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**Issue Date: 26 March 2009**

CASE NO.: 2009-NTS-00001

In the Matter of:

ROBERT BAILEY,  
Complainant

v.

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY,  
Respondent

**RECOMMENDED DECISION AND ORDER  
GRANTING COMPLAINANT'S MOTION TO  
WITHDRAW OBJECTIONS AND REQUEST FOR HEARING**

The above-captioned case is scheduled for a hearing conducted under the employee protection provisions of the National Transit Systems Security Act of 2007, 6 U.S.C. § 1142 ("NTSSA") beginning on April 1, 2009 in Cleveland, Ohio. The complaint was filed with the Occupational Safety and Health Administration ("OSHA") on September 10, 2008. On October 16, 2008, OSHA, as the agent of the Secretary of Labor, issued a letter finding that the complainant failed to establish a *prima facie* case as he failed to establish a nexus between his protected activity and termination. Complainant filed a timely objection and requested a hearing before an administrative law judge.

On February 20, 2009, the complainant submitted a Motion to Withdrawal his complaint. Complainant stated that although his position has not changed, he signed a settlement agreement ("Agreement") with Respondent regarding a union grievance.<sup>1</sup> In the Agreement, Complainant agreed to withdrawal his NTSSA claim. On March 3, 2009, the undersigned issued an Order To Show Cause, requiring Respondent to show cause as to why Complainant's Motion for Withdrawal should be granted. On March 12, 2009, Respondent filed its response wherein it stated that the complainant was not misled into signing the Agreement, but instead freely signed the Agreement which made him whole.

Under the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century ("AIR 21"), a withdrawal "must be a voluntary, considered decision" which is consistent with

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<sup>1</sup> The Amalgamated Transit Union, Local 268 ("union") filed a grievance against the Respondent on February 4, 2008 on behalf of the complainant, alleging that Respondent violated the collective bargaining agreement. On January 30, 2009, an arbitrator issued an award sustaining the grievance and ordered that the complainant "be made whole for any losses suffered..."

the concern for public safety. *Farley v. Alaska Airlines*, Case No. 2005-AIR-25 (A.L.J. July 13, 2005) citing *Harnois v. American Eagle Airline*, Case No. 2002-AIR-17 (A.L.J. Sept. 9, 2002).<sup>2</sup> OSHA's comments to the regulation permitting withdrawal under AIR 21, 29 C.F.R. § 1979.111(c), state that the regulation is intended to "permit a complainant to freely withdraw his or her complainant without prejudice. The purpose of the . . . approval is to help insure that the complainant's withdrawal is, indeed, made freely without threat of coercion or unlawful promise." 68 Fed. Reg. 14100, 14106 (Mar. 21, 2003). The withdrawal must be knowing, intelligent, and voluntary.

I find Complainant's withdrawal request to be knowing, intelligent, voluntary, and made without the threat of coercion. Complainant avers that he was not aware of the January 30, 2009 arbitration decision, sustaining his union grievance and ordering he be made whole, when he signed the Agreement on February 6, 2009. Respondent states that Complainant was aware of the arbitration decision at the time of signing the Agreement because the union was made aware of the decision on February 2, 2009. As the union was made aware of the arbitration decision prior to Complainant's signing of the Agreement and a union representative was present during negotiations and signed the Agreement on February 6, 2009, I find that the complainant was aware of the arbitration award prior to signing the Agreement.

Furthermore, the complainant was represented by the union throughout the grievance process and during the arbitration proceedings. Therefore, the complainant had assistance throughout the process, including assistance in negotiations and in understanding the terms and effects of the arbitration award and any settlement agreement. While the complainant does not have representation in his NTSSA claim, the terms of the Agreement regarding his NTSSA claim are clear and he had union representation with whom he could address questions.

Finally, the text of the Agreement shows that Complainant was to sign the Agreement by February 13, 2009, thereby giving him additional time to consider the Agreement and its terms. Complainant signed the Agreement on February 6, 2009, apparently deciding that he did not need additional time to contemplate the signing of the Agreement as presented.

The above facts establish that Complainant acted knowingly, voluntarily, and intelligently when entering into the Agreement, and therefore, has acted the same with regard to his withdrawal request. The Complainant freely decided to forgo his NTSSA claim when he entered into the Agreement.

In the alternative, Complainant's motion could be construed as a settlement of his NTSSA claim. The Agreement was a final settlement of a union grievance and arbitration request; however, both the Complainant and Respondent were parties to the Agreement and the Complainant's NTSSA claim was addressed within the Agreement. In settling his union grievance with the Respondent, the Complainant chose to forgo the pursuit of his NTSSA claim in exchange for reinstatement and the recovery of other damages. As such, in essence, the Complainant also settled his NTSSA claim.

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<sup>2</sup> According to the Joint Explanatory Statement of the Conference Committee, the NTSSA employee protection provision is modeled on the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, and the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century. 49 U.S.C. § 42121.

A settlement agreement cannot become effective until its terms have been reviewed and determined to be fair, adequate, and reasonable, and in the public interest. *Tankersly v. Triple Crown Services, Inc.*, 1992-STA-8 (Sec'y Feb 18, 1993); *Moore v. Kalitta Air*, 2007-AIR-12 (A.L.J. Sept. 21, 2007). In addition, the Complainant's consent must be knowing and voluntary.<sup>3</sup>

I find the settlement to be fair, adequate, reasonable, and in the public interest. In settling with Respondent, Complainant was reinstated to his former position, and was awarded back pay, benefits, and seniority retroactive to his separation date. The only potential additional remedy available to Complainant under the NTSSA is punitive damages. Any recovery of punitive damages appears unlikely in light of the Secretary's earlier determination. Furthermore, the Complainant had union representation during the settlement negotiations and was familiar with and advised of the terms of the settlement.

In sum, I find that the Complainant has acted in a knowing, intelligent, and voluntary manner. Despite a contrary claim, I find the facts to support a determination that Complainant was aware of the arbitration decision prior to signing the Agreement. Moreover, Complainant's alleged financial and medical needs do not render his request involuntary or made under coercion or duress. Finally, I find the settlement of the NTSSA claim, fair, adequate, and reasonable.

### ORDER

The withdrawal of Complainant's objections and request for hearing is approved. The hearing scheduled to begin on April 1, 2009 in Columbus, Ohio is cancelled.

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RICHARD A. MORGAN  
Administrative Law Judge

**NOTICE OF REVIEW:** Review of this Recommended Decision and Order is by the Administrative Review Board pursuant to ¶¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the National Transit Systems Security Act of 2007. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.

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<sup>3</sup> 6 U.S.C. § 1142(c)(3)(A) provides for the issuance of settlement agreements in NTSSA claims.