October 17, 2002
James W. Johnson
Supervisory Attorney
Air Line Pilots Association, International
535 Herndon Parkway
PO Box 1169
Herndon, Virginia 20172-1169

Re: FedEx Pilots Association Request for Clarification Concerning PIC Authority

Dear Mr. Johnson:

This letter is in response to the February 6, 2002, letter sent to David G. Leitch, Chief Counsel of the Federal Aviation Administration (FAA), from Captain David Webb, President of the former FedEx Pilots Association (FPA). We are directing our response to you since the FPA is now a member of the Air Line Pilots Association (ALPA).

I. The Issue

The FPA asked that the FAA "confirm" that a pilot-in-command's (PIC) "authority to protect the integrity of the flight deck extends to denying permission to passengers to be seated aft of the flight deck if the PIC determines in good faith that their carriage presents an unacceptable risk to either the safety or security of the flight." Letter from Webb to Leitch at 2. It appears from statements made by Captain Webb in his letter that the FPA believes a PIC should have unfettered discretion to deny passage of a person that will be seated aft of the flight deck if the PIC believes that person poses a risk to the flight. In other words, FPA asserts (1) a pilot has sole authority over who rides in the aircraft's cabin; (2) a PIC essentially is unfettered in the exercise of this authority; and (3) if a PIC exercises such authority, his or her determination is not subject to review if questioned.

A flight deck is separated by a bulkhead door or a flight crew compartment door. See Letter from Donald P. Byrne, Assistant Chief Counsel, Federal Aviation Administration, to Captain David Webb and J. Mark Hansen, Federal Pilots Association (July 17, 2001).

II. Analysis

A. A PIC does not have Limitless Authority

1. Authority over the Flight Deck versus the Cabin

As discussed in the series of correspondence from the FAA to the FPA and the ALPA, if a situation involves 14 CFR § 121.547(a)(3) or (a)(4),[2] a PIC has unfettered discretion to determine whether to admit certain people to the flight deck.[3] The PIC's decision to deny permission for certain people to enter the flight deck cannot be second-guessed without undermining the safety underpinnings for having a "PIC-permission-provision" in the regulations. The FPA now seeks FAA concurrence that the authority provided to a PIC under § 121.547(a)(3) and (a)(4) extends aft of the flight deck. No such authority exists. In fact, the FPA did not cite any section of the federal regulations that directly addresses a pilot's authority regarding passenger admission to the aircraft's cabin. Section 121.547 only applies to the flight deck, and there is nothing in the regulatory text or its history that suggests that a pilot's authority under this section, or any other section for that matter, is to be extended to allow a PIC to deny someone passage on a flight when seated aft of the flight deck with the same unfettered discretion a PIC has for most people who seek to enter the flight deck.

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[2] Section 121.547(a) states:

> (a) No person may admit any person to the flight deck of an aircraft unless the person being admitted is
> (1) A crewmember
> (2) An FAA air carrier inspector, or an authorized representative of the National Transportation Safety Board, who is performing official duties;
> (3) Any person who —
> (i) Has permission of the pilot in command, an appropriate management official of the part 119 certificate holder, and the Administrator; and
> (ii) Is an employee of
> (A) The Unites States, or
> (B) A part 119 certificate holder and whose duties are such that admission to the flight deck is necessary or advantageous for safe operations; or
> (C) An aeronautical enterprise certificated by the Administrator and whose duties are such that admission to the flight deck is necessary or advantageous for safe operations; or
> (4) Any person who has the permission of the pilot in command, an appropriate management official of the part 119 certificate holder and the Administrator.
> Paragraph (a)(2) of this section does not limit the emergency authority of the pilot in command to exclude any person from the flight deck in the interests of safety.

3 See Letter from Donald P. Byrne, Assistant Chief Counsel, Federal Aviation Administration, to Captain David Webb and J. Mark Hansen, Federal Pilots Association (July 17, 2001); and Letter from Donald P. Byrne, Assistant Chief Counsel, Federal Aviation Administration, to James W. Johnson, Supervisory Attorney, Air Line Pilots Association (April 2, 2002).

The United States Code provides that "an air carrier . . . may refuse to transport a passenger or property the carrier decides is or might be inimical to safety." 49 USC §44902(b). Further, the Department of Transportation's (DOT) regulation under 14 CFR § 382.31(d) states that

> Carrier personnel, as authorized by 49 USC 1511, 14 CFR 91.8,[4] or 14 CFR 121.533, may refuse to provide transportation to any passenger on the basis of safety, and may refuse to provide transportation to any passenger whose carriage would violate the Federal Aviation Regulations. In exercising this authority, carrier personnel shall not discriminate against any qualified individual with a disability on the basis of disability and their actions shall not be inconsistent with the provisions of this part. In the event that such action is inconsistent with the provisions of this part, the carrier shall be subject to remedies provided under Sec. 382.65.

Given the FPA's recitation of the language under § 44902(b), i.e., "denying admission to passengers in circumstances the captain, in good faith, believes is inimical to the safety of the flight is within his or her regulatory authority," it is clear that the FPA is familiar with this statutory provision. Letter from Webb to Leitch at 7 (emphasis added). However, we note that the FPA makes only passing reference to this key provision. *See id.* at 8, n.2. It appears that the FPA seeks to have the FAA declare that a PIC can deny someone admission to the passenger cabin and that the PIC's actions cannot be questioned. As case law reflects and as discussed more thoroughly below, there is no room to extend the authority granted to air carriers under § 44902(b) to pilots in the manner that the FPA suggests. Specifically, a determination to deplane a passenger must be reasonable and is subject to review if necessary, by, among others, the carrier itself or a court.

2. Section § 44902 of the Federal Aviation Act does not give a Pilot Unfettered Discretion

The language under § 44902 grants authority to "air carriers" to refuse transportation to a passenger. The courts recognize that the air carriers generally exercise that authority through their pilots. For instance, the United States Court of Appeals for the Ninth Circuit in *Cordero v. Cia Mexicana de Aviacion* held that the following jury instruction was correct: "An airline is justified in refusing to transport a

passenger if that transportation in the opinion of the airline **and, that again, means pilot,** would be inimical to the safety of the flight." 681 F.2d 669, 671 (9th Cir. 1982) (emphasis added). One could surmise that the basis for the allowance is practical application – if a passenger does present a threat, then the pilot, being on-the-scene, is best able to make a timely decision.

While a pilot's exercise of the air carrier's authority to determine whether or not a passenger should be asked to leave an aircraft in the interest of safety is consistent with case law, there is no legal precedent for a pilot's unfettered discretion in exercising this authority on behalf of the air carrier. The air carrier, and thus the pilot, is required to make a reasonable decision based on the facts presented. "The test of whether or not the airline [pilot] properly exercises its power under 49 USC § [44902] to refuse passage to

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Refer to 14 CFR § 91.11 instead.

an applicant or ticket-holder rests upon the facts and circumstances of the case as known to the airline [pilot] at the time it formed its opinion and made its decision, and whether or not the opinion and decision is rational and reasonable in the light of those facts and circumstances." *Cordero,* 681 F.2d at 672. The courts recognize that air carriers require broad discretion in making a finding that a passenger is or might be inimical to safety. *Schaeffer v. Cavallero,* 54 F. Supp. 2d 350, 352 (D. S.D.N.Y. June 30, 1999). Hence, an air carrier is only liable for damages if the decision to eject a passenger is arbitrary and capricious. *Id.* The courts, however, are clear in their opinion that there is a statutory standard, and "to say that anytime an impolite or unpleasant passenger debates a non-safety issue with an airline employee in a boisterous or abusive manner, he automatically poses a potential threat to safety would be in effect to set no meaningful limits to the carrier's exercise of its discretion and thus to eliminate the statutory standard altogether." *Id.*

There are several examples where it was held that a pilot acted in an arbitrary and capricious manner in removing a passenger on grounds of safety. For instance, in *Schaeffer v. Cavallero,* a passenger was told he could not bring two pieces of carry-on luggage. He relinquished one of the bags under protest but vociferously demanded a baggage receipt. In response to his verbal protests, he was asked to leave the plane. The court held that a reasonable juror could find that the pilot acted in an arbitrary and capricious manner in removing the passenger on grounds of safety risk when all he had done was loudly protest a non-safety matter. *Id.* In another example, the U.S. Court of Appeals for the Ninth Circuit held a jury might have concluded that the pilot acted unreasonably in excluding a passenger from the flight when the passenger was not provided an opportunity to present his side of the story. *Cordero,* 681 F. 2d 669.

In conclusion, it is apparent that a pilot exercising the air carrier's authority can refuse to transport a passenger if that passenger acts in a manner that raises legitimate questions as to whether he or she pose a risk to the safety of the flight. The decision to ask that passenger to leave an aircraft, however, must be reasonable and may be questioned and reviewed. If it is found to be arbitrary or capricious, liability can attach.

B. Doors

In a related matter, the FPA discusses regulatory

developments associated with strengthening flight deck doors. The FPA's concerns stem from Federal Express' proposal to restore cabin seating privileges to all entitled company employees and business passengers[5] without implementing all the security measures required for passenger planes. The FPA seems to suggest that unless Federal Express retrofits the flight deck doors and, among other things, develops policies for opening, closing and locking of the flight deck doors, pilots should have the authority to refuse to fly passengers that would be seated aft of the flight deck.

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s When the FPA refers to "business passengers," we assume each of these persons falls within § 121.583(a).

The FAA determined that the threat [of using a cargo aircraft as a weapon of mass destruction] is similar to that of passenger airplanes. 66 Fed. Reg. 51546 (Oct. 9, 2001). Thus, under the Flight crew Compartment Access and Door Designs final rule (SFAR 92-3), the FAA requires that all-cargo airplanes that have flight deck doors as of January 15, 2002, must modify flight deck doors by April 2003 in compliance with the rule to improve security. 67 Fed. Reg. 2112 (January 15, 2002). Under 14 CFR § 25.795, the flight deck door installation must be designed to resist intrusion by any person who attempts to enter the flight deck by physically forcing his or her way through the door.

It is our understanding that Federal Express aircraft currently have flight deck doors with a bolt mechanism, and the company fully intends to retrofit these doors by April 2003 as required by the Flight crew Compartment Access and Door Designs final rule. With flight deck doors in place, there is nothing that prevents the company from granting passage aft of the flight deck to certain persons defined in 14 CFR § 121.583(a). A PIC — acting on behalf of the air carrier — can only deny a person a seat aft of the flight deck if he or she reasonably determines that the person is or might be inimical to safety as provided under 49 USC § 44902(b). It would be inconsistent with this statutory provision for the FAA to issue a rule authorizing a PIC to deny a passenger admission to the passenger cabin for any reason or for no reason whatsoever.

As to the outstanding concerns outlined in the FPA's February 6, 2002, letter to the FAA, e.g., no approved procedure for sharing FAA or company security directives with the PICs and no procedure for securing the flight deck door when a crew member leaves the flight deck, we forwarded the FPA's letter and this •resp onseto tI*Transportation Security Administration's Principal Security Inspector assigned to oversee FedEx's security program for consideration.

We trust this letter is responsive to the inquiry.- This letter was prepared by Komal K. Jain, Attorney-Advisor, Office of the Chief Counsel, reviewed by Joseph Conte, Manager, Operations and Air Traffic Law Branch, Office of the Chief Counsel and

coordinated with the Air Transportation Division of Flight Standards Service.

Sincerely,

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Assistant Chief Counsel Regulations Division