Frederick W. Smith
Founder and Executive Chairman

942 South Shady Grove Road
Memphis, TN 38120
Telephone 901.818.7577
Fax 901.818.7570
fwsmith@fedex.com

FedEx Corporation

April 11, 2023

The Honorable Bernie Sanders
Chairman, Committee on Health, Education, Labor, and Pensions
U.S. Senate
332 Dirksen Building
Washington, D.C. 20510

Re: FedEx Express and The Railway Labor Act

Dear Chairman Sanders:

On March 8, 2023, the Senate Health, Education, Labor, and Pensions committee held a hearing titled "Defending the Right of Workers to Organize Unions Free from Illegal Corporate Union Busting." Witnesses submitted written testimony, including references to FedEx, which misrepresented our business and the policy considerations of the Railway Labor Act (RLA). I would like to take this opportunity to correct the record and provide you and the committee with accurate information regarding the historical basis for the RLA and FedEx's status under the statute.

In written testimony submitted to the Senate HELP committee, International Brotherhood of Teamsters President, Sean O'Brien, referred to an "express carrier loophole" in the RLA which "FedEx has exploited" to "deny rights to its employees." Mr. O'Brien's comments are not only defamatory, but also reflect a fundamental misunderstanding of the RLA which has successfully balanced the interests of employers and labor for nearly 100 years. Federal Express Corporation d/b/a FedEx Express is properly classified under the RLA as both an air carrier and an express company. Contrary to his assertion, the express company designation is not a "loophole," but rather, has been a feature of the RLA since the statute's inception in 1926 in recognition of the integral role express companies play in the national economy. FedEx Express's actions under the RLA are supported by decades of federal agency and court decisions which establish that FedEx Express is properly classified.

A Brief History of the Railway Labor Act

The RLA plays an essential role in ensuring that the nation's transportation system functions in an orderly fashion. The country's railroads, airlines, and express companies are vital to the economy, and the RLA is designed to "avoid any interruption to commerce" by providing for the

"prompt and orderly settlement of all disputes" between carriers and their employees.[1] In an industry that FedEx Express pioneered, there remains a compelling need for the "arteries of commerce" to flow freely just as Congress envisioned when it enacted the RLA in 1926.

Significant labor disputes in the transportation industry in the late 19th century prompted the need for federal legislation. Hundreds of strikes involving small groups of employees systematically shut down entire rail systems. In response, Congress sought to balance the need for resolving labor/management differences with the protection of the country's economy, by ensuring that national transportation systems could not be disrupted by local work disputes.

Following the Great Railroad Strike of 1877,[2] when federal troops were used to maintain order, Congress began to consider proposals to prevent debilitating strikes. These efforts led to passage of various labor laws designed to avoid disruption of railroad networks (the Arbitration Act of 1888, the Erdman Act (1898), the Newlands Act (1913), the Adamson Act (1916) and the Transportation Act of 1920). All of these statutes were ultimately unsuccessful due to inherent weaknesses in their dispute resolution processes, but the major features of the RLA can be traced to these early laws.

While Congress was debating and passing various labor laws, it also passed the Act to Regulate Commerce (subsequently The Interstate Commerce Act or ICA) in 1887 to pursue the wholesale regulation of rail carriers. By 1906, through various amendments, the ICA specifically defined common carriers, for purposes of Interstate Commerce Commission (ICC) jurisdiction, to include "express companies."

Express companies have been in existence since the 1830's,[3] and by the late 1800's, express company operations were fairly uniform. The companies employed messengers, who picked up from shippers small but often valuable packages, many of which required special handling, transported them along passenger rail or steamboat lines, and delivered them directly to consignees. The messengers carried the packages much as passengers would carry baggage, and railroads generally set aside space for express shipments. Express companies thus established themselves as an integral complement to rail and other long-haul services, but also undertook direct point-to-point pickup and delivery services using their own conveyances.

In 1917, the federal government took control of the nation's railroads to coordinate their operation in response to the U.S.'s involvement in World War I. That consolidation led to the formation of the American Railway Express Company (American Railway), which combined the

---

[1] The Railway Labor Act, 45 U.S.C. §151

[2] Frank N. Wilner, *The Railway Labor Act and the Dilemma of Labor Relations* 10 (1991). The strike began in 1877 when the railroads cut wages by 10% during a depression that started in 1873 and caused massive unemployment. During the strike, approximately two-thirds of the country's rail mileage was out of service and 200 people were killed, and 1,000 injured.

[3] *See Memphis & Little Rock R.R. v. Southern Express Co.,* 117 U.S. 1 (1885).

seven then-operating express companies.[4] In 1926, when Congress passed the RLA, the term "express company" was commonly understood to mean the expedited pickup and delivery network operated by American Railway and was consistent with the ICC's interpretation of "express company."[5] That definition included expedited transportation of packages, with special handling and delivery to the consignee.

Congress's inclusion of "express companies" under the RLA was done deliberately and with the clear intent of preventing debilitating strikes which could devastate the economy and financially injure the public. Congressional decision-making on this issue was not accidental, and certainly does not constitute a "loophole" that requires a remedy. The inclusion of airlines under the RLA in 1936 further illustrates Congress's recognition that avoiding strikes in key interstate network industries is imperative to protecting the nation's economy.[6] That laudable Congressional goal remains as important now as it was in the early 20th century.

The Railway Labor Act's Coverage of FedEx Express is Proper and Undisputed

Despite Mr. O'Brien's insinuations, FedEx Express and its employees are properly covered by the RLA as both an air carrier and an express company. FedEx Express operates the world's largest all-cargo airline with over 600 aircraft, picks up and delivers in every zip code of the U.S., and serves customers in 220 countries worldwide. As an air carrier with a fully integrated air and ground network, FedEx Express, and all its employees, are covered by the RLA, a status which has been consistently reaffirmed by federal agencies, and courts.[7] The fact that FedEx Express operates trucks and employs couriers does not destroy its status as an air carrier. As one U.S. Court of Appeals has noted,

> The trucking operations of Federal Express are integral to its operation as an air carrier. The trucking operations are not some separate business venture; they are part and parcel of the air delivery system. Every truck carries packages that are in interstate commerce by air. The use of the trucks depends on the conditions of air delivery. The

[4] *See In Re: REA Express, Inc.,* 412 F.Supp. 1239, 1245 (E.D. Pa. 1976).

[5] Frank Wilner, *RLA or NLRA? FedEx and UPS Follow the Money Trail*, The Federal Lawyer, January 2010 at p. 44.

[6] The passage of the National Labor Relations Act in 1935 further indicates that Congress carefully considered what labor law to apply to air carriers and determined that the young air industry should be covered by the RLA.

[7] Federal Express Corp. and its employees have consistently been determined by the federal courts, the National Mediation Board, and the National Labor Relations Board to be subject to the RLA. *See e.g.*, *Chicago Truck Drivers, Helpers and Warehouse Workers Union v. National Mediation Board*, 670 F.2d 665 (7th Cir. 1982); *Federal Express Corp*., 323 NLRB 871, 872 (1997); *Federal Express Corp*., 23 N.M.B. 32 (1995). On the record statements by various lawmakers also indicate a uniform understanding that FedEx Express is covered by the RLA as an "express company." See, 142 Cong. Rec. S12171, 12179, 12225 (Oct. 2-3, 1996) (Statements of Sens. Feingold, Kennedy, Boxer).

> timing of the trucks is meshed with the schedules of the planes. Federal Express owes some of its success to its effective use of trucking as part of its air carrier service.

Federal Express, Corp. v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991). (emphasis added)

In addition to RLA coverage as an air carrier, FedEx Express has also, since its inception, been covered by the RLA as an "express company." Coverage for express companies was included in the RLA because Congress recognized the important role express companies play in our nation's transportation system. With the birth of Federal Express in the early 1970's, the significance of that industry exponentially increased.

Although "express company" is not defined in the statute, various National Mediation Board opinions and court decisions have provided a working definition which includes (1) the pick-up and consolidation of shipments from various shippers (2) carriage by rail, air, or over-the-road transportation, (3) delivery by the express company to consignee at destination, (4) expedited service, (5) premium price, and (6) special handling.

FedEx Express's network continues to meet the definition of an "express carrier" under the RLA. FedEx Express consolidates shipments from thousands of shippers each day through a series of pickups at customer locations, authorized shipping partners, FedEx Office locations, and drop boxes. Those shipments are transported to thousands of stations and ramps where they are sorted for transportation using air or surface linehaul. The shipments are delivered on an expedited basis to the consignees. The majority of shipments are delivered overnight with specific day definite and time definite delivery commitments, with some packages being delivered in two to three days, depending upon the service purchased by the shipper. Finally, customers can track and trace shipments as they move through the vast FedEx network – the ultimate form of special handling.[8]

Mr. O'Brien complains that the requirement for system-wide organizing under the RLA makes it more difficult to convince enough FedEx Express employees to join a union. Yet the Teamsters agreement with UPS is bargained for on a system-wide basis, and in that respect, it resembles an RLA contract. The relatively high rate of employee unionization under the RLA also contradicts his comments. As of 2021, union membership in RLA industries represented approximately 38% of air carrier employees, and 54% of railroad employees. Contrast that rate with the trucking industry which is covered by the National Labor Relations Act and boasts a union

[8] FedEx famously invented the ability to track and trace packages while in transit to provide information to the customer which could be as valuable as the shipment itself. Although such technology seems commonplace today, it was revolutionary at its inception and remains a core component of the value that FedEx Express's service provides.

membership of approximately 7% of employees.[9] The implication that the RLA is somehow unfair to union organizers is simply untrue.

In the Past, UPS has Argued for RLA Inclusion

Mr. O'Brien decries the fact that UPS and FedEx Express are covered by different labor laws, but his concerns reflect a fundamental misunderstanding of the situation. FedEx is not misclassified as an express company under the RLA, as he contends, but rather, UPS undoubtedly meets the requirements of an express company and should be covered by the RLA. United Parcel Services of America is a holding company with several corporate subsidiaries, including its largest subsidiary, UPS, Inc., which employs several hundred thousand employees and conducts its traditional parcel business. UPS, Inc. was undisputedly subject to the National Labor Relations Act (NLRA) for decades before fundamentally changing its structure in the 1980's in response to FedEx's emergence as an express carrier designed to provide fast service for high tech and high value-added industries, which created a growing rivalry with UPS. United Parcel Services Company (UPS, Co.) is the airline subsidiary and has been a common carrier by air subject to the RLA since its inception in 1988.[10] In recognition of this restructuring, UPS has argued, correctly but unsuccessfully, that its ground operations should be covered by the RLA as an express company.

During the 1993 contract negotiations with the Teamsters union, UPS, Inc. took the position before the NLRB in defending against several unfair labor practice cases that its ground operations should be subject to the RLA as an air carrier. The NLRB refused to send the case to the NMB, as would normally occur when a party raises a potential jurisdictional issue under the RLA, and instead, issued its own determination that UPS, Inc. was not subject to the RLA. [11]

UPS also asserted that it should be covered by the RLA as an "express company," and argued that the "pickup and consolidation of traffic, turning it over to common carriers by rail or air for transport, and delivery by the express company to consignee at destination," closely resembled its pickup and delivery network. The NLRB conducted a substantive review of the definition of "express company" under the RLA and concluded that UPS "failed to support its claim, either legally or factually, that it is an 'express company.'"[12]

---

[9] Barry T. Hirsch, David A. Macpherson, William E. Even, *Historical Tables: Union Membership, Density, and Employment*, www.unionstats.com, accessed April 5, 2023.
[10] *United Parcel Service, Co*., 17 N.M.B. 77 (1990).
[11] *See United Parcel Serv., Inc.,* 318 NLRB 778 (1995).
[12] *Id.*, The NLRB's determination that UPS, Inc. was subject to the NLRA was upheld on appeal. *United Parcel Serv. Inc. v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996).

A Strike of UPS or FedEx Express Would Severely Damage the U.S. Economy

In 1997, UPS suffered a nationwide strike of 185,000 Teamsters employees, which severely snarled the nation's supply chains,[13]and caused an estimated loss of $780 million to UPS.[14] That disruption to the national economy likely would have been avoided or mitigated had UPS been covered by the RLA.

A similar strike today, at either UPS or FedEx, would devastate the broader economy and disrupt the significant portion of U.S. GDP that travels via the two carriers. UPS delivers approximately 20 million packages per day while FedEx delivers approximately 16 million packages per day. Neither carrier has sufficient capacity to handle the increased volume if the other were to suffer a significant strike. The resulting disruptions would endanger businesses and individuals dependent on the critical shipments carried in these rival express networks. The RLA was specifically designed to avoid such economic devastation. The misclassification of UPS under the NLRA creates an imminent risk of a Teamsters strike as early as this summer – a prospect that Mr. O'Brien appears to relish.[15]

The desirable public policy of avoiding damaging strikes, as expressed in the RLA, should extend to UPS. Under the RLA, collective bargaining agreements remain in full force and effect until a new agreement is reached between the parties. Neither party could unilaterally declare a work stoppage at the end of a contract term because of procedures in the RLA which discourage strikes and encourage resolution of labor disputes. Witness, for example, the narrowly averted rail strike of 2022 which would have crippled the nation's economy and stranded billions of dollars in bulk shipments of petroleum, industrial chemicals, construction materials, and consumer goods. A strike at UPS, affecting critical goods including technology, medical devices, pharmaceuticals, and just in time manufacturing parts, would prove equally devastating, but it is unlikely to be avoided due to the structure of the NLRA. Well-reasoned public policy should be designed to avoid such disparate outcomes.

Mr. O'Brien's written testimony concludes with a gratuitous shot at FedEx Express compliments of Senator Ted Kennedy. There's no need to re-litigate Sen. Kennedy's role in removing the term "express company" from the coverage provision of the Railway Labor Act via the Interstate Commerce Commission Termination Act of 1995 without benefit of hearings or industry input; however, it is worth noting those Senators who supported FedEx's position in 1995. Among

---

[13] Steven Greenhouse, *UPS Says Fears of Bigger Losses Made it Cut Deal,* The New York Times, August 20, 1997.

[14] Prarthana Prakash, *UPS Drivers Who Earn $95,000 a Year Are Threatening to Strike, and It Could Hurt Virtually Every American. Look What Happened in 1997*, Fortune, Sept. 6, 2022, www.fortune.com, accessed April 5, 2023.

[15] "July 31st, when Big Brown is shut down, you're going to see supply-chain solution come to a halt," O'Brien said, leading to a big cheer and applause from the union workers. "And you know what? We're not afraid to do it. We're not afraid to do it." Rick Sobey, *Teamsters President Sean O'Brien blasts UPS ahead of contract negotiations: 'We are not afraid to strike,'* Boston Herald, April 3, 2023.

others, Democratic Senators Daniel Inouye and Fritz Hollings both sided with FedEx in the dispute. Senator Hollings, who sponsored the amendment correcting the removal of "express company" from the RLA, stated in response to Sen. Kennedy:

> Since commencing operations 23 years ago, Federal Express and its employees consistently have been determined by the Federal courts, the National Mediation Board, and the National Labor Relations Board to be subject to the RLA. (citing numerous cases)
>
> The National Mediation Board recently ruled—and this is a 1995 case— on Federal Express' Railway Labor Act status by stating unequivocally that ''Federal Express and all of its employees are subject to the Railway Labor Act.'' Federal Express Corporation, 23 N.M.B. 32 (1995).
>
> I do not know how you make it more clear than that.

142 Cong. Rec. S121112, October 1, 1996.

In more colorful remarks on the same issue, Sen. Hollings responded to Sen. Kennedy, "My distinguished colleague from Massachusetts thinks when he repeats something or says something, somehow that makes it true," going on to add, "I have been a Democrat since 1948. I think you were just learning to drive at that time. So you can't define who is a Democrat; we will see how the Democrats vote." After several days of debate, the bill passed, reinserting the "express company" coverage into the RLA.

Thank you for the opportunity to clarify FedEx's status under the RLA, and please let me know if you would appreciate any additional information on this important issue.

Sincerely,

Frederick W. Smith

CC: U.S. Senate Committee on Health, Education, Labor, and Pensions
Raj Subramaniam, President and Chief Executive Officer, FedEx Corporation