OFFICE OF ADMINISTRATIVE LAW JUDGES
UNITED STATES DEPARTMENT OF LABOR

JANATHAN HARTE, Complainant, v. NEW YORK CITY TRANSIT AUTHORITY and MARK RUGGIERO, Respondents.	)	Case No. 2015-NTS-0002

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE* OPPOSING RESPONDENTS' MOTION FOR SUMMARY DECISION

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This case involves Complainant Janathan Harte's whistleblower retaliation claim against New York City Transit Authority ("NYCTA") and Mark Ruggiero (collectively "Respondents"), brought pursuant to the National Transit Systems Security Act ("NTSSA" or "the Act"), 6 U.S.C. 1142. In response to NYCTA's January 15, 2016 Motion for Summary Decision, the Assistant Secretary for Occupational Safety and Health ("Assistant Secretary") respectfully submits this brief in support of Harte. For the reasons set forth below, Harte's actions are within the scope of activity protected under NTSSA and therefore the Administrative Law Judge ("ALJ") should deny Respondents' motion.

BACKGROUND

On August 9, 2012, Harte, a track worker for the NYCTA, accompanied his supervisor Mark Ruggiero and two New York State Public Employee Safety and Health Bureau ("PESH") inspectors on an inspection of a NYCTA welding shop. *See* Resp'ts' Mem. 2. During the

inspection, a PESH inspector observed that a drill press did not have a guard on it and was not locked or tagged out. *See* Resp'ts' Statement of Material Facts 8. Though Ruggiero told the PESH inspector that the machine was not operational, Harte disagreed. *See id.* at 8-9. In response, and in front of the PESH inspectors, Ruggiero threatened Harte with a loss of overtime. *See* Complainant's Mem. 7.[1]

On September 6, 2012, Harte filed a retaliation complaint with PESH.[2] Thereafter, Harte elected to pursue his complaint under NTSSA rather than under New York's OSHA-approved state plan. On September 27, 2012, PESH referred Harte's complaint to OSHA, which investigates complaints under NTSSA. *See* Complainant's Ex. 2.

While Harte's retaliation complaint was pending with OSHA, Harte contacted OSHA on July 23, 2013, claiming that his current supervisor, Alexander Umana, was harassing him in retaliation for having made a complaint to OSHA in September 2012. *See* Complainant's Mem. 8; Resp'ts' Statement of Material Facts 14. Specifically, Harte alleged that Umana had acted unreasonably in assigning him work while other co-workers were playing cards while on duty and that this was in retaliation for Harte having filed a complaint with OSHA. *See* Complainant's Mem. 8; Resp'ts' Statement of Material Facts 15.

The OSHA investigator contacted NYCTA counsel, who then contacted Umana, who, in turn, told Harte's co-workers that Harte had told OSHA that they had been playing cards at work.

[1] As the nonmoving party responding to Respondents' Motion for Summary Decision, the facts as alleged and supported by the Complainant must be assumed to be true.

[2] The Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. 651, *et. seq.*, requires the Occupational Safety and Health Administration ("OSHA") to establish workplace health and safety standards but permits states to adopt, with OSHA approval, state plans establishing health and safety standards that are at least as effective as OSHA's. New York has an OSHA-approved state plan that sets health and safety standards for state and local government public sector employees. PESH administers and enforces that plan. *See* http://www.osha.gov/dcsp/osp/index.html.

See Complainant's Mem. 8. Soon thereafter, Harte notified OSHA that his co-workers had accused him of reporting them to OSHA for playing cards and were giving him the cold shoulder. *See id.*

On March 19, 2015, OSHA issued its Findings and Order ordering NYCTA to pay $2,500 in compensatory damages and $50,000 in punitive damages. Respondents objected to OSHA's Findings and Order and requested a hearing before an ALJ.

ARGUMENT

Respondents argue that the ALJ should grant their Motion for Summary Decision and dismiss Harte's retaliation claim because, according to Respondents, Harte did not engage in activity protected under NTSSA.[3] Specifically, Respondents argue that an activity is protected under NTSSA only if it relates to public transportation safety or security, not if it relates to workplace safety hazards. *See* Resp'ts' Mem. 6. Accordingly, Respondents argue that Harte's August 9, 2012 statement to PESH inspectors about the drill press did not constitute protected activity because the statement related only to workplace safety. *See id.* In addition, Respondents argue that Harte's July 23, 2013 call to OSHA was not a protected activity because the subject of his call regarding work assignments and co-workers playing cards has no connection to public transportation safety or security. *See id.*

The Assistant Secretary disagrees with Respondents' narrow interpretation of the scope of protected activity under the Act. NTSSA protects acts related not only to the safety and security

[3] To show a prima facie case of NTSSA retaliation, a complainant must demonstrate that: (1) he engaged in protected activity under NTSSA; (2) the employer knew or suspected the employee engaged in the protected activity; (3) the employee suffered adverse action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor to the adverse action. *See* 29 C.F.R. 1982.104(e)(2). Respondents' Motion for Summary Decision only addresses the first requirement regarding whether Harte engaged in protected activity under NTSSA.

of public transportation but also to workplace safety hazards affecting employees of transit systems. Therefore, Harte's August 9, 2012 statement to PESH inspectors was a protected activity under NTSSA. NTSSA also protects an employee from retaliation for having filed, in good faith, a complaint with OSHA regarding enforcement of NTSSA's whistleblower protection provision. Accordingly, Harte's July 23, 2013 call to OSHA alleging that he had suffered retaliation for having filed a NTSSA whistleblower complaint with OSHA is a protected activity under NTSSA.[4]

I. HARTE'S STATEMENT TO PESH INSPECTORS REGARDING THE DRILL PRESS DURING THE AUGUST 9, 2012 PESH INSPECTION IS A PROTECTED ACTIVITY UNDER NTSSA.

A. NTSSA Protects Complaints Related to Workplace Safety Hazards in Addition to Complaints Related to the Safety and Security of Public Transportation.

NTSSA states:

> (b) Hazardous safety or security conditions
>
> (1) A public transportation agency . . . shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for--
>
> (A) reporting a hazardous safety or security condition;
> (B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or
> (C) refusing to authorize the use of any safety- or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) of this subsection exist.

6 U.S.C. 1142(b)(1).

[4] In their motion, Respondents do not challenge whether Harte's filing of a whistleblower complaint in September 2012 constituted a protected activity. Rather, Respondents focus on whether his August 9, 2012 statement to PESH inspectors and his July 23, 2013 call to OSHA were each protected activities. Therefore, the Assistant Secretary limits his arguments to those two issues.

The statutory language in section 1142(b)(1)(A) unambiguously protects an employee's report about a hazardous safety condition. Nothing in this language excludes reports about hazardous conditions in the workplace or limits the subject of the protected report to hazardous conditions related to the safety or security of the public transportation system. There is no support in this statutory language for Respondents' narrow interpretation; they are attempting to read words into the statute that are not there.

In several cases in which employees of public transportation agencies lodged complaints relating to workplace safety, ALJs have treated those complaints as protected activities under NTSSA.[5] In *Winters v. S. F. Bay Area Rapid Transit Dist.*, ALJ No. 2010-NTS-00001, slip op. at 6, 17 (ALJ July 16, 2012), the ALJ concluded that an employee's complaint about unsafe methods for cleaning vomit from train cars and request for more personal protective equipment were protected under subsection (b)(1)(A) of NTSSA. Similarly, in *Serrano v. Metro Transit Auth. and NYCTA*, ALJ No. 2008-NTS-00001, slip op. at 4, 10-11 (ALJ Oct. 17, 2008), the ALJ concluded that an employee's repeated complaints concerning tool maintenance and electrical safety precautions for co-workers constituted protected activities under subsection (b)(1)(A). *See Graves v. MV Transp., Inc.*, ALJ No. 2011-NTS-0004, slip op. at 5, 7 (ALJ Apr. 18, 2012) (concluding that an employee's objection to the practice of backing up buses in the bus-lot without a spotter was a protected activity, albeit without indicating which subsection of NTSSA protected this activity), *aff'd on other grounds*, ARB No. 12-066, 2013 WL 4715036 (ARB Aug. 30, 2013).

In support of their motion, Respondents cite to *Hill v. Champaign-Urbana Mass Transit Dist.*, ALJ No. 2010-NTS-00004 (ALJ Oct. 19, 2010), contending that complaints under NTSSA

[5] There is no federal court decision or ARB decision addressing this issue.

must pertain to transportation safety or security to further NTSSA's goal of promoting public transportation safety. *See* Resp'ts' Mem. 4. The Assistant Secretary respectfully disagrees with *Hill*. The employee in *Hill* had several disagreements with a co-worker and told his manager that he felt physically threatened by the coworker. *See* ALJ No. 2010-NTS-00004, slip op. at 3. The ALJ concluded that a complaint is protected under subsection (b)(1)(A) only if it relates to public transportation safety or security. *See id.* at 7. In reaching this conclusion, the ALJ looked to cases analyzing the Surface Transportation Assistant Act ("STAA"), 49 U.S.C. 31105, and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. 42121. *See Hill,* ALJ No. 2010-NTS-00004, slip op. at 6-7 (citing *Harrison v. ARB*, 390 F.3d 752 (2d Cir. 2004) (interpreting STAA); *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, 2009 WL 2371239 (ARB July 2, 2009) (interpreting AIR 21); and *Luckie v. UPS, Inc.*, ARB No. 05-026, 2007 WL 1935552 (ARB June 29, 2007) (interpreting STAA)).

STAA and AIR 21 do not, however, contain the same broad statutory language that is in subsection (b)(1)(A) of NTSSA. STAA protects, in relevant part, filing a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order[.]" 49 U.S.C. 31105(a)(1). AIR 21 protects providing information to the employer or federal government that relates to a violation of law "relating to air carrier safety[,]" or filing, testifying, assisting, or participating in a proceeding related to a violation of law "relating to air carrier safety[.]" 49 U.S.C. 42121(a). Because NTSSA's statutory language differs from that in STAA and AIR 21, cases interpreting the scope of protected activity under STAA and AIR 21 are necessarily inapposite. Therefore, *Hill* should not be determinative of the outcome in this case.

In light of the plain statutory language in NTSSA and supporting ALJ case law, Harte's statement to the PESH inspectors regarding the condition of a drill press during the August 9,

2012 inspection is a protected report about a hazardous safety condition. During this inspection, Harte disagreed with his supervisor Ruggiero regarding the operability of the drill press and raised safety concerns about the lack of a machine guard on the press. Such reporting of safety concerns is similar to the protected complaints in *Winters*, *Serrano*, and *Graves* in which the complainant reported hazardous safety conditions relating to inadequate protective equipment, inadequate maintenance of tools, and unsafe practices in the workplace. Therefore, Harte's August 9, 2012 statement during the PESH inspection similarly constitutes protected activity under subsection (b)(1)(A).[6]

B. Parallel Statutory Language Between NTSSA and the Federal Railroad Safety Act Supports Interpreting NTSSA to Protect Complaints About Workplace Safety Hazards.

The statutory language in section 1142(b)(1)(A) of NTSSA is nearly identical to language in the Federal Railroad Safety Act ("FRSA"). FRSA protects railroad employees from retaliation for, among other things, "reporting, in good faith, a hazardous safety or security condition[.]" 49 U.S.C. 20109(b)(1)(A). At least one federal court and the ARB have treated reports about workplace safety hazards as protected under this subsection. In *Kuduk v. BNSF Ry. Co.*, 980 F. Supp. 2d 1092, 1099 (D. Minn. 2013), *aff'd*, 768 F.3d 786 (8th Cir. 2014), an employee reported that a faulty derail handle could cause injury to other employees. The district court concluded that there were disputed facts as to whether the employee acted in good faith when reporting the hazard, *see id.*, thus implying that reporting, in good faith, a workplace safety hazard is a protected activity under FRSA. In *Leiva v. Union Pac. R.R. Co.*, ARB Nos. 14-016, 14-017, 2015 WL 3539576, at *4 (ARB May 29, 2015), the ARB concluded that reporting a potentially violent situation at the workplace between an engineer and train conductor was covered under subsection

[6] It bears noting that there may be cases where workplace safety also implicates public safety.

section 20109(b)(1)(A) because the employee reasonably believed that the situation presented a hazardous condition. *Cf. Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157, 166 (3d Cir. 2015) (in concluding that another provision of FRSA that protects against discipline for following a physician's treatment orders, 49 U.S.C. 20109(c)(2), protects only injuries incurred on-duty, not injuries incurred outside of work, the court looked to section 20109(b)(1)(A) and concluded that it applies only to work-related hazardous conditions, not to hazardous conditions unrelated to the workplace).

ALJs have treated this provision of FRSA similarly. *See Mercier v. Union Pac. R.R.*, ALJ No. 2008-FRS-00004, slip op. at 19-21 (ALJ Feb. 28, 2013) (finding that numerous complaints to a railroad's safety hotline regarding practices that presented dangers in the workplace constituted protected activity under section 20109(b)(1)(A), *aff'd*, ARB No. 13-048, 2015 WL 5214580 (ARB Aug. 26, 2015), *appeal docketed*, No. 15-3369 (8th Cir. Oct. 23, 2015); *cf. Laidler v. Grand Trunk W. R.R. Co.*, ALJ No. 2014-FRS-00099, slip op. at 54-55, 57 (ALJ Aug. 13, 2015) (finding that an employee's refusal to perform a particular task due to hazardous conditions constituted protected activity under subsection (b)(1)(B) of FRSA), *appeal docketed*, ARB No. 15-087 (ARB Sept. 24, 2015). The undersigned counsel is not aware of any cases that have interpreted this provision of FRSA to exclude reports of hazardous workplace conditions. Thus, this provision of FRSA protects complaints about workplace safety hazards that affect employees, even if the complaints do not relate to railroad safety or security.

The interpretation of FRSA's similar language applies to NTSSA. The whistleblower provision of NTSSA was enacted in 2007 as part of the same legislation in which Congress significantly amended FRSA. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1413, sec. 1142, 121 Stat. 266, 414 (2007) (codified at 6 U.S.C.

1142 and § 1521, sec. 20109, 121 Stat. 444 (codified at 49 U.S.C. 20109). Congress provided the same procedures for filing and adjudicating NTSSA and FRSA whistleblower complaints. *See id.*; *see also Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 635 n.7 (4th Cir. 2015) (noting that NTSSA is modeled on FRSA, with the primary difference being that NTSSA governs safety in commuter railroads and FRSA governs safety primarily in freight railroads). Because of these similarities and shared legislative history, the respective whistleblower provisions should be interpreted similarly to include complaints about workplace safety hazards within the scope of protected activity.

C. The Inclusion of an Election of Remedies Provision in NTSSA Shows that NTSSA Necessarily Protects Complaints About Workplace Safety Hazards.

The inclusion of an election of remedies provision in NTSSA supports interpreting NTSSA to protect complaints about workplace safety hazards. NTSSA's election of remedies provision states that "[a]n employee may not seek protection under both this section [NTSSA] and another provision of law for the same allegedly unlawful act of the public transportation agency." 6 U.S.C. 1142(e). As explained below, the election of remedies provision bars complainants from seeking protection under NTSSA and whistleblower statutes that protect similar activities, such as Section 11(c) of the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. 660(c), or its state-plan equivalents. If NTSSA did not protect complaints about workplace safety hazards, then the election of remedies provision would have no purpose.

While no court has addressed NTSSA's election of remedies provision, the Fourth Circuit analyzed the essentially identical language in FRSA's election of remedies provision in *Lee v. Norfolk S. Ry. Co.*, 802 F.3d at 634-35, and concluded that it applies only to complaints brought under whistleblower safety statutes such as Section 11(c) of the OSH Act or its state-plan equivalents. FRSA's election of remedies provision states that "[a]n employee may not seek

protection under both this section [FRSA] and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. 20109(f). The issue in *Lee* was whether the election of remedies provision precludes an employee from pursuing a FRSA whistleblower complaint when the employee has already filed a complaint under 42 U.S.C. 1981 for racial discrimination in employment. *See* 802 F.3d at 627-28. The court concluded that it did not. *See id.* at 628. Rather, the court concluded, the election of remedies provision "requires employees to choose between proceeding under various workplace safety whistleblower statutes." *Id.* at 635. The court looked to FRSA's legislative history and noted a particularly relevant statement by the House Representative who managed the 1980 bill that included the whistleblower protection provision in FRSA, of which the election of remedies provision was a part:

> We also agreed to a provision clarifying the relationship between the remedy provided here and a possible separate remedy under [the OSH Act]. Certain railroad employees, such as employees working in shops, could qualify for both the new remedy provided in this legislation, or an existing remedy under [the OSH Act]. It is our intention that pursuit of one remedy should bar the other, so as to avoid resort to two separate remedies, which would only result in unneeded litigation and inconsistent results.

126 Cong. Rec. 26,532 (1980) (statement of Rep. James Florio). Based on this history, the Fourth Circuit reasoned that Congress "intended to bar railroad employees from seeking duplicative relief under overlapping anti-retaliation or whistleblower statutes that provide protections similar to the protections in FRSA, such as Section 11(c) of the OSH Act and various state versions of the OSH Act[.]" 802 F.3d at 634; *see id.* at 634 n.6 ("Congress intended the Election of Remedies provision to address only the potential overlap between the OSH Act, various state versions of the OSH Act, and the FRSA."). The Seventh Circuit similarly explained, when examining FRSA's election of remedies provision, that "[t]he election-of-remedies provision . . . bars railroad employees from seeking duplicative relief under overlapping antiretaliation or

whistleblower statutes." *Reed v. Norfolk S. Ry. Co.*, 740 F.3d 420, 426 (7th Cir. 2014) (emphasis added). Thus, the election of remedies provision is predicated on there being an overlap between the protected acts under FRSA and Section 11(c) of the OSH Act.

Given the nearly identical election of remedies provision in NTSSA as in FRSA and the overall similarities between NTSSA and FRSA, the Fourth Circuit's conclusion regarding the scope of the election of remedies provision applies with equal force to NTSSA. Because the election of remedies provision applies to claims that overlap between NTSSA and Section 11(c) of the OSH Act, and Section 11(c) protects complaints about workplace safety hazards, NTSSA necessarily also protects complaints about workplace safety hazards.

II. HARTE'S CALL TO OSHA ON JULY 23, 2013 IS A PROTECTED ACTIVITY UNDER NTSSA.

Harte's call to OSHA on July 23, 2013 to provide information about alleged retaliation Harte suffered stemming from having filed a complaint with OSHA in September 2012 is a protected activity under section 1142(a)(3) of NTSSA. Subsection (a)(3) protects an employee from retaliation for having taken a "lawful, good faith act . . . to file a complaint or directly cause to be brought a proceeding related to the enforcement of this section[.]" 6 U.S.C. 1142(a)(3).

All that subsection (a)(3) requires is that the complainant lawfully and in good faith file a complaint (or cause a proceeding to be brought) related to the enforcement of NTSSA's whistleblower provision. *Cf.* 29 C.F.R. 1982.103(b) (no particular form of complaint is required and a complaint may be filed orally or in writing). To determine whether a retaliation complaint was made in "good faith," the relevant inquiry is whether, at the time the employee made the retaliation complaint, the employee had a genuine belief in the complaint. *See Ray v. Union Pac. R.R. Co.*, 971 F. Supp. 2d 869, 883-84 (S.D. Iowa 2013) (analyzing the "good faith" requirement under FRSA to require only that the complainant believe at the time he reported a work injury

that the injury was, in fact, work-related). Similar to FRSA, the statutory language of NTSSA specifies that the "good faith" pertain to the act in question. Here, there is no indication, nor do Respondents contend, that when Harte called OSHA on July 23, 2013, he was acting unlawfully or without a genuine belief that his supervisor Umana was acting in retaliation for his earlier OSHA complaint. Though the incident on July 23, 2013 between Harte and Umana turned out to be a misunderstanding, Harte did not know this until after he called OSHA and OSHA called NYCTA's counsel. Therefore, at the time of Harte's July 23, 2013 call, Harte was acting in "good faith."

Lastly, Harte's complaint related directly to the enforcement of NTSSA's whistleblower protection provision because Harte alleged that he had been retaliated against for having filed an NTSSA whistleblower complaint. There is no requirement under subsection (a)(3) of NTSSA that the complaint or proceeding be related to public transportation safety or security. Therefore, there is no merit to Respondents' argument that Harte's July 23, 2013 call was not protected because it was not related to public transportation safety or security.[7] Thus, Harte's July 23, 2013 call to OSHA is a protected activity under subsection (a)(3) of NTSSA, 6 U.S.C. 1142(a)(3).

[7] In their motion, Respondents' argue generally that the July 23, 2013 call to OSHA is not a protected activity under NTSSA because it does not relate to public transportation safety or security, or even workplace safety; they do not, however, reference any particular subsection of NTSSA. *See* Resp'ts' Mem. 3, 6.

CONCLUSION

For the foregoing reasons, the Respondents' Motion for Summary Decision should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief of the Assistant Secretary of Labor for Occupational Safety and Health as *Amicus Curiae* was served on all counsel of record on this 8th day of March, 2016, by sending said copy by first class mail, postage prepaid.

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