



Issue Date: 26 September 2011

Case No.: 2010-NTS-00003

In the Matter of

R. SCOTT LEWIS

Complainant

v.

NEW YORK TRANSIT AUTHORITY

Respondent

**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION;
AND DENYING COMPLAINANT'S MOTIONS FOR SUMMARY DECISION;
AND DENYING RESPONDENT'S MOTION FOR ATTORNEY'S FEES**

Background and Procedural History

This matter arises out of a complaint filed pursuant to the employee protection provisions of the National Transit Systems Security Act of 2007 (NTSSA or the "Act"), which was enacted on August 3, 2007, as Section 1413 of Public Law 110-053, and is found at 6 U.S.C. § 1142. The "Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges," set forth at 29 C.F.R. Part 18, apply in this proceeding. The Complainant is not currently represented by counsel.

On March 26, 2008, the Complainant filed a complaint, under the NTSSA, with the Occupational Safety and Health Administration (OSHA) against the Respondent, the New York City Transit Authority ("NYCTA" or "New York Transit"), his former employer.¹ After an investigation, on December 14, 2009, OSHA made the following findings:

- while the Complainant's initial complaint was timely, the Complainant made specific allegations which occurred more than 180 days prior to the filing of his complaint; therefore, alleged adverse actions which occurred prior to that time are untimely.

¹ This is the date of the e-mail in which the Complainant first contacted an OSHA investigator and submitted documents in support of his complaint. Complaint. The OSHA Report of Findings lists the date of the Complainant's complaint as April 18, 2008. The basis for this date is not clear, from the record. As will be discussed below, because the evidence of record indicates the Complainant filed his complaint by March 26, 2008, I will use that date to compute issues relating to timeliness.

- the Complainant’s assertion that he was engaged in protected activity when he attempted to curb “overtime fraud” do not constitute protected activity under the Act, because the Act’s provisions cover only reports of “fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security,” and the Complainant’s allegations did not address these issues.
- the Complainant was “unable to establish a reasonable belief that computer tampering had anything to do with the death of a track worker,” as the Complainant had alleged.
- the Complainant’s complaint also alleged due process violations, which were not under the aegis of the NTSSA.

Therefore, the OSHA Administrator dismissed the Complainant’s complaint, based on the lack of evidence that the Complainant engaged in any protected activity under the Act. “Secretary’s Findings” dated Dec. 14, 2009 (hereinafter, “OSHA Findings”).²

By letter dated January 15, 2010, Complainant objected to the OSHA determination, and requested a hearing before an administrative law judge (ALJ). See RX Y. The case was forwarded to the Office of Administrative Law Judges (OALJ) and subsequently assigned to me on January 21, 2010. I issued a Notice of Hearing on January 27, 2010. Subsequently, however, the hearing was cancelled because certain unresolved issues made holding a hearing in May 2010 impracticable. See Order dated Apr. 29, 2010. No hearing is currently set in this matter.

Throughout 2010, I adjudicated various preliminary issues, principally (but not exclusively) relating to discovery disputes.³ The Complainant filed numerous Motions, some of which he titled as Motions for Summary Judgment.⁴ I also held multiple pre-hearing conferences via telephone with the parties (Respondent’s counsel and Complainant).⁵ By Order dated January 21, 2011, I directed that discovery close by February 25, 2011, and provided additional guidance and instruction to the parties regarding the requirements for submissions of Motion for Summary Decision. I further informed the Complainant that, at his option, he may choose to withdraw Motions he has previously filed and submit a new Motion for Summary Decision, with supporting exhibits and affidavits, as appropriate. Order of Jan. 21, 2011, at 2 n.3.

By Order dated March 14, 2011, I set out deadlines for submission of motions for summary decision; answers to summary decision motions; and responses to answers. Received in my office on March 31, 2011, the Respondent submitted its “Motion for Summary Decision.” This Motion was accompanied by 28 Exhibits, marked A-BB, as well as a “Statement of Facts,” counsel’s declaration, a pro se notice, and Respondent’s Memorandum in Support of Motion for

² See also Exhibit X to Respondent’s Motion for Summary Decision (RX X). The Exhibits to the Respondent’s Motion for Summary Decision (denominated “RX”) contain copies of many of the documents in the record that are relevant to my adjudication of the parties’ Motions.

³ See, e.g., Orders dated May 9, 2010, Aug. 19, 2010; Sept. 2, 2010.

⁴ See, e.g., Complainant’s Motions dated Oct. 19, 2010; Nov. 1, 2010; Dec. 15, 2010; Feb. 28, 2011.

⁵ These conferences all were on the record. See Transcripts of conferences dated Mar. 9, 2010; Apr. 26, 2010; June 29, 2010; Sept. 14, 2010; Sept. 24, 2010; Nov. 3, 2010; Feb. 11, 2011.

Summary Decision (hereinafter, “Respondent’s Support”). The Respondent also requested reimbursement for attorney’s fees. Respondent’s Support at 6-7.

By Order dated June 24, 2011, I informed the parties that I was in receipt of their Motions for Summary Decision, and informed them that I intended to address their Motions by Order, to be issued as soon as practicable.⁶

On August 19, 2011, I issued an Order providing additional guidance to the parties. This Order was prompted by review of their Motions for Summary Decisions and applicable case law. In this Order, among other things, I authorized the parties to submit Answers in response to the opponent’s Motion(s) for Summary Decision, including affidavits or documents in support of their Answers. Additionally, I also reiterated the standard governing summary decision (at 18 C.F.R. § 18.40). I informed the Complainant that factual assertions contained in the Respondent’s Statement of Material Facts or the Declaration of Kristen M. Nolan (submitted with the Respondent’s Motion for Summary Decision), unless contradicted with counter-affidavits or other documentary evidence, will be taken as true. I directed the parties to submit these items by September 2, 2011.

In response, by fax dated August 23, 2011, the Complainant submitted “Motion to Submit Prima Facie Evidence Affidavit and for Summary Judgment.” In this latest submission, the Complainant requested that I accept his previous affidavits, specifically his Amended Complaint for Declaratory Relief” and writ of mandamus. In addition, the Complainant submitted a document titled “LPDC Proactive Problem Management Program Defect Investigation Notice . . .” with an attached affidavit in which he attested to the document’s authenticity.

By fax dated September 2, 2011, the Respondent reiterated its position — that the Complainant failed to present any admissible evidence relating to his claim — and enclosed a copy of its letter to me, dated April 21, 2011, in which the Respondent earlier had voiced this assertion.

I find that the record before me is now sufficient to address the opposing Motions for Summary Decision. I will now consider the record before me to determine whether to grant the opposing Motions.

⁶ The Complainant has also submitted Motions requesting, then demanding, that I rule on the pending Motions for Summary Decision. See, e.g., Complainant’s Motions dated May 26, 2011; June 7, 2011. Additionally, on July 18, 2011, the Complainant filed a “Writ of Mandamus” with the Administrative Review Board, asserting that I had not issued a determination on his Motions for Summary Decision in a timely way. By Order dated August 8, 2011, the Administrative Review Board denied the Complainant’s request for relief.

Applicable Law

The Act

In pertinent part, the National Transit Systems Security Act prohibits a public transportation agency from taking adverse actions (including discharge and discrimination) against an employee if such action is due, in whole or in part, to the employee's protected activity. 6 U.S.C. § 1142(a).⁷ Protected activity is defined in the statute as including the following:

- (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security . . . , if the information or assistance is provided to or an investigation stemming from the provided information is conducted by —
 - (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452) ;
 - (B) any Member of Congress, any Committee of Congress, or the Government Accountability Office; or
 - (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

6 U.S.C. § 1142(a)(1); and

- (5) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation.

6 U.S.C. § 1142(a)(5).⁸

According to the Joint Explanatory Statement of the Congressional Conference Committee, this statute 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 21st Century (AIR 21), 49 U.S.C. § 42121. H.R. CONF. REP. NO. 110-259, at 340 (2007). Accordingly, the Act has similar standards for establishing what constitutes protected activity,

⁷ In addition, 6 U.S.C. § 1142(b)(1)(A) prohibits a public transportation agency from taking adverse action (including discrimination or discharge) against an employee who reports a “hazardous safety or security condition.” However, this provision applies only to “security personnel, including transit police, employed or utilized by a public transportation agency to protect riders, equipment, assets, or facilities.” 6 U.S.C. § 1142(b)(3). The Complainant was employed by the Respondent as a “computer operations manager.” RX A. Consequently, based on the record before me, I find that 6 U.S.C. § 1142(b)(1)(A) does not apply.

⁸ I find that the provisions of 6 U.S.C. § 1142(a)(2) through (4), which describe other types of protected activity (such as cooperating with an investigation of the National Transportation Safety Board) are not implicated under the facts in this matter, based on the record before me, and so I do not discuss them.

and for what constitutes a defense to a claim. For example, a complainant must establish that the protected activity was a “contributing factor” in the adverse action alleged in the complaint. 6 U.S.C. § 1142(c)(2)(B)(i). In addition, notwithstanding a determination that a complainant has established a prima facie case by making such a showing, the employer prevails if it demonstrates, by “clear and convincing evidence” that it would have taken the same unfavorable personnel action in the absence of the protected activity. 6 U.S.C. § 1413(c)(2)(B)(ii).

Further, the Act provides specific remedies to a complainant who successfully prevails. In addition to reinstatement, back pay (with interest), and compensatory damages, a complainant may be awarded punitive damages up to \$250,000. 6 U.S.C. § 1142(d). However, in the event a complaint is determined to have been brought frivolously or in bad faith, the Act permits the employer to be awarded reasonable attorney fees up to \$1,000. 6 U.S.C. § 1142(c)(3)(D).

During the pendency of this matter, on August 31, 2010, the Department of Labor issued “Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act.” 75 Fed. Reg. 53,522 (Aug. 31, 2010). These provisions, to be codified at 29 C.F.R. Part 1982, mirror the provisions set forth in the Act with regard to the parties’ burdens. See, e.g., 75 Fed. Reg. 53,530-53,532 (Aug. 31, 2010), to be codified at 29 C.F.R. §§ 1982.104-109. I find that these regulations govern the procedures to be used in adjudicating this matter.

Standard for Summary Decision

Under the governing procedural regulation, any party may move, with or without supporting affidavits, for summary decision. 29 C.F.R. § 18.40(a). An administrative law judge may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 29 C.F.R. § 18.40(d).

In a motion for summary decision, the moving party bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by “an absence of evidence to support the nonmoving party’s case.” Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). A genuine issue of material fact is one, the resolution of which “could establish an element of a claim or defense and, therefore, affect the outcome of the action.”⁹ Motarjemi v. Metropolitan Counsel Metro Transit Div., ARB No. 08-135 (ARB Sept. 17, 2010), slip op at 3, quoting Celotex, 477 U.S. at 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). If there are disputed matters of material fact, then summary decision must be denied. Motarjemi, slip op. at 2-3. Additionally, the summary decision ruling shall not include a weighing of the evidence or determination of the truth of the matters asserted. Reddy v. Medquist, Inc., ARB No. 04-123 (ARB Sept. 30, 2005), slip op. at 5. In adjudicating a motion

⁹ In Reddy v. Medquist, Inc., the Administrative Review Board elaborated on the meaning of “genuine issue of material fact.” See ARB No. 04-123 (ARB Sept. 30, 2005). It stated, “A ‘genuine issue’ exists when the nonmoving party produces sufficient evidence of a material fact so that a fact-finder is required to resolve the parties’ differing versions at trial. Sufficient evidence is any probative evidence.” Reddy, slip op. at 4.

for summary decision, I must view all facts and inferences in the light most favorable to the non-moving party. See Celotex, 477 U.S. at 323; Anderson, 477 U.S. at 261; Reddy v. Medquist, Inc., ARB No. 04-123 (ARB Sept. 30, 2005), slip op. at 5.

The Administrative Review Board (“Board”) has offered specific guidance on the issue of summary decision:¹⁰

Once the moving party has demonstrated an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The non-moving party may not rest upon mere allegations, speculations, or denials in his pleadings, but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. If the non-moving party fails to sufficiently show an essential element of his case, there can be “no genuine issue as to any material fact [because] a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.”

Reddy v. Medquist, Inc., ARB No. 04-123 (ARB Sept. 30, 2005), slip op. at 4-5 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).

In an action under the NTSSA, a complainant is required initially to establish a prima facie case, which consists of the following elements:

- He engaged in protected activity, as defined in the applicable statute;
- The employer knew or suspected that the employee engaged in protected activity;
- The complainant suffered an adverse action; and
- Circumstances are sufficient to raise the inference that his protected activity was a contributing factor to the adverse action.

75 Fed. Reg. 53,530 (codified at 29 C.F.R. § 1982.104(e)(2)).; see also 75 Fed. Reg. 53,524 (Aug. 31, 2010). Once a complainant establishes a prima facie case, the burden of proof shifts to the respondent. Stojicevic v. Ariz.-Am. Water, ARB No. 05-081 (ARB Oct. 30, 2007), slip op. at 5. The respondent prevails if it establishes, by clear and convincing evidence, that it would have taken the same adverse action, notwithstanding the complainant’s protected activity. 6 U.S.C. § 1142(c)(2)(B)(iv); see also 75 Fed. Reg. 53,531 (Aug. 31, 2010), codified at 29 C.F.R. § 1982.109.

Consequently, in order to prevail on his Motions for Summary Decision, the Complainant must show that the Respondent failed to make a showing sufficient to establish the existence of an element essential to its defense, and on which it bears the burden of proof. Nixon v. Steward & Stevenson Servs., Inc., ARB No. 05-066 (ARB Sept. 28, 2007), slip op. at 6-7. Put another way, the Complainant must establish that the Respondent is unable, as a matter of law, to succeed in its proffered defense – for example, by pointing to “the absence of evidence proffered by the nonmoving party” as to an element that party (the Respondent) must establish. Nixon, slip op. at 6.

¹⁰ The Board also noted that, because it reviews issues of law de novo, its procedure for reviewing a grant of summary decision is the same as the ALJ would follow in ruling on such a motion. Reddy, slip op. at 3-4.

In order to address whether the Complainant should prevail in his Motion for Summary Decision, I must also determine whether he in fact has established a prima facie case. This is because under the Act, a respondent is not required to make any showing until a complainant has established a prima facie case. Kalkunte v. DVI Fin. Servs., Inc., ARB Nos. 05-139, 05-140, (ARB Feb. 27, 2009); see also Halloum v. Intel Corp., ARB No. 04-068, (ARB Jan 31, 2006). Therefore, in order to succeed in his Motion for Summary Decision, the Complainant must do two things: first, establish his prima facie case; and second, show that there is an absence of evidence to support a defense by the Respondent.

Complainant's Status as a Pro Se Litigant

In Peck v. Safe Air Int'l, Inc., ARB No. 02-028, (ARB Jan. 30, 2004), the Board described its obligations toward a pro se litigant in whistleblower cases, and noted that this standard also applies to administrative law judges:

We construe complaints and papers filed by pro se complainants "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude. Young v. Schlumberger Oil Field Serv., ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), citing Hughes v. Rowe, 449 U.S. 5 (1980). At the same time we are charged with a duty to remain impartial; we must "refrain from becoming an advocate for the pro se litigant." Id. We recognize that while adjudicators must accord a pro se complainant "fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance." Griffith v. Wackenhut Corp., ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), quoting Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1983). Affording a pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system. See Young v. Schlumberger Oil Field Serv., ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 9, citing Jessica Case, Note: Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law and Excuse?, 90 Ky. L.J. 701 (2002).

The Complainant's Complaint

The starting point for any summary decision analysis must be the Complainant's complaint to OSHA.¹¹ The Complainant filed an initial complaint in March 2008, and then filed an amended complaint to OSHA on April 30, 2008.¹²

A copy of the Complainant's initial complaint is attached as an Exhibit to the OSHA Findings dated December 14, 2009. I find that the Complainant's initial complaint consists of the following four items:

¹¹ At his deposition, when asked with whom he filed complaints, the Complainant stated he filed one with the New York State Department of Labor on March 17, 2008, and "because it involved NYCTA it was forwarded to OSHA." RX C at 216-17.

¹² A copy of the Complainant's amended complaint is at RX W. The record does not indicate why the Complainant filed an amended complaint. As noted above, the OSHA Findings indicated the Complainant filed his complaint on "April 18, 2008" which is neither the date of his initial complaint (March 26, 2008) nor the date of his amended complaint (April 30, 2008).

1. E-mail from the Complainant to the OSHA supervisory investigator, dated March 26, 2008;
2. New York State Department of Labor Public Employee Safety and Health (PESH) “Notice of Alleged Safety or Health Hazards” Form, completed by the Complainant, and dated March 17, 2008;
3. Copies of news articles, dated April and May 2007, relating to recent deaths of NYCTA track workers in April 2007; and
4. Unsigned copy of a letter, dated January 18, 2008, which appears to be from the Complainant’s then-attorney, Ira Cure, to a NYCT Human Resources official.¹³

I find that, principally, the e-mail from the Complainant to the OSHA investigator served to explain the other items. The e-mail stated that the Complainant had been fired on February 21, 2008, and that management claimed he was insubordinate. As articulated in the PESH form, the substance of the Complainant’s initial complaint was that unauthorized software configuration changes constituted safety hazards. The Complainant wrote the following:

The hazards are unauthorized changes. A change is an action by a Transit employee that results in a new status for one or more train infrastructure Configuration items (CI). A CI is a component of an infrastructure or item, such as a request for change, associated with an infrastructure, that is (or is to be) under the control of Rail Control Center Configuration Management. For example, CI(s) include signals, switches, maintenance schedules, and Information Technology (IT) infrastructure, among other components.

In this case, the hazard was an employee(s) aided by management to perform an unauthorized change which was used to denigrate another manager, and to enhance the employee overtime (i.e. time to repair the damage caused by the change). The author believes this behavior occurred throughout NYCTA at the time there was a change in office at the Presidential level, beginning ’07. Attached is description of the incidents that occurred.

The author believes this is a passenger safety problem. In addition, you’re being notified in order to prevent a reoccurrence of these destructive acts before the next change of office occurs at the Presidential level within NYCT or any [Respondent] affiliate.

The Complainant also indicated on the PESH form that this matter had been brought to the attention of the Respondent. The news articles showed that two track workers had been fatally injured in accidents, in April 2007. The January 18, 2008 letter discussed in detail the Complainant’s complaints to NYCT management about unauthorized software changes (or “tampering”). Notably, the letter did not assert that the unauthorized software changes compromised safety or security; rather, the contention was that these changes increased overtime costs or undermined the Complainant’s authority as a manager. The letter also stated that two track workers were killed in the same timeframe that the unauthorized changes to the software systems were made.

¹³ Based on this letter’s date, I infer that the purpose of the letter is to respond, on the Complainant’s behalf, to the Respondent’s proposal to terminate the Complainant’s employment. This item appears to be a file copy, as it is not on letterhead.

In his April 30, 2008 amended complaint to OSHA, the Complainant stated the following:

I claim that [Respondent] were intentionally non-compliant under . . . the National Transit System Security Act (NTSSA) . . . and therefore they should be penalized to the fullest extent of the law for not securing the configuration of their assets by way of change management after I reported a break down in their controls. This lack of control jeopardizes the safety of passengers and workers.

....

. . . In my case, I saw something, said something, and was fired. . . .

The Complainant's amended OSHA complaint also contained a listing of three incidents, two of which were the same incidents of deaths to NYCTA track workers that were in his initial complaint. The third incident listed is dated "10/20/2007," labeled "tampering with payroll interface" and includes the following comment: "Reasonable cause for second / third degree tampering investigation since they did not report tampering incident that began 1:12AM, 20 OCT 07; 21 OCT 07, 00:00, and again at 00:31, nor did they the Trelisky incident J. Merwin, K. McKenna, & R. Hayes." See RX W.¹⁴

The record reflects that in his deposition testimony (found at RX C), the Complainant contended that the Respondent took the following "adverse actions" against him:¹⁵

- "[T]he gang attacked me from time my hiring manager left [in November 2006]. . . . From the time my manager left is that I was attacked by a gang, period." RX C at 55.
- "Mistreatment," which involved personnel transfers in his work department in June of 2007 and "formal warnings and things like that" that he received in July of 2007. RX C at 101-04. These "formal warnings" included the warning letter (dated July 11, 2007 and found at RX J) and a disciplinary meeting held on July 16, 2007. RX C at 103.
- The Complainant was passed over for a promotion, for which he contended he was qualified, on November 19, 2007. RX C at 96. "I was competing for a senior director slot. The gang apparently didn't want me to become the senior director. Consequently, did anything in their powers to knock me out." RX C at 55.

¹⁴ The "Declaration of Kristen M. Nolan" states that RX W is a complete copy of the Complainant's amended complaint to OSHA, dated April 30, 2008. However, RX W also includes an article from "The Signalman's Journal 2nd Quarter 2009" about a signalman, who was killed while making repairs at a railroad crossing. It is unlikely that an article from a journal dated "2d Quarter 2009" could have been submitted in April 2008. I find its inclusion in this Exhibit must be an error, and I disregard it.

¹⁵ I note that the record before me contains only extracts of the Complainant's deposition testimony. See RX C.

Limiting Factors in Addressing the Complainant's Complaint

I have carefully reviewed all of the Complainant's submissions, both those to OSHA and those made to me directly during the course of this matter (which I will discuss in more detail below). Noting the Complainant's status as a pro se litigant, and his desire to have his various allegations adjudicated by me in this forum, I find that I must comment on the limits of my authority as an administrative law judge in the Department of Labor. I am constrained in adjudicating his complaint by the limits of the Act, as well as by the procedural requirements the Department of Labor has enunciated, principally through the Board's decisions. These factors limit the extent to which the Complainant can obtain relief, because they limit the issues that I am able to consider in my adjudication. I find that it is helpful to address these factors, before undertaking any analysis of the competing Motions for Summary Decision.

Effective Date of the Act

The NTSSA was enacted on August 3, 2007. Public Law 110-053. In general, acts of Congress are not applicable retroactively, unless the language of the enacted law indicates otherwise. Fernandes-Vargas v. Gonzales, 548 U.S. 30 (2006). There is no suggestion, either in the Act or the legislative history, that Congress intended the Act to have any retroactive effect. Moreover, the AIR21 statute, on which the NTSSA is modeled, has been held not to be retroactive. See Brune v. Horizon Air Indus., Inc., ARB No. 04-037 (ARB Jan. 31, 2006), slip op. at 6-8.

I must conclude, therefore, that the Act does not cover any adverse actions that occurred prior to the date it was enacted: that is, August 3, 2007. Consequently, I am unable to consider any allegations of adverse actions that occurred prior to that date.

Untimely allegations

The Act requires a complainant to file a complaint with OSHA within 180 days of the employer's alleged adverse action. 6 U.S.C. § 1142(c)(1). The evidence of record indicates the Complainant first filed a complaint with OSHA on March 26, 2008. Consequently, any adverse action that occurred prior to September 28, 2007, the 180th day prior to the date the Complainant filed his complaint, is untimely, and cannot be considered.

Allegations against parties other than the Respondent

The OSHA Findings refers to "several other allegations" made by the Complainant, which were determined not to be within the aegis of the NTSSA.¹⁶

¹⁶ The OSHA Findings states that these allegations include an assertion that the NYCTA is a terrorist or criminal organization, and that the Federal Bureau of Investigation or Drug Enforcement Administration tried to run the Complainant's sister off the road. Findings at 2. However, these allegations are not in either the Complainant's initial or amended complaint.

The whistleblower protection provision of the NTSSA covers actions only by a “public transportation agency,” or its contractors, subcontractors, officers, or employees. 6 U.S.C. § 1142(a). The term “public transportation agency” is defined in the NTSSA at 6 U.S.C. § 1131 as a “publicly owned operator of public transportation” eligible to receive Federal assistance. Neither of the law enforcement agencies mentioned in the OSHA Findings (the Federal Bureau of Investigation and the Drug Enforcement Administration) are public transportation agencies, so any actions by those agencies or their employees are not covered under the NTSSA.

Upon careful review, I also find that any of the Complainant’s allegations against a criminal element (or “gang”) are outside the purview of the NTSSA.¹⁷

Complaints Not Submitted to OSHA

I find that the issue of whether a whistleblower complainant is required to raise all allegations against a respondent in the initial complaint to OSHA has not, to date, been definitively resolved. I am cognizant that the implementing regulation states that proceedings before an administrative law judge are *de novo*. 75 Fed Reg. 53,531 (Aug. 31, 2010), to be codified at 29 C.F.R. § 1982.107(b). This standard implies, but does not definitively state, that an administrative law judge is not required to limit consideration strictly to matters that were first raised to OSHA. However, in at least one case, the Board has held that “the OSHA investigation is an absolute prerequisite” and stated that where a complainant fails to file a complaint with OSHA, “the ALJ had no power to adjudicate such a complaint.” Coates v. Southeast Milk Inc., ARB No. 05-050 (ARB: July 31, 2007), slip op. at 8 n.3; see also Parker v. Tenn. Valley Auth., ARB No. 99-143 (ARB June 27, 2002), slip op. at 4 (declining to address allegations of post-layoff retaliation because complaints were not investigated by OSHA).

Coates is not an NTSSA case, and indeed the Board’s decision pre-dates the effective date of the NTSSA. Nevertheless, I find that the case addresses the common requirement in most whistleblower complaints that fall within the Department of Labor’s aegis: that is, the requirement that the initial complaint (and subsequent administrative investigation) involve OSHA. For that reason, I find that the Coates case may be applicable to cases, like the Complainant’s that are grounded in the NTSSA.

Moreover, at least one court, in a case adjudicated under the Sarbanes-Oxley Act, has held that the failure to file a complaint with OSHA constitutes a failure to exhaust administrative remedies, and for that reason a matter may be dismissed. See Zhu v. Fed. Housing Fin. Bd., 389 F.Supp. 2d 1253, 1271-72 (D. Kan. 2005) (Sarbanes-Oxley claim dismissed because statute is not retroactive, and plaintiff failed to exhaust administrative remedies); see also Bozeman v. Per-Se Technologies, Inc., 456 F.Supp.2d 1282, 1357 (N.D. Ga. 2006) (Sarbanes-Oxley complaint dismissed as to a defendant not cited in the OSHA complaint). This is important because, like the NTSSA, procedures and standards for the Sarbanes-Oxley Act are based on the AIR21 statute. See 18 U.S.C. § 1514A(b)(2)(C).

¹⁷ I will address below the Complainant’s allegations that the Respondent and a criminal element have acted together.

I find that the NTSSA requires that all complaints be initially submitted to the Department of Labor; under the governing regulation, OSHA has been designated to receive such complaints. 6 U.S.C. § 1142(c)(1); see also 75 Fed. Reg. 53,530 (Aug. 31, 2010), codified at 29 C.F.R. § 1982.103(c). Based on my analysis, above, I find that the governing regulations require submission of complaints to OSHA as a prerequisite to further action by the Department of Labor. This includes action by an administrative law judge. Consequently, I find that any allegations that were not submitted to OSHA for investigation are not properly before me, and I cannot consider them.¹⁸

In sum, I conclude that the Complainant's allegations that include the following are not properly before me, for the reasons stated, and I thus am unable to consider them.

- Any adverse action by the Respondent prior to August 3, 2007: NTSSA not yet in effect.
- Any adverse action by the Respondent prior to September 28, 2007 (the 180th day prior to the filing of the Complainant's initial OSHA complaint): not timely under the NTSSA.
- Any adverse action by the Respondent not contained in Complainant's complaint to OSHA: Complainant failed to exhaust administrative remedies
- Action by any party other than the Respondent: NTSSA jurisdiction limited to "public transportation agencies."

THE PARTIES' MOTIONS FOR SUMMARY DECISION

In this matter, both the Complainant and the Respondent have moved for summary decision. I will address both parties' Motions, focusing first on the Complainant's Motion and then on the Respondent's Motion.

The Complainant's Motion for Summary Decision

Over the course of this proceeding, the Complainant has submitted multiple Motions, which I collectively will construe as his Motions for Summary Decision. These include:

¹⁸ The record reflects that I repeatedly informed the Complainant that I would not consider allegations against the Respondent that he had not raised to OSHA, and that I would not consider any allegations against any party other than the Respondent. See, e.g., Order of Feb. 24, 2010, at 4; Order of Sept. 23, 2010, at 2. I also informed the Complainant that, regarding any new allegations against the Respondent he chose to make, he had several options, including instituting a new complaint with OSHA See, e.g., Telephonic Conference of Sept. 14, 2010, Transcript at 27. In a later telephonic conference, I reiterated this information and informed the Complainant of the following options: (1) file his new allegations with OSHA; (2) allow the proceedings to go forward with only the allegations complained of to OSHA be adjudicated; or (3) file his case in federal district court where broader jurisdiction might allow him to include more allegations. Telephonic Conference of Sept. 24, 2010, Transcript at 14-15. The Complainant responded that he chose not to exercise any of these options and wished to add these items to the instant proceeding. Telephonic Conference of Sept. 24, 2010, Transcript at 35.

- October 19, 2010, “Motion to Preclude the Admission of Testimony and for Summary Decision” stating Complainant “moves for summary judgment” In support of the Motion, the Complainant averred that he “saw something and said something and was fired unlawfully. This behavior on the part of the MTA is unlawful under the NTSSA.”
- November 1, 2010, “Motion to Submit Prima Facie Evidence and for Summary Judgment” stating that the Complainant “moves again for summary judgment in favor of [the Complainant] for the full amount of \$250,000 plus another \$200,000 in sanctions.” This submission contained an attachment titled, “LPDC Proactive Problem Management Program Defect Investigation Notice Spurious ATS Messages,” which the Complainant contended, showed the Respondent “was negligent with responding to an attack of critical computer infrastructure after repeated warnings” The Complainant also attached several e-mails dating from October 2007 were attached.
- December 15, 2010, “Motion to End Settlement Talks, Motion to Submit Habit Criminal Evidence, Motion for Summary Judgement [sic],” stating the Complainant moved for summary judgment based on the “resolution” (i.e. settlement terms) proposed by his then-representative. Such terms were attached to the Complainant’s Motion.
- January 17, 2011, “Motion to Submit New Habit Evidence with Motion for Summary Judgment,” in which the Complainant moved for summary decision against the Respondent due to Respondent’s “criminal acts,” which he listed in an attachment to the Motion.
- January 25, 2011, “Motion to Preclude the Admission of Testimony and for Summary Judgment,” stating that the Complainant moved for summary decision, based on his assertion that he had established that the New York City transit system was under attack in 2007 and that he “saw something and said something and was fired unlawfully.”
- February 28, 2011, “Motion for Judgment on the Facts and Temporal Evidence,” stating the Complainant moved for summary judgment “since there is no genuine dispute” concerning several material facts.

The Complainant attached documents to some of his “Motions for Summary Decision.” See, e.g., Attachment to Motion of Nov. 1, 2010 “LPDC Proactive Problem Management Program Defect Investigation Notice Spurious ATS Messages.”¹⁹

In general, the Complainant’s Motions for Summary Decision repeatedly assert that his allegations against the Respondent are true, and that the Respondent has failed to show that his allegations are not true. On my review of the Complainant’s submissions, I find that this conclusion constitutes a principal basis for his Motion.²⁰

¹⁹ This is the same document the Complainant submitted in response to my Order of August 19, 2011.

²⁰ The Complainant also has submitted multiple Motions on other subjects, including Motions to amend his complaint by adding additional allegations against the Respondent. I DENY the

Perhaps the Complainant's most cogent articulation of the basis for his Motion for Summary Decision is set forth in his "Motion for Judgment on the Facts and Temporal Evidence" dated February 28, 2011. He wrote the following:

Therefore, [Complainant's first name] moves for summary judgment . . . since there is no genuine dispute concerning the following material facts: (1) that [Complainant] had documented and reported that the MTA-NYCT network and computer systems were compromised from the time Mr. Roberts, NYCT Pres., was install [sic] in 2007 (2) MTA was thereby negligent in responding JUL '07; (3) as a direct result of such negligence MTA-NYCT critical infrastructure sustained an attack throughout the year and so had injury ensue on [the Complainant] and his family.

In order to prevail on his Motion for Summary Decision, the Complainant must establish that there is a lack of evidence in the record to support the Respondent's burden. The Respondent's burden is to establish, by clear and convincing evidence, that it would have taken the same adverse action against the Respondent, notwithstanding any protected activity. As stated above, the Respondent has no burden until after the Complainant has established his prima facie case (as defined above). In order to address the Complainant's Motion for Summary Decision, and for the purposes of discussion only, I shall presume that the record before me establishes the Complainant's prima facie case.²¹ For purposes of this discussion, I will presume that the adverse action involved is the termination of the Complainant's employment.

The record reflects the Complainant was terminated from his employment on February 19, 2008. RX V. The record before me includes documents relating to the Respondent's termination of the Complainant from employment. These include the following:

- Memorandum dated June 29, 2007, to Richard Hayes, Chief Officer, Computing Service and Support, in which James Merwin, the Complainant's direct supervisor, reported that the Complainant had been "provocative, disruptive, obstructive and disrespectful" in a meeting on June 21, 2007. The subject of the meeting was to discuss implementation of a new backup procedure. RX E.
- Memorandum dated July 5, 2007, also to Mr. Hayes, in which Mr. Merwin reported an incident on June 28, 2007, in which the Complainant had stated he "knew all the dirt about this place and financial improprieties." This discussion took place after the Complainant's request to have a specific person placed under his supervision was denied. RX F.
- Memorandum dated July 11, 2007, to the Complainant, in which Mr. Hayes recounted the two incidents of June 21, 2007 and June 28, 2007. Mr. Hayes also stated that, in conversations regarding the Complainant's concerns about "fiscal irresponsibility," the

Complainant's Motions to amend his complaint, based on my determination that my adjudication of this matter is limited to allegations the Complainant initially has submitted to OSHA.

²¹ The Complainant should not presume that I have made such a finding; I will discuss in detail whether he has in fact established a prima facie case later, when I address the substance of the Respondent's Motion for Summary Decision.

Complainant also “threatened to provide information to the MTA inspector general if [his] demands were not met.” Mr. Hayes stated: “I believe this behavior is extremely inappropriate and unprofessional and as such this is to be considered a formal warning that if there is any further similar incident I will have no other alternative but to pursue further action against you.” RX J.

- A memorandum dated October 19, 2007, to Mr. Merwin, in which Kevin McKenna (who was acting in Mr. Merwin’s capacity while the latter was on vacation) recounted an incident in which the Complainant implemented a change, contrary to Mr. McKenna’s directive. Copies of e-mails documenting the incident were attached. RX Q.
- E-mail dated October 24, 2007, to the Complainant, in which Mr. Merwin addressed his memorandum to the Complainant “Allegation of Insubordination and Investigation.” Mr. Merwin’s memorandum, which was attached, addressed the incident that Mr. McKenna had reported. RX R.
- Memorandum dated November 5, 2007, to the Complainant, in which Mr. Merwin informed the Complainant of the determination that the Complainant had been insubordinate to Mr. McKenna. RX S.
- Memorandum dated December 21, 2007, to the Complainant, in which Mr. Hayes, the hearing officer in a “Managerial Discipline case” alleging insubordination and deceitful representation (both relating to the incident regarding Mr. McKenna and the change request), informed the Complainant that the charges, and the penalty of dismissal were upheld. The Memorandum summarized the positions of both management and the Complainant and reflects that the Complainant asserted that the charges were brought against him “not because of any wrongdoing on [his] part, but in retaliation for [the Complainant] having applied for the position of Senior Director of Livingston Plaza Data Center.” RX U.
- Letter to Complainant dated February 19, 2008, from Kevin Hyland, Vice President of Human Resources of NYCT, enclosing a copy of the “Step II decision” sustaining the charges and penalty. The “Step II appeal” document, also dated February 19, 2008, reflects that charges were preferred against the Complainant²² on November 21, 2007 (insubordination and deceitful representation, both relating to the October 2007 incident Mr. McKenna initially reported); a “Step 1” meeting was held on December 13, 2007, at which the Complainant and his attorney were present; that a “Step I decision” was issued on December 21, 2007, from which the Complainant appealed. The Step II appeal document reflects that the Complainant had previously received a warning about his conduct. It also reflects that, prior to making a final determination Mr. Hyland met, separately, with the Complainant (accompanied by his attorney), and with several named individuals, including Mr. McKenna. The focus of Mr. Hyland’s meetings was on the October 2007 incident. However, the Step II appeal document also reflects that the Complainant “kept trying to discuss numerous events dating back to March 2006 that he

²² In this document, the Complainant is referred to as the “Respondent.”

had recounted in his appeal letter” and which, according to the Complainant, showed “a continuing conspiracy against him” and that other workers “set him up” in furtherance of the conspiracy.²³ In a footnote, Mr. Hyland indicated that the Complainant asserted that the disciplinary charges “were levied as harassment for his having alerted the IG to the wrongdoings of some of his co-workers.” RX V.

I make the following findings, based on the record before me, including Respondent’s submissions:

1. The Respondent’s first disciplinary action against the Complainant was a “warning” issued on July 11, 2007. See RX J.
2. The Respondent instituted action to terminate the Complainant’s employment on November 21, 2007, and terminated his employment, after an investigation as well as meetings with the Complainant and other employees, on February 19, 2008. RX V.
3. The Respondent’s asserted rationale for terminating the Complainant’s employment was insubordination and deceitful conduct, both relating to the October 2007 incident that Mr. McKenna initially reported. RX V; see also RX Q, R, S.
4. Prior to the Respondent’s final decision to terminate his employment, the Complainant’s asserted that he was being “set up” because of his prior actions in reporting misconduct by other employees. RX V.
5. The Step II appeal indicates that the Complainant stated that he had reported “wrongdoing” by other employees to the “MTA Inspector General” but does not reflect the date of any report, or the substance of any complaints the Complainant made. RX V.
6. In his complaint to OSHA, the Complainant asserted he made a complaint to the “MTA inspector general,” on or about July 9, 2007, about “tampering with the overtime system.” OSHA Complaint.
7. The Complainant’s OSHA complaint did not indicate that the Complainant’s complaint to the inspector general implicated safety or security in any way. Id.
8. The Complainant made various complaints to the MYCT Equal Employment Opportunity Office. See, e.g., RX K, T. However, none of these complaints involve any complaint regarding safety or security.
9. The record before me includes multiple documents created contemporaneously with the events they describe, provides facts relating to the incident between the

²³ I presume that the substance of the “appeal letter” is the same as in the unsigned copy included in the initial complaint to OSHA.

Complainant and Mr. McKenna in October 2007, the event that precipitated the Complainant's termination from employment. RX M-RX R.

10. The record indicates the Complainant does not deny that the October 2007 incident occurred, but only denies that he was insubordinate to Mr. McKenna. OSHA Complaint.
11. Shortly after the October 2007 incident, the Respondent's managers investigated; and then the Respondent almost immediately took action to terminate the Complainant's employment, citing insubordination to Mr. McKenna and deceitful conduct. RX S, U.
12. The Complainant, in July 2007, had also received a written warning regarding his behavior. RX J.

Drawing all inferences in favor of the Respondent, as the non-moving party, I find that a fair reading of these materials indicates there is evidence sufficient to support an inference that the Respondent may be able to successfully meet its burden to establish that it would have terminated the Complainant's employment, notwithstanding any protected activity on the Complainant's part.²⁴ I also find that, based on the evidence of record, the Respondent may well be able to sustain its burden to establish this issue by clear and convincing evidence. See Yadav v. L-3 Comm. Corp., ARB No. 08-090 (ARB Jan. 7, 2010), slip op. at 16-17 (discussion of respondent's burden).

I find, consequently, that the Complainant has not established that he is entitled to summary decision as a matter of law, with regard to the issue of his termination from employment.

Based on the foregoing, I DENY the Complainant's Motion for Summary Decision.

I now turn to the Respondent's Motion for Summary Decision.

The Respondent's Motion for Summary Decision

The Respondent's Motion for Summary Decision makes two assertions: first, that during his employment with NYCTA, the Complainant did not complain about any issues relating to public transportation safety or security; and second, the termination of the Complainant's employment was not related to any complaints he may have made. Respondent's Support at 3-5.

²⁴ I also note that the Step II decision document indicates that Mr. Hyland, the deciding official, was aware that the Complainant had made a report to the MTA inspector general, but that Mr. Hyland told the Complainant no circumstances other than the circumstances surrounding the October 2007 incident would be considered in his action. RX V. I find this document, which was provided to the Complainant the same day that the decision was made to terminate his employment, is evidence to support the Respondent's position that its decision to terminate the Complainant's employment was based solely on the October 2007 incident.

As noted above, in an action under the NTSSA, a complainant (who must be an employee of a “public transportation agency”) is required initially to establish a prima facie case, which consists of the following elements:

- He engaged in protected activity, as defined in the applicable statute;
- The respondent employer knew or suspected that the employee engaged in protected activity;
- The complainant suffered an adverse action; and
- Circumstances are sufficient to raise the inference that his protected activity was a contributing factor to the adverse action.

75 Fed. Reg. 53,530 (codified at 29 C.F.R. § 1982.104(e)(2)); see also 75 Fed. Reg. 53,524 (Aug. 31, 2010).

If a complainant is unable to establish a prima facie case, then summary decision in favor of the respondent is appropriate. Motarjemi, slip op. at 3.

The Respondent’s position that the Complainant’s complaint does not relate to public safety or security is an assertion that the Complainant’s reports do not constitute protected activity, as defined in the Act. See 6 U.S.C. § 1142(a). The Respondent’s second assertion, that the termination of the Complainant’s employment is not related to any reports he may have made, constitutes an assertion that the Complainant cannot establish that the circumstances are sufficient to raise the inference that his reports (his “protected activity”) contributed to the adverse action, which in this case is the termination of the Complainant’s employment. Id.

Because the Respondent submitted this Motion for Summary Decision, I must draw all inferences in favor of the non-moving party (here, the Complainant). At this stage of the proceeding, the Complainant’s burden is minimal. If the evidence of record indicates that there is a dispute of material fact as to whether the Complainant is indeed able to establish a prima facie case, then I must deny the Respondent’s Motion for Summary Decision. See Motarjemi, slip op. at 3. However, drawing an inference in favor of the Complainant is not intended to remove from the Complainant the burden of bringing forth facts, from which it can be construed that he may be able to establish a prima facie case.

The Complainant’s Prima Facie Case

Are the Parties Covered under the Act?

It is clear, based on the record before me, that the Complainant was an employee of New York City Transit Authority (NYCTA), which is the Respondent in this matter. According to the record, the Complainant was hired as a “computer operations manager” in October 2004. RX A. It is also clear that the Respondent is a “public transportation agency” as defined in the Act. See 6 U.S.C. § 1131. I also find that, under the governing regulations, a former employee is covered under the Act. 75 Fed. Reg. 53,528 (Aug. 31, 2011) (to be codified at § 1982.101(d)).

I find, consequently, that the Act applies to the parties.

Do the Complainant's Allegations Constitute Protected Activity?

The first issue to examine is whether the Complainant's allegations constitute protected activity. In pertinent part, an allegation constitutes protected activity under the Act if it involves either:

- providing information to specified parties, including supervisors, regarding conduct which the employee reasonably believes “constitutes a violation of any Federal law, rule or regulation relating to public transportation safety or security, or fraud, waste or abuse of Federal grants or other public funds intended to be used for public transportation safety or security;” 6 U.S.C. § 1142(a)(1); or
- furnishing information to a regulatory or law enforcement agency “as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation.” 6 U.S.C. § 1142(a)(5).

The Complainant's Complaint

I have summarized the Complainant's initial and amended Complaints to OSHA above. The Complainant's initial complaint to OSHA is not entirely clear in its elucidation of his actions that constituted protected activity. An examination of the Complainant's allegations reveals that his initial complaint to OSHA stated that “unauthorized changes” to “configuration items” created a “hazard.” OSHA Complaint.²⁵ According to the Complainant's OSHA complaint, the “hazard” was “employees aided by management to perform an unauthorized change which was used to denigrate another manager, and to enhance the employee overtime.” *Id.* In his amended complaint filed with OSHA on April 30, 2008, the Complainant indicated that he was reporting (or had reported) “attacks” on the NYCTA computers. He indicated that these “attacks” included tampering with the payroll interface. The Complainant also stated that he had reported these matters, which included “a break down in their controls” to NYCTA management, who failed to act. *See* RX W.

The record before me indicates that, during the course of this proceeding, (for example at his deposition on September 17, 2010), the Complainant attempted to clarify his initial complaint, and discussed the actions that, in his view, constituted protected activity. They include the following:

- An e-mail, dated July 9, 2007, from Complainant to his superior, Chief Officer for Computing Service and Support Richard Hayes, listing an “employee profile” that contained “symptoms” of unnamed employees who potentially should be investigated by the “Inspector General.” The e-mail also advised Mr. Hayes that “higher levels (e.g.,

²⁵ As part of his initial complaint, the Complainant used a New York State Department of Labor PESH Form, titled “Notice of Alleged Safety or Health Hazards.” For the purpose of my discussion, I will presume that the term “hazard” in the New York State form is substantially equivalent to the term “public safety or security” in the NTSSA.

supervisor and above)” needed to be investigated, and how such investigation should be conducted. See RX H; see also RX C at 122-23.

- Another e-mail to Mr. Hayes, dated July 10, 2007, from Complainant, which stated: “I learned who brought down the subnet that knocked off both Midas and RSMIS users.... attempt to disrupt my next project (i.e. Centralized Monitoring). Compuware is one of the software products under review. Their efforts to slander me are causing NYC Transit more harm than I first thought.” See RX I.
- The Complainant’s first meeting with the Respondent’s Office of Equal Employment Opportunity (EEO): “On July 24, 2007 I asked Mr. D. Camacho for a contact in the Civil Rights Organization. . . . I met with Ms. Rodriguez of the Civil Rights Organization to determine how to file a complaint.” See RX C at 100-01. The “Pre-Complaint Form” from the EEO stated that the Complainant stated he was being slandered and inquired about an age discrimination claim. See RX K.
- According to an EEO investigator memorandum, dated December 30, 2009, the Complainant participated in two intake interviews on November 20, 2007 and December 5, 2007. The EEO accepted two of the Complainant’s discrimination claims for investigation: sexual orientation discrimination and unlawful retaliation. During this investigation, the Complainant stated that he was being targeted because he had highlighted computer tampering and re-directed money to curtail overtime. RX T at 3-4.

I find that the e-mails to Mr. Hayes, to which the Complainant adverted at his deposition, appear to address the same items that are addressed in his initial complaint to OSHA. See RX H, I. I do note that, although these two e-mails stated that the MTA inspector general should be informed of the Complainant’s allegations, there is no indication, from the face of these e-mails, that the inspector general was in fact notified.²⁶

In his most recent submission, the fax dated August 23, 2011, submitted in response to my Order dated August 19, 2011, the Complainant submitted a document titled “LPDC Proactive Problem Management Program Defect Investigation Notice....” The Complainant asserts that this document supports the allegations made in his complaint. I have examined this document, which is related to the incident in October 2007 involving unauthorized software changes. On its face, the document does not specifically indicate that these changes deal with safety or security matters.

Notably, not every complaint by an employee of a public transportation agency constitutes protected activity under the Act. As 6 U.S.C. § 1142(a)(1) explicitly states, only complaints relating to a “violation of any Federal law, rule or regulation in relation to public transportation safety or security” or “fraud, waste or abuse of Federal grants or other public funds intended to be used for public transportation safety or security” constitute protected activity. The implementing regulations mirror the statute. 75 Fed. Reg. 53,528 (Aug. 31, 2010),

²⁶ In his OSHA complaint, the Complainant stated he informed the inspector general on July 9, 2007, which is the same date as the Complainant’s e-mail to Mr. Hayes.

to be codified at 29 C.F.R. § 1982.102(a); see also 75 Fed. Reg. 53,522 (where the Department states that NTSSA created employee protection provisions for employees “who engage in whistleblowing activities pertaining to public transportation safety or security”) (emphasis added).

A fair reading of the Complainant’s initial and amended complaints, as well as other documents he has submitted since that time, reflects that the Complainant’s reports to management, at the time that he made them, constituted complaints about unauthorized changes to software. The Complainant’s reports also express the Complainant’s concern that employees may have generated these changes so as to create opportunities for paid overtime, either for themselves or for others, or that employees may be engaging in fraud. At his deposition, the Complainant confirmed that the gravamen of his complaints to his supervisors was that other employees were making unauthorized changes to software. RX C at 123-24; 216-17.

On their face, the Complainant’s allegations, as contained in the record before me, do not relate to any federal rule or regulation involving transportation safety or security. Consequently, I must conclude that they do not constitute protected activity under the Act, which strictly limits the definition of protected activity to complaints about these subjects.²⁷ Consequently, I also conclude that the Complainant’s initial reports, regarding unauthorized software changes, do not constitute protected activity under 6 U.S.C. § 1142(a)(1).²⁸

Hazards to Track Workers

Both in his initial complaint and his amended complaint filed with OSHA, the Complainant alluded to incidents in which track workers (employees of the NYCTA) had been fatally injured while at work. The Act includes, in the description of protected activity, furnishing information “as to the facts relating to any accident or incident resulting in injury or death to an individual . . . occurring in connection with public transportation.” Under the Act, such information must be furnished to certain named federal agencies or to “any Federal, State, or local regulatory or law enforcement agency.”

²⁷ I also note that, by making reports that other employees are generating software issues as a means to create the opportunity to make overtime pay, the Complainant was, at least implicitly, alleging fraud. However, I find that an allegation of fraud, without a concomitant assertion that the fraud related to funds intended to be used for transportation safety or security, does not constitute protected activity, because the language of the statute defines protected activity as encompassing only allegations of fraud relating to the funds “intended to be used for public transportation safety or security.” 6 U.S.C. § 1142(a)(1).

²⁸ 6 U.S.C. § 1142(a)(1) requires that a complainant’s complaints evidence a “reasonable” belief of a violation of federal standards (law, rule or regulation) involving public transportation safety or security, or of fraud involving public funds relating to transportation safety or security. Because I find that the complainant’s complaints about unauthorized changes to software did not articulate any nexus to public transportation safety or security, I find it is not necessary to address whether the Complainant’s belief was reasonable.

The Complainant's initial complaint clearly mentions at least two incidents in which NYCTA employees were fatally injured when they were hit by subway trains while performing track maintenance work or other duties. In the e-mail that initiated his complaint, the Complainant states: "The file titled 'Two New York City transit workers killed...' explains the fatalities that occurred the week of my first report, April '07. I reported the matter to my management immediately after the incidents, and then to MTA Inspector General in July '07." The Complainant's initial complaint to OSHA noted that, the week after one of the Complainant's co-workers made an "unauthorized change" to the software, there were "two separate incidents of subway worker fatality."

In his amended complaint, the Complainant again listed the deaths of the two track workers. He stated that he reported a "break down in [the NYCTA's] controls" which "jeopardizes the safety of passengers and workers." The Complainant stated that he "explained [his] situation to Mr. James Henly, MTA Deputy Executive Director." RX W.

The NTSSA was only recently enacted, in 2007. I am aware of no reported case that addresses the elements of what constitutes protected activity under 6 U.S.C. § 1142(a)(5). In order to determine whether the Complainant's reports constituted protected activity, I start with the language of the provision itself, which governs the following:

1. Furnishing information
2. To certain specified federal agencies or to "any Federal, State, or local regulatory or law enforcement agency"
3. "As to the facts relating to"
4. An accident or incident that resulted in death or injury or property damage occurring in connection with public transportation.

Under 6 U.S.C. § 1142(a)(5), the reports must be made to law enforcement officials. Importantly, as the Complainant himself states, he made his initial reports to supervisors or officials within the NYCTA. OSHA Complaint. The Complainant's complaint to OSHA is silent as to whether the Complainant made a complaint to any law enforcement agency, as the statute requires, but does indicate that the Complainant made a report to the "inspector general." It is possible that the "inspector general" is a law enforcement official. Based on the record before me, and making all inferences in the Complainant's favor, I must conclude that there is a question of material fact as to whether the Complainant timely made reports to law enforcement.

This conclusion does not end the inquiry, however, as to whether the Complainant's reports constituted protected activity under 6 U.S.C. § 1142(a)(5). This provision requires a complainant to provide information "as to facts" relating to an incident or accident. I conclude, based on the language of the provision, that in order to constitute protected activity, the information that a complainant furnishes must not be merely an opinion or a conclusion, but rather must be specific factual information related to one or more incidents. See generally

Simpson v. United Parcel Svc., ARB No. 06-065 (ARB Mar. 14, 2008) (Complaint under AIR21 statute must be specific).²⁹

In his initial and amended complaints to OSHA, the Complainant does not indicate what “information as to facts” regarding these incidents he may have reported.³⁰ All that is provided in the OSHA Complaint are conclusory statements that, according to the Complainant, linked his revelations about software compromises to incidents in which track workers were harmed. For example, in his initial complaint, the Complainant stated that track worker fatalities occurred the same week he made his initial report, in April 2007. OSHA Complaint. In his amended complaint, the Complainant stated: “I have evidence that showed people were harmed” and again cited the two incidents in April 2007 in which track workers were fatally injured. RX W.

I note that the language of 6 U.S.C. § 1142(a)(5), in defining what acts constitute protected activity, is different from than the standard in 6 U.S.C. § 1142(a)(1). In the former, a complainant must provide “information as to facts,” whereas in the latter, all that is required is a “reasonable belief.” 18 U.S.C. § 1514A(b)(2)(C); see also H.R. CONF. REP. NO. 110-259, at 340 (2007). These differing statutory standards suggest that the definition of protected activity in 6 U.S.C. § 1142(a)(5) is more stringent than the standard in 6 U.S.C. § 1142(a)(1). The “reasonable belief” standard is used in a number of statutes, including the Sarbanes-Oxley Act, and a substantial body of law has been developed concerning what constitutes “reasonable belief”. See 18 U.S.C. § 1514A(a). See also Sylvester v. Parexel Int’l LLC, ARB No. 07-123 (ARB May 25, 2011); Guay v. Burford’s Tree Surgeon’s [sic] Inc., ARB No. 06-131 (ARB June 30, 2008); Melendez v. Exxon Chemicals Americas, ARB No. 96-051 (ARB July 14, 2000).

In a Sarbanes-Oxley case, the Board has held that “general, conclusory accusations” do not constitute protected activity. Levi v. Anheuser-Busch Cos., Inc., ARB Nos. 06-102, 07-020, 08-006 (ARB Apr. 30, 2008), slip op at 13. At least one court has noted that a complainant’s suspicions of wrongful conduct do not constitute a “reasonable belief” of a respondent’s violation. Harp v. Charter Comm., Inc., No. 04-951-MJR (S.D. Ill., Jan 22, 2007), slip op. at 11, aff’d 558 F.3d 722 (7th Cir. 2009). Administrative law judges also have addressed the issue of whether a complainant’s allegations constitute a reasonable belief. For example, one administrative law judge noted that “suspicion is simply speculation” and cannot form the basis for a reasonable belief.³¹ Riedell v. Verizon Commc’ns, Case No. 2005-SOX-00077 (ALJ Aug. 14, 2006), slip op. at 10. Similarly, an administrative law judge determined that a complainant’s generalized allegations of fraud and other wrongdoing do not amount to protected activity.

²⁹ The governing regulation states that the burdens of proof under the NTSSA are the same as those of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century “AIR21”), at 49 U.S.C. § 42121. See 75 Fed. Reg. 53,324 (Aug. 31, 2010).

³⁰ The Board has stated that, in determining whether a complainant has engaged in protected activity, the relevant inquiry is to determine what information the complainant provided when making an initial report, rather than to examine the allegations in the OSHA complaint. Platone v. FLYi, Inc., No. 04-154, (ARB Sept. 29, 2006); see also Neuer v. Besseliu, Case No. 2006-SOX-00132 (ALJ Dec. 5, 2006) (reports to management).

³¹ The same “reasonable belief” language is used in both the Sarbanes-Oxley Act and the NTSSA. See 18 U.S.C. § 1514A(a)(1); 6 U.S.C. § 1142(a)(1).

Townsend v. Big Dog Holdings, Inc., Case No. 2006-SOX-00028 (ALJ Feb. 14, 2006), slip op. at 16.

I find that, based on the record before me, there is no evidence that the Complainant, at the relevant time, provided information “as to facts” regarding the incidents in which track workers were fatally injured. Rather, the Complainant’s allegations, as set out in his OSHA complaint, are merely conclusory statements purporting to link these events to matters involving software. The injuries themselves were matters of public record (as is evidenced by the fact that the Complainant’s complaint included newspaper articles). Based on the record before me, I find the Complainant may have pointed out a temporal coincidence between his initial report of software-based “attacks” and these tragic incidents. But a report of a coincidence does not provide any connection between the two events. If conclusory statements are not sufficient to establish a “reasonable belief” as has been held, then certainly such statements cannot be sufficient to establish what is a higher standard, that of “information as to facts.”

In a very recent case under the Sarbanes-Oxley Act the Board reiterated that the “reasonable belief” standard is the appropriate standard for ascertaining whether a complainant’s reports constituted protected activity. Sylvester v. Paraxel Int’l LLC, ARB Case No. 07-123 (ARB May 25, 2011), slip op. at 13.³² In elucidating what constitutes a “reasonable belief,” the Board held that this concept contains both objective and subjective elements. The Board stated: “To satisfy the subjective component of the ‘reasonable belief’ test, the employee must actually have believed that the conduct he complained of constituted a violation of the relevant law.” Id. at 14. And the Board also remarked: The second element of the “reasonable belief” standard, the objective component, “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” Id. at 15 (citation omitted).

As noted above, I conclude that the “information as to facts” standard of 6 U.S.C. § 1142(a)(5) is higher than the “reasonable belief” standard in 6 U.S.C. § 1142(a)(1). Nonetheless, I find that, in determining whether the Complainant’s reports regarding fatal injuries to track

³² In two separate cases, the United States Supreme Court has heightened the requirements for plaintiffs in civil cases to survive motions to dismiss under Rule 12(b), of the Federal Rules of Civil Procedure. Bell Atl. Corp. v. Twombly, 550 U.S.544 (2007); Ashcroft v. Iqbal, 556 U.S. ___, 129 S.Ct. 1937 (2009). In these cases, the Supreme Court stated that “[f]actual allegations must be enough to raise a right to relief above the speculative level” and must be sufficient “to state a claim to relief that is plausible on its face.” Twombly, 550 U.S. at 570. The Court also held: “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at 1949. In Sylvester, the Board stated that these requirements are inapplicable to Sarbanes-Oxley cases brought in the administrative procedures within the Department of Labor. Slip op. at 13. In a footnote, however, the Board declined to explicitly extend this holding to other whistleblower statutes. This suggests that the Board could choose to adopt the heightened Twombly/Iqbal standard for claims under the NTSSA. Sylvester, slip op. at 13 n.10. Nevertheless, I find that the Board’s reasoning in Sylvester is persuasive, and I find that it is appropriate to apply its analysis of “reasonable belief” to this case.

workers constitutes protected activity under 6 U.S.C. § 1142(a)(5), an analysis of the objective and subjective elements of the Complainant's complaint is also helpful. As the Board held, a complainant has satisfied the subjective element of the "reasonable belief" test when he demonstrates that he actually believes that the conduct he complains of constitutes a violation of the relevant law. I find, based on the record before me, that the Complainant has demonstrated a sincere belief in the veracity of the matters he has reported.

Regarding the objective component of the "reasonable belief" test, a complaint must be evaluated based on the knowledge available to a reasonable person in the same circumstances, with the same training and experience, as the complainant. The Complainant served as a computer operations manager. RX A. I presume that he is educated in this specialized field, and is highly knowledgeable about computer operations. However, I find that I am unable to conclude that the Complainant's complaints are objectively reasonable, because the record before me consists of conclusory statements, without any explanation from the Complainant as to how he arrived at the conclusions he did. It is up to the Complainant to show, at a minimum, that there is a reasonable question of material fact as to whether his complaints about track workers constitute protected activity, as defined under 6 U.S.C. § 1142(a)(5). See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

I acknowledge that, when adjudicating the Respondent's Motion for Summary Decision, the burden on the Complainant is low, and that all inferences must be made in the Complainant's favor. However, the fact that the burden on the Complainant is low does not mean that the Complainant has no obligation at all to establish that his allegations constituted protected activity. Put succinctly, I find there is a paucity of evidence to establish the objective reasonableness of the Complainant's allegations. Because the Complainant cannot establish his reports constituted a "reasonable belief" of a violation, then I must conclude that he is unable to meet the higher standard of providing "information as to facts" regarding incidents. And I therefore must conclude that there is no evidence that the Complainant's reports constituted protected activity, as defined in 6 U.S.C. § 1142(a)(5).

Because I have found that the Complainant's reports do not constitute protected activity, under either 6 U.S. C. § 1142(a)(1) or 6 U.S. C. § 1142(a)(5), it is not necessary for me to address the remaining elements of the Complainant's prima facie case. See Klopfenstein v. PCC Flow Technologies Holdings Inc., ARB Nos. 07-021, 07-022 (ARB Jan. 13, 2010). However, I will briefly review the evidence, as set forth in the record before me, relating to these elements.

Whether the Respondent was aware of the Complainant's purported Protected Activity

Based on the record before me, I find that the official who terminated the Complainant from employment was Kevin Hyland, and that before he took such action he interviewed several NYCT officials, including the Complainant's supervisors. RX V. I find that the official who was involved in the Complainant's "Step I" employment action was Richard Hayes. RX U. The record indicates that Mr. Hayes was well aware of the October 2007 incident which precipitated the Complainant's termination from employment. RX D, E, R.

There is no evidence, based on the record before me, that either Mr. Hayes or Mr. Hyland was aware of the Complainant's specific reports of software "attacks" and/or harm to transit workers.

Whether the Respondent subjected the Complainant to Adverse Action

The Complainant was terminated from the Respondent's employment on February 19, 2008. RX V. Termination of employment constitutes an adverse action and is specifically listed in the Act as "discharge". 6 U.S.C. § 1142(a). The Complainant's complaint, filed with OSHA on March 26, 2008, and specifically mentioning his termination from employment, was timely filed. Consequently, I find that the Complainant has established that the Respondent subjected him to adverse action when it terminated his employment.

As to other allegations of adverse action, I make the following findings:

As set forth above, because the NTSSA did not come into existence until August 3, 2007, I find that any adverse actions that occurred before that date are not properly before me.³³ Therefore, I cannot consider them.

I also find, based on my examination of the entire record, that the Complainant contends that a criminal element, composed in part of persons who may be under the control of the Respondent, continue to harass him, even after the termination of his employment. See, e.g., Complainant's Motions dated Mar. 7, 2011; Apr. 4, 2011; Apr. 19, 2011. In the Complainant's view, these allegations may be linked, because the perpetrators in each instance are members of the same group that was responsible for some of the "attacks," such as unauthorized changes to software, the Complainant asserted in his initial OSHA complaint.³⁴ The Complainant also asserts that, on occasion, this criminal element has attempted to do him harm, or to harm members of his family. See Complainant's Motion dated May 4, 2011. Allegations such as these are not contained in either the Complainant's initial or amended complaint to OSHA.³⁵

I find that, under the governing regulations, a former employee is covered under the Act. 75 Fed. Reg. 53,528 (Aug. 31, 2011) (to be codified at § 1982.101(d)). Consequently, the fact that some of the alleged events occurred after the Complainant ceased to be an employee of the NYCTA is not a bar to jurisdiction. However, as set forth above, I am unable to address any allegations not contained in the Complainant's complaint to OSHA, or any allegations against entities other than the NYCTA.

³³ For example, the record reflects the Complainant received a "Formal Warning" on July 10, 2007. See RX J.

³⁴ The Complainant's shorthand expression for this group is "The Gang." See, e.g., Complainant's Motion of Mar. 7, 2011.

³⁵ However, it appears that OSHA was cognizant of the Complainant's allegation that employees of federal law enforcement agencies attempted to harm his sister, because it is addressed in the OSHA Findings. OSHA Findings, at 2.

Whether there is a Relationship between the Complainant's Purported Protected Activity and the Respondent's Adverse Action

For a prima facie case, a complainant is required to show that facts establish a reasonable inference of a nexus between the complainant's protected activity and the respondent's adverse action. In the absence of direct evidence on this issue, an inference of a nexus can be made if the protected activity and the adverse action are close in time to each other. See Bechtel Constr. Co. v. Sec. of Labor, 50 F.3d 926, 934 (11th Cir. 1995). An adverse action is considered to have occurred on the date when the employer communicates to the employee that its decision is final. Id. See also Avlon v. Am. Express Co., ARB No. 09-089 (ARB May 31, 2011), recon. denied (ARB Sept. 14, 2011).

The Respondent asserts there is no relationship between the Complainant's purported protected activity and the Respondent's termination of his employment. Respondent's Support at 5-6. I have examined the record before me carefully. I find there is no direct evidence of any relationship between what the Complainant asserts was protected activity and the Respondent's termination of the Complainant's employment. For example, there is no indication that the Complainant's report to managers about software "attacks" was cited as a reason for his termination from employment.

As there is no direct evidence, it is appropriate for me to examine whether the circumstances are sufficient to infer a nexus. The documents proffered by the Respondent indicate that the Complainant, who already had been given a written warning about inappropriate behavior, was terminated from employment due to insubordination and deceitful conduct, relating to an incident that occurred in October 2007. The Complainant's removal from employment was initially proposed in November 2007; was decided in December 2007; and, after the Complainant's appeal, was upheld in February 2008. See, e.g., RX D, Q, U, V.

The Complainant's complaint indicates that he made his initial report in April 2007. OSHA complaint. As noted above, the Complainant also asserts that he made additional reports in July 2007. As set forth above, I can only consider adverse actions that are contained in the Complainant's initial complaint and that occurred after the NTSSA went into effect, on August 3, 2007. I find that the length of time between the Complainant's report and his termination from employment is at least seven months (July 2007 to February 2008), and may be as much as 10 months (April 2007 to February 2008). Even if I presume that the termination action should be dated from the precipitating incident, in October 2007, or the initial notice, in November 2007, I conclude that the span of time at issue here does not suggest a relationship between the Complainant's protected activity and the adverse action. Consequently, I find there is no evidence of record to establish a connection between the Complainant's purported protected activity and any adverse action that may constitute a violation of the Act.

Summary

As set forth above, I find that the evidence of record, with all inferences made in favor of the Complainant, indicates that the Complainant's actions, as he reported in his complaints to OSHA, do not constitute protected activity under either 6 U.S.C. § 1142(a)(1) or 6 U.S.C. § 1142(a)(5). In making these findings, I emphasized that I am constrained by the language of the NTSSA, which sets forth a specific definition of what constitutes protected activity.

Based on the foregoing, I conclude that summary decision in favor of the Respondent is appropriate, and I GRANT the Respondent's Motion for Summary Decision.

RESPONDENT'S MOTION FOR ATTORNEY'S FEES

The Respondent has also requested that it be awarded attorney's fees in this matter. Respondent's Support at 6-7. The principal basis for the Respondent's request is its conclusion that the Complainant's litigation against the Respondent is "without merit."

The NTSSA includes a provision authorizing the Secretary of Labor to award attorney's fees in an amount not exceeding \$1,000 to a "prevailing employer" where the Secretary has determined that an employee's complaint is "frivolous" or has been "brought in bad faith." 6 U.S.C. § 1142(c)(3)(D).

The governing regulation published on August 31, 2010, and effective on that date, parallels the Act and states:

If, upon the request of the respondent, the ALJ [administrative law judge] determines that a complaint filed under NTSSA was frivolous or was brought in bad faith, the ALJ may award to the respondent a reasonable attorney's fee, not exceeding \$1,000.

"Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act," 29 Fed. Reg. 53,522 (Aug. 31, 2010), 75 Fed. Reg. 53,532, codified at 29 C.F.R. § 1982.109(d)(2); see also 75 Fed. Reg. 53,523 (discussion of Secretary's authority under NTSSA to award prevailing employer an attorney's fee). The terms "frivolous" or "brought in bad faith" are not defined in the regulation.

The burden to establish an entitlement to attorney's fees is on the party requesting the fee award. Cefalu v. Roadway Express, Inc., ARB No. 04-103 (ARB Apr. 3, 2008). Under the regulation, I may award attorney's fees to a prevailing employer only upon finding that the complaint is frivolous or brought in bad faith. The Respondent in this case argues, essentially, that the Complainant's case is frivolous because, in the Respondent's opinion, it has been particularly burdensome. For example, the Respondent states that it has spent "many hours" dealing with the Complainant's case.

I find that the Respondent fails to establish entitlement to a fee award in this specific case. A burdensome case is not necessarily frivolous. Consequently, I deny the Respondent's request for fees.

ORDER

It is hereby ORDERED that the Respondent's Motion for Summary Decision be GRANTED, and the Complainant's Motion be DENIED. Accordingly, the Complainant's complaint is DISMISSED.

The Respondent's request for award of attorney's fees is DENIED.

SO ORDERED.

A

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an

appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).