish its Same-Action Defense

Although Captain Seubert has established his case by a preponderance of evidence, AIR 21 provides, “[r]elief 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. § 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*, slip op. at *11; *Palmer*, ARB No. 16-035, slip op. at 52. Where an employer offers shifting explanations for its adverse action, 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 v. Vieques Air Links, Inc.*, ARB No. 04-021 slip op. at 8 (Dec.30, 2004); *Douglas v. SkyWest Airlines, Inc.*, ARB Nos. 08-070 and 08-074 (Sept. 30, 2009); *see also Clemmons*, ARB No. 08-067, slip op. at 11 (finding that the ALJ’s credibility determinations and “factual findings regarding temporal proximity, pretext, and shifting

defenses . . . preclude any determination that [the employer] could establish by clear and convincing evidence that it would have fired [the complainant] absent his protected activity”).

By FedEx’s own admission, Captain Seubert’s weight and balance concerns and resultant rotation technique formed a core reason for the adverse actions suffered by Captain Seubert. (Whearty Tr. 1396:1-12) (“The late rotation technique was a question I had, because I thought that was one of the most concerning things that I had read”). Not only are Captain Seubert’s concerns reflected in the FO reports, but they also were a focus of management’s subsequent investigation. The direct evidence that Captain Seubert’s concerns precipitated later adverse actions precludes a successful same-action defense.

With respect to the Section 19.E referral in particular, FedEx has offered shifting explanations for when decision was made, the reasons for the delay in issuing the Section 19.E Notice, and why it withheld key information necessary to Captain Seubert’s hearing preparation. Although FedEx had non-disciplinary methods by which to address issues with pilot conduct and technique, in Captain Seubert’s case, FedEx opted for discipline. The explanation offered for the Section 19.E referral are both implausible and ultimately relate back to Captain Seubert’s protected active. Circumstantial evidence also precludes FedEx’s same-action defense.

V. Damages

A. Compensatory Damages

AIR 21 and its implementing regulations permit an administrative law judge to award compensatory damages for emotional distress, defamation of character, inconvenience and the like. 49 U.S.C. § 42121(b)(3)(B)(iii); 29 C.F.R. § 1979.109(b). The ARB has upheld awards of such compensatory damages based on a complainant’s own account of his suffering. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, ALJ No. 2006-AIR-22 (ARB June 30, 2009); *Negron*

v. Vieques Air Link, Inc., ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004).

From December 18, 2021, to September 3, 2022, FedEx left Captain Seubert twisting in the wind. He received no explanation on why he could no longer fly for the Company. Increasingly isolated, in March 2022, Captain Seubert was removed by FedEx property by armed guards, treated like a criminal. (Seubert Tr. 344:9-18). The removal was witnessed by Captain's Seubert's close colleagues. (Seal Tr. 128:12-17; Seubert Tr. 425:6-25).

FedEx was also taking steps to ensure that he could never getting a piloting job at another major airline. At the request of Captain Whearty, Captain Howard used his wife to obtain Captain Seubert's employment history at Delta Airlines. (Howard Tr. 1022:16-22; 1027:19-23). Sarah Howard was formerly a fleet manager at Delta and "knew all the players." (Howard Tr. 950:18-21; 953:10-14). As Captain Howard confirmed, professional jet pilots are a "small community" where reputation plays a role obtaining advancement opportunities. (Howard Tr. 985:9-16; 986:15-250). Captain Howard told his wife that, based on his investigation, he believed Captain Seubert was acting in an unsafe manner. (Howard Tr. 1020:21-1022:1). His discussions with his wife, as non-employee, violated FedEx Privacy Policy. (Howard Tr. 1019:20-25; CX-26).

At Captain Howard's request, Sarah Howard contacted a two fleet captains at Delta, Bill Thurber and Rich Kaynor. (Howard Tr. 1023:24-1024:13; 1025:8-12; CX-16). In an ominous email back to Sarah Howard with a subject line "Fed Ex Instructor Phil Seubert Mystery Solved," later forwarded to Captain Howard, Delta employees confirmed that Captain Seubert had not been an instructor in the Delta training department. (CX-16). The obvious subtext of the exchange is that FedEx was pursuing a disciplinary investigation against Captain Seubert, potentially for falsifying employment history.⁹ Given the small nature of the piloting community, it is certain

⁹ Seubert's preemployment records were readily available to FedEx management. Even a cursory review would have revealed that Captain Seubert's has never claimed to have been a Delta Instructor. That

that Captain Seubert employment prospects will wither as employers are informed of FedEx's unfounded allegations against him.

When the Section 19.E notice did eventually come, it confirmed that the process would be a sham. Faced with a blanket accusation that he had done something wrong in the course of trips covering a two-years span, there was absolutely no way for Captain Seubert to prepare for the hearing. (Seubert Tr. 338:25-229). The prospect of participating in the hearing process was undeniably traumatic. Captain Graham testified that he did no doubt that the prospect of the hearing would be extremely stressful for Captain Seubert and had the potential to cause significant health issues. (Graham Tr. 1111:13-17). As the Tribunal observed, pilots “spend years and years and years scratching and clawing their way” to positions like those held by Captain Seubert. (Morris Tr: 908:21-909:3). Captain Seubert began flying as a boy and slowly made his way up through the aviation ladder. (Seubert Tr. 159:13-165:15). To be hired at FedEx meant that you were the “cream of the crop.” (Whearty Tr. 1244:10-1245:12; Sebasco Tr. 1553:24-1554:2). The Section 19.E notice expressly threatened to end Captain Seubert's career, while still at its peak, and simultaneously denied Captain Seubert an opportunity to defend himself.

The months of uncertainty exacted a physical toll on Captain Seubert. His sleep began to deteriorate in March 2021 following the expulsion from FedEx property. (Seubert Tr. 343:18-24; 344:9-18). His body weight, which for years had remained steady, suddenly shot up by thirty-five (35) lbs. (Seubert Tr. 343:10-17; 343:25-344:3). In an April 14, 2022 visit to Dr. Reshma Shah, Captain Seubert stated that he was only sleeping three (3) hours a night and that the issue was exacerbated by job stress. (CX-42 at -326). To treat Captain Seubert's chronic insomnia, Dr. Shah prescribed 2mg/day of Lunesta. (Seubert Tr. 345:7-10; CX-42 at -325). Captain Seubert went to

management instead opted to conduct its investigation by sharing Captain Seubert's confidential information with third parties shows the animosity harbored against Captain Seubert.

a follow-up appointment with Dr. Shah on September 6, 2022, and his prescription for Lunesta was continued. (CX-42 at -324). On October 5, 2022, Captain Seubert had a third appointment with Dr. Shah. (CX-42 at -320). Treatment notes describe Captain Seubert's increasing insomnia and its connection to his placement "on the disciplinary pathway with Fed Ex." (*Id.*). In her review of symptoms, Dr. Shah confirmed the presence of anxiety and insomnia. She increased Captain Seubert's Lunesta prescription to 3mg/day. (*Id.* at -321). Captain Seubert testified to his continued compliance with Lunesta, but confirmed that his insomnia persisted through the present date. (Seubert Tr. 348:4-22). Use of the Lunesta prescription precludes Captain Seubert from holding the First Class Medical necessary for commercial pilots. (Seubert Tr. 345:18-22)

Captain Seubert also pursued costly and invasive procedures in an attempt to mitigate his damages and eliminate any physical conditions that could exacerbate his insomnia. In June 2022, Captain Seubert underwent a surgery to improve his ability to breathe through his nose. (Seubert Tr. 349:16-350:21; CX-43 at -379). He underwent allergy testing, immunotherapy, sleep studies, and obtained a CPAP machine, all in an effort to improve his sleep. (Seubert Tr. 352:3-11; CX-43). Because he could not tolerate the CPAP machine, Captain Seubert also obtained a custom mouth guard to address his sleep apnea. (Seubert Tr. 353:4- CX-44). Captain Seubert testified that he had never had sleep apnea prior to FedEx's adverse actions. (Seubert Tr. 354:10-13).

FedEx's acts of retaliation have destroyed Captain Seubert health, career, and reputation. (Seubert Tr. 370:2-10). For that reason, he seeks \$10,000,000 in compensatory damages.

B. Back Pay

An award of back pay must completely redress the economic injury, and therefore should account for salary, including any raises which the employee would have received, sick leave, vacation pay, pension benefits, and other fringe benefits that the employee would have received

but for the discrimination. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983). There is no fixed method for computing a back pay award; calculations of the amount due must be reasonable and supported by evidence, but need not be rendered with “unrealistic exactitude.” *Ass’t Sec’y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-STA-14, ALJ No. 2003-STA-36, slip op. at 5-6 (ARB June 30, 2005). Any ambiguity is resolved against the discriminating employer. *Rasimas*, 714 F.2d at 628.

Captain Seubert provided the estimate of his damages including back pay, as of the date of the damages submission required by 29 CFR § 18.50(c). (CX-45; Seubert Tr. 368:22-369:1). A pilot’s basic salary is a function of his flight hours multiplied by his hourly rate. Captain Seubert’s conservative estimate is that he would have had approximately 1,250 credit hours in each year of employment until his mandatory retirement in 2030, with an additional 174 hours of paid vacation time. (Seubert Tr. 360:1-3). The FedEx-ALPA CBA provides for increasing hourly rates for each additional year of service. (JX-A at -0036; Seubert Tr. 360:4-25). Based on Captain Seubert’s estimated credit hours and years of service, his expected salary for each year between 2022 and 2030 is as follows— 2022: \$454,441.12; 2023: \$459,638.72; 2024: \$464,950.24; 2025: \$468,424.80; 2026: \$473,095.52; 2027: \$477,837.44; 2028: \$477,837.44; 2029: \$477,837.44; 2030: \$477,837.44. Through the end of 2023, Captain Seubert had received \$490,738.45 in wages, reflecting contractually required NOQ and disability pay. (CX-39; RX 53).¹⁰ Captain Seubert currently receives \$191,750.00 in annual disability pay. (RX-53). Assuming that Captain Seubert remains on disability through 2024, he will have lost \$696,521.63 in net wages.

At trial, the Tribunal found that Captain Seubert was not entitled to pay associated with his

¹⁰ Captain Seubert’s 2022 FedEx W-2 reflects a topline wage of \$241,566.78. (CX-39). Captain Seubert transitioned to disability pay in September 2022. (Seubert Tr. 358:17-21). His 2022 Hartford W-2 reflects a topline wage of \$57,441.67. (RX-53). Captain Seubert’s 2023 Hartford W-2 reflects a topline wage of \$191,750.00. (RX-53).

anticipated selection as an instructor or check airman even though Captain Seubert had previously served in a instructor position at FedEx. (Seubert Tr. 366:4-13; 162:7-163:6). Those positions receive up to \$250,000 in additional annual compensation. (CX-45). The Tribunal also indicated that it could not award damages associated with Captain's Seubert lost pension benefits in the absence of expert testimony. (Seubert Tr. 367:9-17). Captain Seubert respectfully requests that the Tribunal reconsider its determinations or reopen the record to allow for a complete exposition of Captain's Seubert damages.

C. Front Pay

Front pay, which is money for future lost compensation as a result of discrimination, may be an appropriate substitute for promotion or reinstatement in certain circumstances. *Doyle v. Hydro Nuclear Servs., Inc.*, 89-ERA-22, slip op. at 2-3 (ARB Nov. 26, 1997). It may be an appropriate substitute when the parties establish the impossibility of a productive and amicable working relationship, or where reinstatement is not possible. *Id.* In pilot AIR-21 cases, this Tribunal has awarded front pay until the date of the complainant's 65th birthday in amounts "no lower than the highest salary" paid to employees of the same rank and fleet type. *Petitt*, 2018-AIR-00041, slip op. *106 (ALJ Dec. 21, 2020).

Captain Seubert, as a direct result of FedEx's campaign of retaliation, has developed chronic sleep issues that preclude him from holding the First Class Medical Certificate required for commercial pilots. (Seubert Tr. 345:18-22). He has been deprived of his profession. Even should he recover from his disability, complete all necessary re-training, and return to the line, his employment relationship with FedEx has been irreparably damaged. FedEx has ignored Captain Seubert's reported safety concerns, and to return to flying for FedEx would require Captain Seubert to place his life in the hands of same people who denigrated his concerns. FedEx has already

demonstrated a manifest disregard for his well-being, both because it allowed him to needlessly suffer through fear and uncertainty for eight (8) months and because FedEx, as foretold by ALPA, made clear at trial that it would “go after” Captain Seubert for any reason or no reason at all. Captain Seubert therefore requests front pay in the amounts identified in his 29 CFR § 18.50(c) submission or such greater amounts as may result from a renegotiated CBA or an increased mandatory pilot retirement age.

D. Attorneys’ Fees and Costs

AIR 21 provides that a prevailing complainant is entitled to be compensated for aggregate amount of all costs and expenses (including attorneys’ and expert witness fees) reasonably incurred. 49 U.S.C. § 42121(b)(3)(B)(iii). Pursuant to the Tribunal’s directive, Captain Seubert’s submission of attorney’s invoices and litigation costs has been deferred until after a decision on the merits has been made. (Morris Tr.1722:24-1723:1).

E. Affirmative Relief

Captain Seubert requests that this Tribunal order FedEx to: refrain from retaliation against him in any form in response to his protected activity; disseminate the Tribunal’s decision to every executive and employee by email; and post a copy of an OSHA AIR 21 informational bulletin in each/every pilot crew room and on its pilot intranet system. Such affirmative relief is necessary to prevent the ongoing threat to Captain Seubert arising from FedEx’s hostility to his protected activity, and, consistent with public policy, will inform others of their rights and protections against retaliation under the law. Furthermore, such requested relief is necessary to correct the pervasive fear of retaliation among FedEx pilots, reflected in the testimony of multiple witnesses, which undeniably threatens aviation safety.

Respectfully submitted on:

Date: October 4, 2024

By: /s/ Samuel A. Seham

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CERTIFICATE OF SERVICE

A copy of the foregoing document was electronically served on this date to:

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