

**U.S. Department of Labor**

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**Issue Date: 27 November 2018**

Case No.: 2017-NTS-00001

In the Matter of

**VINCENT McNULTY**  
Complainant

v.

**METROPOLITAN TRANSIT AUTHORITY;  
FRONTIER-KEMPER CONSTRUCTORS, INC.**  
Respondent

Appearances:

For Complainant: George J. Cannata, Esquire  
For Respondent Metropolitan Transportation Authority: John Abili, Esquire  
For Respondent Frontier-Kemper Constructors: Louis P. DiLorenzo, Esquire and  
For Respondent Frontier-Kemper Constructors: Christopher J. Dioguardi, Esquire

Before: **THERESA C. TIMLIN**  
Administrative Law Judge

**DECISION AND ORDER DENYING CLAIM**

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 the Implementing Regulations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, and is found at 6 U.S.C. § 1142. Implementing regulations were published on November 9, 2015. See “Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and Federal Railroad Safety Act,” 80 Fed. Reg. 69,138 (Nov. 9, 2015) to be codified at 29 C.F.R. Part 1982.<sup>1</sup> A hearing in this matter took place on July 10 and 11, 2017. Complainant is represented by counsel.

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<sup>1</sup> Unless otherwise noted, all references to regulations are to Title 29, Code of Federal Regulations (C.F.R.). References to the implementing regulations will cite to the applicable provision in Part 1982, rather than to the Federal Register.

## I. PROCEDURAL HISTORY

On July 11, 2016, Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”), alleging that Respondent Frontier-Kemper Constructors (“Respondent FKC”) terminated his employment in response to a Workers’ Compensation claim and Liability Notice of Claim he filed with Respondent Metropolitan Transportation Authority (“Respondent MTA”) over injuries he suffered from exposure to fumes and dust.<sup>2</sup>

On November 4, 2016, OSHA found that Respondent MTA did not commit an adverse action against Complainant and therefore Complainant could not make out a *prima facie* case against it. Although Respondent FKC terminated Complainant’s employment, OSHA also found that Respondent FKC showed by clear and convincing evidence that Complainant’s protected activity did not contribute to the termination. OSHA therefore dismissed the action.

Complainant objected to OSHA’s findings and requested a hearing before an administrative law judge (“ALJ”) on November 28, 2016. Upon receiving this case, the undersigned issued an Initial Notice of Hearing and Pre-hearing Order, which set a hearing date for June 26, 2017 and continuing June 27, 2017 as necessary.

During a telephonic conference call on May 9, 2017, the parties and undersigned agreed to reschedule the hearing for July 10-11, 2017. A Notice of Rescheduled Hearing dated May 11, 2017 memorialized the new hearing date.

The hearing took place over these two days as scheduled. The undersigned admitted JX 1-22 (Tr. at 8); CX 1 and 2 (Tr. at 88, 313); and RX 1-6 (Tr. 135, 405, 526, 529, 534).<sup>3</sup> At the close of the hearing, the undersigned set a briefing deadline for October 16, 2017. (Tr. at 537.)

By letter dated October 6, 2017, Respondent FKC, with the consent of Complainant and Respondent MTA, requested a 30-day extension through November 15, 2017 to submit post-hearing briefs, which the undersigned granted. The parties timely submitted their briefs.

## II. ISSUES

The following issues require adjudication under the NTSSA:

1. Are Respondents covered by the Act?
2. Did Complainant engage in protected activity?
3. Did Complainant suffer an adverse employment action?
4. Did any demonstrated protected activity contribute to Respondent’s adverse employment action?

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<sup>2</sup> As the alleged NTSSA violation occurred in the state of New York, the law of the U.S. Court of Appeals for the Second Circuit applies. See 6 U.S.C. § 1142(c)(4).

<sup>3</sup> This Decision and Order uses the following abbreviations: “JX” refers to Joint Exhibits; “CX” refers to Complainant’s Exhibits; “RX” refers to Respondent’s Exhibits; and “Tr.” refers to the transcript of the July 10-11, 2017 hearing.

5. Assuming Complainant can meet his burden of demonstrating the above elements, would Respondent have terminated Complainant's employment in the absence of any protected activity?
6. Is Complainant entitled to relief?

See Nichik v. New York City Transit Auth., 2013 U.S. Dist. LEXIS 4792 at \*9-10 (E.D.N.Y. 2013).

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### A. Evidence

The parties jointly submitted the following exhibits:

- JX 1: Complainant's Summons and Complaint against Respondent MTA, et al. dated July 11, 2016
- JX 2: Workers' Compensation Board Decision denying Complainant's claim dated January 11, 2017
- JX 3: Complainant's OSHA Complaint against Respondent FKC dated July 11, 2016
- JX 4: OSHA letter dated November 4, 2016 dismissing the Complaint
- JX 5: Complainant's Initial Submission to the Court dated December 27, 2016
- JX 6: Respondent FKC's Demand for Production of Documents dated January 5, 2017
- JX 7: Statement of Wilmar Esguerra dated June 24, 2016
- JX 8: Dr. Okhravi's Return to Work Form dated July 31, 2015
- JX 9: Injury Report Form prepared by Michael Colletti dated July 31, 2015
- JX 10: Respondent FKC's Certificate of Orientation, initialed by Complainant, dated February 23, 2015
- JX 11: Respondent FKC's Smoking Memorandum dated May 19, 2015
- JX 12: Respondent FKC's Safety Memorandum dated June 14, 2016
- JX 13: Respondent FKC's Acknowledgment of Receipt of Policy Against Harassment, signed by Complainant, dated February 23, 2015
- JX 14: Complainant's Response to Respondent FKC's Demand for Production of Documents dated February 13, 2017
- JX 15: Incident/Accident Investigation Report, prepared by Complainant, dated July 31, 2015
- JX 16: Complainant's Notice of Claim against Respondent MTA's Capital Construction Company served on June 7, 2016
- JX 17: Complainant's Notice of Claim against Respondent MTA served on June 7, 2016
- JX 18: Respondent FKC's Position Statement to OSHA in response to the OSHA Complaint, prepared by attorney Robert Nida, dated August 1, 2016
- JX 19: Respondent FKC's Safety and Health Plan (pp. 33-35)

- JX 20: Tunnel Workers Contract
- JX 21: Workers' Compensation Board decision of July 11, 2016
- JX 22: Complainant's Application for Board Review dated June 13, 2017.

Complainant submitted the following exhibits:

- CX 1: Copy of text message exchange between Complainant and Complainant's counsel
- CX 2: Respondent FKC's disclosures

Respondent FKC submitted the following exhibits:

- RX 1: Complainant's deposition dated June 27, 2017
- RX 2: Handwritten notes regarding Complainant's smoking dated January 2016 to April 2016
- RX 3: Complainant's interview with OSHA investigator dated August 9, 2017
- RX 5: Wilmar Giovanni Esguerra's deposition dated June 30, 2017<sup>4</sup>
- RX 6: Michael Colletti's deposition dated June 30, 2017

#### B. Stipulated Facts

1. Complainant was hired by Respondent FKC on February 23, 2015.
2. Complainant was covered by the Tunnel Workers Union collective bargaining agreement.
3. On July 31, 2015, Complainant reported that he had a sore throat and headache due to dust and shotcrete at his job site.
4. Complainant later filed a Workers' Compensation claim.
5. On June 24, 2016, union foreman Wilmar Esguerra terminated Complainant's employment.
6. The Union never filed a grievance alleging Complainant was not discharged for just cause.
7. Complainant's Workers' Compensation claim was disallowed in a decision dated July 11, 2016.
8. On July 11, 2016, Complainant filed his Notice of Whistleblower Complaint with OSHA.
9. On November 4, 2016, OSHA issued a decision dismissing Complainant's whistleblower complaint.
10. On November 28, 2016, Complainant objected to the dismissal and requested a hearing.

Tr. at 7.

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<sup>4</sup> RX 4 was a letter from Respondent accompanying RX 3.

### C. Hearing Testimony

#### Complainant (Tr. at 34-232)

Complainant, born in Ireland in August 1973, came to the United States in 2010 and began working in the Sandhog Union in 2011. Sandhog work consists of construction of new train lines in underground tunnels. On his last job, Complainant performed steel ladder work, which required him to tie rebar together in a circle, creating a reinforcement around the tunnel's inside perimeter prior to the pouring of shotcrete or concrete. He began work for Respondent FKC in February 2015 as part of a gang. He maintained a very good relationship with his foreman, Mr. Wilmar Esguerra, and would fill in for Mr. Esguerra as foreman when he could not work. (Tr. at 34-39.)

As part of the tunnel construction, dry shotcrete is sprayed on the walls and ceiling through one hose and mixes with water from another hose to create a sticky paste. Because this process creates a lot of dust and milestone, the gang members doing this work wear respirators, but the individuals who work in proximity do not. Respondent FKC did not offer Complainant a respirator or fit test him for one. To protect other trade workers near the shotcrete, Respondent FKC built bulkheads intended to seal off that section of the tunnel with plastic, but the fumes bled through. Then it tried using fans to blow the dust away, but that did not prove successful either. Finally, it moved the shotcrete process to the graveyard shift, when fewer people worked in the surrounding area. (Tr. at 40-42.) Complainant felt that this change helped. (Tr. at 57.)

Exposed to the shotcrete, Complainant fell ill due to the dust exposure. He developed pain in his head and throat burn and lost his voice. On July 31, 2015, Complainant reported these symptoms to safety officer John Roach. A medic came onsite and recommended that he see a doctor. Derrek Davis, another member of Respondent FKC's safety team, brought Complainant to a doctor in Manhattan. The doctor examined Complainant and administered a steroid injection, nasal spray, and tablets. (Tr. at 42- 44.) Contrary to the narrative at JX 9, the doctor Complainant saw in Manhattan did not tell him to stop chewing tobacco, nor did the doctor's report reference chewing tobacco. Complainant has never chewed tobacco and therefore chewing tobacco could not have caused his throat burn. (Tr. at 55-56.) After seeing the doctor, Complainant returned to the job site and filled out the Incident/Accident Investigation Report. (JX 15). Complainant characterized the dust as an unprotected hazard, meaning the dust had reached him without his having donned a respirator. (Tr. at 45-46.)

Respondent FKC had not given Complainant a half-face respirator when he was exposed to the dust. Over the next eight or nine months, his throat worsened and he had to use prescription inhalers. During that time, Complainant sought medical treatment from Dr. Henoch in Yonkers, who diagnosed Complainant with asthma, as reflected in JX 14. In February 2016, Complainant retained a workers' compensation attorney and filed a claim in connection with the exposure that he believed caused his asthma. The Workers' Compensation Board denied his claim for lack of evidence. Complainant appealed, this time with additional evidence including Dr. Henoch's report. The decision is currently pending. (Tr. at 54-62.)

Complainant started smoking cigarettes, which he rolls himself, in his twenties. He characterized these cigarettes as half the thickness of a standard commercial cigarette. As of

2015, his smoking frequency varied from zero to twenty per week, but he did not provide a particular reason for this pattern. Complainant described himself as an occasional smoker. After his asthma diagnosis, doctors advised Complainant not to smoke and he tried not to, but there were times when he still smoked. At the time of the hearing in 2017, Complainant had not smoked since Christmas because it irritated his throat, but he also testified that he had smoked over the prior weekend at a party. Although he testified at a deposition that he did not smoke on the job, Complainant corrected that the testimony and stated that he did smoke at work on occasion. He attributed his original testimony to nervousness about outing other workers as smokers. Complainant described the conditions in the underground tunnel as wet and dusty such that he could not effectively roll a cigarette. He generally remained underground in the tunnel for his entire shift, including taking his meals there, and he also smoked down there a couple of times per week. While working for Respondent FKC, he wore his safety glasses almost all of the time, except when he sprayed water, so he could see what he was doing. In spite of Respondent FKC's claims otherwise, he never received an infraction for not wearing his glasses or for smoking underground. To his knowledge, Respondent FKC did not terminate any other workers for failing to wear safety glasses or for smoking. Complainant estimated that about a quarter of the underground workers smoked in the tunnel. (Tr. at 63-72.)

Two weeks after filing his Notice of Claim on June 22, 2016, as Complainant was about to start his shift, Mr. Esguerra ordered Complainant off of the train and informed him that Respondent FKC wanted to lay him off for filing a claim, though Mr. Esguerra did not specify which claim. (JX 16, 17.) Mr. Esguerra left Complainant and returned five or ten minutes later and told him not to worry about the layoff after all. Complainant then proceeded to work as usual. Once he returned home, he texted his counsel a message at 6:44 p.m. (Tr. 77-83.) The text message read:

Hi Greg, it's Vincent here. How is everything? Could I call you this evening? I know you're probably not long home yourself, I'm just going eating dinner now, so I'll call maybe in a half hour or so. Just some concerns I have. I just heard today that they went to lay me off. I'll chat with you better when I get talking to you. Thanks, Greg.

(CX 1.)

Despite Mr. Esguerra's denial that he told Complainant about his imminent dismissal due to his claim and that he was ultimately terminated two days later, on June 24, 2016, for safety violations, this version of events does not square with the text message that Complainant sent to his attorney telling him of his impending layoff on the evening of June 22, 2016. (Tr. at 112.)

On June 24, 2016, Mr. Esguerra approached Complainant as he stepped off the elevator shaft and reached the work area. Appearing uneasy in Complainant's mind, Mr. Esguerra conveyed to Complainant that safety managers Mike Colletti and Bill Bilmar had directed him to fire Complainant for safety reasons—specifically for smoking and not wearing safety glasses. Almost crying, Mr. Esguerra told Complainant that the decision to fire him was not right, attributing it to the claim Complainant filed. Complainant spoke to the union about his termination, but the union declined to pursue it to maintain a good working relationship with Respondent FKC. (Tr. at 90-98.)

The specific infractions levied against Complainant, as listed in JX 18, occurred on July 31, 2015 when Mr. Davis observed Complainant smoking a cigarette. However, he did not even go underground that day. Instead, he came in at 6:30 a.m., reported feeling sick, was evaluated by the on-site medic and taken to see a doctor in Manhattan before returning back to the on-site office to complete paperwork and returning home. The pain in his throat prevented him from speaking and therefore he could not have smoked a cigarette that day. Complainant denied that the next alleged infraction even occurred, in which Dennis Lee maintains that he caught Complainant smoking in the cross-flue section of the project. The third and fourth infractions, occurring on February 17, 2016 and April 20, 2016 respectively, cited Complainant for not wearing safety glasses at the job site. Complainant's final infraction before his termination occurred on June 24, 2016 for not wearing safety glasses, even though he had not started work yet. In any case, Complainant testified that he donned his safety glasses before taking materials out of the tool box. Smoking infractions are comparatively more serious than not wearing glasses if not engaging in high risk work. The Notice of Claim processed two or three weeks before Complainant's firing and Complainant believes that this changed his standing in the company. (Tr. at 99-105.)

On cross-examination from Respondent FKC's counsel, Complainant made clear that the text message sent by Complainant to his counsel did not reference Mr. Esguerra. The "they" referred to Respondent FKC. (Tr. at 124.) Complainant stated that Mr. Esguerra, and no one else, informed Complainant of his imminent layoff based on his workers' compensation claim. However, during his OSHA interview, Complainant told the investigator that a group of foremen directed him to go upstairs and told him that he was being terminated due to his workers' compensation claim. (Tr. at 120-122.)

In his June 27, 2017 deposition, Complainant maintained that he smoked two or three times per week, but never underground or on the subway. He subsequently corrected this representation at the hearing. In another correction, he changed his testimony from "no" to "yes" as to whether other workers smoked underground. He made these changes because he wanted to his testimony to reflect accurate answers. When asked why he stated that he never smoked underground himself at the deposition, he cited his nervousness and uneasiness upon questioning. Upon further reflection, he wished to correct his spur-of-the-moment answers to reflect the truth. (Tr. at 135-144.)

Complainant also sat for a deposition on June 30, 2017. At that deposition, Complainant testified that he did not smoke prior to his twenties, a contention he did not correct when presented with six or seven medical opinions stating otherwise. He further amended his testimony by indicating that he occasionally smoked cigarettes in the tunnel a couple of times per week over a period of a year-and-a-half depending on how much work he had to do. If he identified a safety crew member while smoking a cigarette, he would put it out. Complainant knew that smoking and repeated glasses violations were grounds for termination, but could not recall Respondent FKC firing anyone for either offense. He also did not recall the company terminating anyone for filing a Workers' Compensation claim. (Tr. at 144-159.)

Recalling the day of his firing on June 24, 2016, Complainant started the morning by unloading the gang box and retrieving tools, but he had not actually started working. (Tr. at 167.) Mr. Esguerra called Complainant over from the gang box to the work area. Mr. Smith, in close proximity, approached as well. The three congregated and Mr. Esguerra advised Complainant that he had been fired for filing a claim, without specifying which particular claim, and that the instruction came from Mr. Bilmar. (Tr. 171-173, 180.) Upon reaching Mr. Breslin's office after Mr. Esguerra advised him of his termination, Complainant recalled telling Mr. Breslin that Respondent FKC fired him due to the Workers' Compensation claim. (Tr. at 184-185.)

Complainant testified that he always wore his safety glasses except when he had to clean them. Mr. Esguerra never had to tell Complainant to wear his safety glasses. He also stated that Mr. Esguerra did not tell him that his mother died of cancer stemming from cigarette smoking, (Tr. at 175-177.)

Complainant agreed that Respondent FKC puts a premium on its safety program. Mr. Colleti or Mr. Lee hold a five to ten minute safety meeting every Monday morning, which Complainant attended in Queens. The meeting was conducted via loudspeaker and Complainant could not always hear what was said. The safety inspectors sometimes would not come around all day and other days Complainant would see them three or four times in a day. Complainant acknowledged that a general disregard of the safety rules constitutes a major infraction, which can lead to termination after a one-time offense. (Tr. at 186-189.)

On the undersigned's questioning. Complainant testified that back in Ireland, rolling cigarettes is much more common than in the U.S. and he kept the tobacco and papers in his pocket or pouch when he had them. When Complainant arrived at work, he would change into work clothes in the hog house and sometimes would put the papers and tobacco in the work clothes he donned or the lunch box he brought down with him. Other times those items would stay in a locker. He did not plan for which days he would bring the tobacco and papers with him underground. (Tr. at 204-208.)

Complainant wore his safety glasses consistently aside from times he could not see through them because of splattered water or muggy air, causing them to fog up. Out of the six men in his crew, Complainant recalled that two in particular had a problem wearing the glasses, but they always wore them when cutting steel. (Tr. at 214-215)

On redirect examination by Complainant's counsel, Complainant testified that Mr. Esguerra never reprimanded him for smoking, despite observing him smoke. (Tr. at 221.)

On redirect examination by Respondent FKC's counsel, Complainant denied that Mr. Esguerra told him that his smoking could land Mr. Esguerra in trouble. He further denied rolling four or five cigarettes to last him through lunch and otherwise rolling cigarettes in advance. Instead he would roll one at a time. Sometimes he smoked alone, and other times he would chat with another worker and they would smoked cigarettes. When Complainant saw someone, he would put his cigarette out, but when he saw Mr. Esguerra, he would not do so because Mr.

Esguerra “paid no heed.” Complainant denied that he tried to protect other workers and he did not intentionally withhold their names, he just did not want to drag anyone into this issue. Complainant confirmed that he worked six years underground as a sandhog and did not develop any asthma symptoms or lung problems until July 2015. (Tr. at 222-225.)

John Brendan Smith (Tr. at 231-264)

Mr. Smith is married to Complainant’s sister and has known Complainant since 2004. Like Complainant, Mr. Smith is a sandhog and they have worked together on three projects, including the Eastside Access Tunnel Project. He could not recollect the exact date of Complainant’s termination, but could recall that he was working on a bulkhead structure in close proximity to Mr. Esguerra and Complainant. (Tr. at 234-235.) That day, he started work around 6 a.m. and later observed Complainant and Mr. Esguerra having a serious conversation. Among the three of them, Mr. Esguerra told Complainant and Mr. Smith that the company wanted him to say that he saw Complainant working without safety glasses or smoking and fire him on this basis. Mr. Esguerra said he did not feel comfortable doing that, but he had been told that he had to choose between firing Complainant or the gang. Mr. Esguerra did not appear happy about this directive. This development did not seem right to Mr. Smith because it seemed to him as if the company forced Mr. Esguerra’s hand, that it forced him to do something he did not want to do. (Tr. at 241-243.)

One in five sandhogs smoke in the tunnels, according to Mr. Smith. Sometimes wearing safety glasses can be irritating, but in other instances wearing glasses can prevent sharp objects from coming into contact with one’s eyes. He described the tunnels as dusty. As a carpenter, Mr. Smith cuts wood using saws and he sometimes removed his glasses when making a precision cut. Otherwise, the glasses would impede his work. To his knowledge, no sandhog has been fired for smoking on the job or failing to wear safety glasses. Mr. Smith has seen Complainant smoke in the tunnel and also knew of Complainant’s workers’ compensation claim regarding his throat irritation from working in the tunnel, but he did not hear about it from Vincent himself. Specifically, Mr. Smith learned that he left work with throat irritation, saw a doctor, and disputed an outstanding medical bill a couple of weeks prior to Complainant’s termination. (Tr. at 234-240.)

On cross-examination conducted by Respondent FKC’s counsel, Mr. Smith approached Complainant and Mr. Esguerra to greet them that morning as he retrieved a saw. He did not notice anything unusual about their conversation until he inched closer. As he received the news of Complainant’s departure, he did not recall Mr. Esguerra identifying specific members of management who directed him to fire Complainant. Mr. Smith did not realize until that morning that a foreman could be fired for safety violations of the gang. However, Mr. Smith acknowledged that Respondent FKC has a compulsory policy of wearing safety glasses for safety purposes based on OSHA and New York City law requirements and that the company will face fines for non-compliance. (Tr. at 243-253.)

In the past, Mr. Smith estimated seeing Complainant not wearing his safety glasses in the tunnel three or four times from April 2015 to July 2016, but not on a regular basis. He has also seen Complainant smoke in the tunnel and acknowledged that Complainant rolls his own

cigarettes in advance of the work day before reaching the tunnel, sometimes two at a time. (Tr. at 253-257.)

Upon the undersigned's questioning, Mr. Smith testified that, to his knowledge, the company did not discipline anyone from his crew. He did recall a safety officer, Mr. Dennis McGuire, and other foremen telling him to put on his safety glasses, as he had a habit of removing his glasses. Often, Mr. Esguerra would express his satisfaction with Complainant's work performance and stated that he did not have to monitor him. (Tr. at 259-261.)

On cross-examination from Respondent FKC, Mr. Smith clarified that he did not have knowledge of the workers' compensation claim until after Complainant's firing, but did know of a billing discrepancy related to seeing an outside doctor from talking to Complainant. Rumors about layoffs were constant, but he did not hear any rumors about laying off Complainant due to the bill dispute. (Tr. at 261-263.)

Michael Colletti (Tr. at 270-394)

Mr. Colletti, a safety manager for Respondent FKC and certified OSHA inspector, has worked in safety positions for about a decade and has undergone extensive safety training. Working on the Eastside Access Tunnel Project, he performs daily inspections of the tunnel over a two or three mile stretch to ensure the gangs comply with standards because they engage in potentially dangerous work. Mr. Colletti's responsibilities also include holding safety meetings every Monday and arranging the testing for elevated levels of dust in the tunnel, conducted by a third party engineering company. OSHA has a minimal Permissible Exposure Limits ("PEL") and if the measurements fall below this level, the company must give employees who work in that area respirators. Prior to the project, the tunnel is measured to provide a baseline and OSHA requires testing twice per year. Mr. Colletti testified that Respondent FKC does so every quarter. Measurements have never reached a dangerous level. Mr. Colletti first learned of Complainant's throat irritation a month before Complainant's hearing before the Workers' Compensation Board, reflected at JX 21. (Tr. at 270-278.)

Company policy dictates that Respondent FKC provide respirators to any employee who requests one. It requires employees to wear respirators for specific processes, such as shotcrete operations. Mr. Colletti described two different types of shotcrete operations. In one, which does require a respirator, a worker breaks bags of dry concrete such that it causes dust. Roller shotcrete, on the other hand, funnels through a pipe from street level, shoots out from a hose and is applied to the walls. The company does not require respirators for the latter because wet shotcrete does not produce as much dust as dry shotcrete. About ninety-five percent of shotcrete is wet, while the remaining five percent is dry. (Tr. at 279-280.)

On the day that Complainant became ill, Mr. Colletti reported Complainant's injury to Respondent MTA as a work-related injury as per his job duties. Respondent MTA handles workers' compensation claims on this project and Respondent FKC does not have financial responsibility for workers' compensation claims. Respondent MTA notified Mr. Colletti that he would have to testify at the before the Workers' Compensation Board. In preparation for the hearing, Mr. Colletti produced air samplings. (Tr. at 282-287.)

Mr. Colletti estimated that he had reported forty work-related injuries in his four years in this capacity, none of which resulted in terminations for filing workers' compensation claims. He learned of Complainant's Notice of Claim against Respondent MTA from the HR Department after Complainant's termination. Mr. Colletti denied that he discussed terminating Complainant prior to his firing with either Respondent. He also denied having prior knowledge of Complainant's termination. He did not direct Mr. Esguerra to fire Complainant; Mr. Esguerra made that decision himself. On the day of Complainant's termination, Mr. Colletti was on vacation. Mr. Davis advised Mr. Colletti that, on the day he took Complainant to Med-Core, he was smoking on the construction site, a violation of law and not just a company rule. (Tr. at 288-293.)

On cross-examination, Mr. Colletti acknowledged the dusty condition in the tunnels in July 2015 and that shotcrete can pose a hazard to an employee's health because it contains silica and is high in alkaline. However, of all of the sandhogs, Mr. Colletti received one dust complaint from Complainant only. The workers are provided with water, the best control for dust, and the company uses dust busters, fans, and bulkheads as preventive measures to guard against exposure to dust. Mr. Colletti did not have input in the decision to move the shotcrete operation from the day shift to the night shift in July 2015. Respondent FKC did not have a policy mandating that sandhogs wear respirators near dry shotcrete operations. Mr. Colletti estimated that fifty out of 500 sandhogs received respirators. He does not know whether Complainant was fit-tested for one. (Tr. at 298-308.)

One of Mr. Colletti's safety representatives, most likely Mr. Davis, prepared an investigation report as to Complainant's injury suffered on July 31, 2015 for Respondent MTA. (Tr. at 321.) Mr. Colletti did not know that Complainant had sued Respondent MTA in connection with this injury. (Tr. at 342.) Mr. Colletti did not make any promises to Mr. Esguerra if he fired Complainant. Nor did he know of any agreement that would ensure Mr. Esguerra could keep his job if he cooperated with Respondent FKC in this current claim. (Tr. at 356-358.) In fact, he denied having conversations with Mr. Esguerra and denied even speaking about Complainant prior to June 24, 2016. Not until after he returned from vacation, after Complainant's termination, did Mr. Colletti learn about the circumstances surrounding Complainant. (Tr. at 342-344.)

When a safety member observes a worker committing an infraction, the safety member will make a written note of it, including the worker's name, date, and nature of the infraction and will then place the note in an envelope. Mr. Colletti explained that he shows more leniency when he sees a sandhog without safety glasses while walking in tunnel than, for example, while cutting wood or chipping rock. The infraction sheet does not necessarily provide the name of the safety member who wrote it. There is no formal policy for completing these sheets because the safety member eventually inputs them into a Microsoft Excel spreadsheet. (Tr. at 344-349.)

On the undersigned's questioning, Mr. Colletti explained that the shotcrete process includes sandhogs who break bags of concrete and apply wet shotcrete. The sandhogs who break dry bags of concrete, which produces dust, must wear a respirator. Other workers load wet

shotcrete from a truck aboveground into a tube and shoot the wet shotcrete onto the walls of the tunnel. They do not need to wear respirators. During this time, no workers other than the gang at work, can enter the area for ninety minutes by law so the shotcrete can adhere to the walls and ceiling. (Tr. at 362-366.)

Although Mr. Davis completed the MTA Injury Report Form (JX 9), Mr. Colletti signed it as his supervisor. Mr. Davis told Mr. Colletti that he brought Complainant to Med-Core as per the Collective Bargaining Agreement. An injured employee cannot file a workers' compensation claim unless the employee reports to Med-Core. There, Med-Core takes a statement from the injured employee and sends it to Respondent MTA. Meanwhile, Mr. Colletti will send an OSHA 100 form, as well as the Incident/Accident Investigation Report (JX 15), to Respondent FKC's headquarters. Because Mr. Colletti had been on vacation at the time of Complainant's termination, Mr. Lee acted in his stead as safety manager. Mr. Colletti testified that Respondent FKC had terminated other sandhogs in the past for smoking violations, including one that occurred a week or two before Complainant's firing. Others have been fired for personal protective equipment ("PPE") violations, such as failure to wear safety glasses. (Tr. at 367-378.)

Mr. Colletti testified to the difficulty of tiring sandhogs for smoking because when he makes his rounds, the sandhogs developed signals to throw out their cigarettes so as not to get caught, leaving cigarette butts on the ground. The issue of smoking became so dire after two firemen passed away, that the company hired a tobacco smelling dog. Mr. Colletti explained that he does not wish to fire sandhogs and knows that their employment opportunities are limited, but at the same time he has to maintain control and safety of the work environment. A simple flick of a cigarette in this environment can cause a fire and those who violate the law against smoking should be held accountable for putting others at risk. Respondent FKC has a progressive disciplinary system, but Mr. Colletti admitted the difficulty of enforcing the system because union workers do not want to rat out their brothers and because safety monitors have to cover five-and-a-half miles of tunnel, making it difficult to catch violations. In addition, employees charged with infractions must sign paperwork, and the union advises the employees not to sign anything. (Tr. at 381-383.)

On redirect examination from Respondent FKC's counsel, Mr. Colletti testified that Complainant and Mr. Esguerra belonged to the same union, a dynamic that makes enforcing the progressive discipline scheme difficult. The measures taken to reduce the impact of the dust occurred long before Complainant's June 24, 2016 firing. Mr. Colletti treats repeat offenders of safety violations harsher than one-time offenders because multiple minor infractions amount to a major infraction. Multiple infractions can result in termination and this represents the most common form of termination. (Tr. at 384-387.)

On re-cross examination, Mr. Colletti characterized smoking as a serious issue. However, he did not terminate Complainant immediately after his November 2015 smoking violation because "we're not the police officers," commenting that the company gives employees more chances than they deserve. Mr. Colletti was not aware of this smoking violation at the time it happened. (Tr. at 387-392.)

Dennis Lee (Tr. 395-422)

Dennis Lee, a safety representative for Respondent FKC for three years, has worked on the Eastside Access Tunnel Project for that same duration, with two years of safety work experience prior to that. As a safety representative, he goes down to the tunnel every day to ensure that employees work safely, wear the proper PPE, and that the area is clean. He checks different sites and walks the length of the tunnel back and forth, a distance of about six miles. He has taken the forty-hour safety manager's training two or three times and holds a number of other safety certifications. (Tr. at 395-397.)

Mr. Lee has observed Complainant commit safety infractions related to smoking and not wearing safety glasses. (Tr. at 398). He memorialized these infractions, reflected at RX 2, which occurred during his walk-around. Mr. Lee does not frequently catch workers smoking because word spreads quickly of his inspection among the sandhogs, signaling to the workers not to do anything unsafe. Mr. Lee only interacted with Complainant once, when he caught Complainant smoking in November 2015. In that instance, Mr. Lee walked down Tunnel 1 and crossed over the flue and found Complainant sitting on a box at lunch smoking. Mr. Lee walked up alongside Complainant and gave him a warning, advising him that he could be fired for smoking because it violates fire rules and regulations. Mr. Lee had learned of Complainant's dismissal when Mr. Esguerra and Complainant came to Mr. Lee's office the day of the termination when Mr. Esguerra told him that Complainant had been terminated for not wearing safety glasses. Mr. Esguerra made the statement at JX 7 at Mr. Lee's direction. Mr. Lee typed it and Mr. Esguerra signed it. The statement includes multiple dates of infractions as memorialized in Mr. Lee's notes. (Tr. at 406-412.)

On cross-examination by Complainant's counsel, Mr. Lee noted that Mr. Esguerra drafted his statement in a separate room and that he did not assist Mr. Esguerra in writing it. He did not have prior conversations with Mr. Esguerra regarding Complainant's termination or past infractions. Approximately five or six workers have been fired for smoking violations and two for not wearing safety glasses over a period of three years. (Tr. at 412-415.)

Respondent FKC did not fire Complainant after the November 2015 smoking infraction to give him another chance. Mr. Lee had known of Complainant's prior July 2015 smoking violation at that time, but could not recall Complainant's name regarding this incident. Mr. Lee acknowledged using an employee reprimand form as dictated by company rules because he gave Complainant another chance when he found him smoking. As to the safety glasses violation, Mr. Lee told Mr. Esguerra about it, but left it up to him to discipline Complainant for it. (Tr. at 415-419.)

On redirect examination by Respondent FKC's counsel, Mr. Lee stated that he does not use employee reprimand forms unless he issues a formal reprimand. (Tr. at 419.)

On the undersigned's questioning, Mr. Lee testified that he places thirty to forty post-it notes in a manila envelope once a month. He locks the envelope in his drawer when he needs to

refer to it. When Mr. Esguerra drafted his statement, Mr. Esguerra came to Mr. Lee's office to ask for the dates in which he marked Complainant's violations in the past and Mr. Lee consulted the manila envelope. Mr. Esguerra advised Mr. Lee that he planned to terminate Complainant after not wearing his glasses again, but Mr. Lee instructed him to write up Complainant for this latest safety violation first. (Tr. at 419-422.)

Wilmar Esguerra (Tr. at 423-502)

Wilmar Esguerra served as the foreman of Complainant's gang for Respondent FKC until two months prior to the hearing. Complainant worked in Mr. Esguerra's gang and he described Complainant as a good worker, selecting Complainant as substitute foreman in his absence. As of June 2016, Mr. Esguerra's duties included overseeing a group of six workers who installed rebar, reading blueprints, and ensuring that workers wore their PPE, as well as maintaining a safe atmosphere. Mr. Esguerra caught Complainant smoking many times and advised him to become more vigilant about it, warning him that it could lead to his termination. (Tr. at 424-426.) He had also observed Complainant make several pre-rolled cigarettes that he kept in a little pouch. (Tr. at 432.) Prior to his dismissal, Mr. Esguerra spoke to the shop steward, Mr. Breslin, about Complainant's smoking. Smoking became such a problem that Respondent FKC informed the foremen that responsibility for such infractions would fall on them. Mr. Esguerra had a heart-to-heart talk with Complainant, referencing his mother as someone in his life whom he lost to cancer as a result of smoking, while also acknowledging the difficulty of quitting. Complainant assured him that it would not happen again. (Tr. at 424-429.)

On the morning of June 24, 2016, Mr. Esguerra retrieved tools from the tool box and prepared to work, when he spotted Complainant with a cigarette in his mouth and without his glasses. Having already had a heart-to-heart talk with him, Mr. Esguerra took this latest violation as a slap in the face and escorted him upstairs to the hog house office so he could terminate Complainant in front of Mr. Breslin. At that point, Mr. Esguerra believed his smoking would not stop and that his own job would be in jeopardy if he did not act. Mr. Esguerra decided to dismiss Complainant on his own accord, but found it difficult to do so because of the fondness he felt for Complainant. (Tr. at 430-432.) Mr. Esguerra did not know of Complainant's pending Workers' Compensation claim or lawsuit against Respondent MTA when he fired Complainant, but he did know about a discrepancy Complainant had over a medical bill from seeing Respondent FKC's doctor. At the time he brought the billing discrepancy to Mr. Esguerra's attention, Mr. Esguerra directed him to see Mr. Breslin about it. Mr. Esguerra did not discuss the possibility of Complainant's layoff prior to his termination. (Tr. at 437-439.)

The following Monday, Mr. Esguerra explained to Mr. Lee why he dismissed Complainant. Mr. Lee instructed Mr. Esguerra to write up Complainant and he told Mr. Esguerra that he had caught Complainant smoking several times as well, referencing notes from an orange envelope. Mr. Esguerra prepared the handwritten statement detailing this incident on Monday, June 27, 2016 even though the events took place the Friday before because he faced a long commute home that Friday and decided to complete it on Monday. He also signed the typed version of the statement, which referenced the dates Mr. Lee had observed Complainant smoking. (Tr. at 434-437.) In Mr. Esguerra's mind, he did not need the dates recorded by Mr. Lee because a one-time smoking offense merits a dismissal. (Tr. at 455.)

On cross-examination by Complainant's counsel, Mr. Esguerra described Complainant as an outstanding worker and a friend. He selected Complainant as his substitute foreman because of his work ethic and conscientiousness. As work slowed down during the Eastside Access Tunnel Project and before Complainant's termination, Mr. Esguerra discussed bringing Complainant with him to a project at LaGuardia Airport. Despite his infractions from the Eastside Access Tunnel Project, Mr. Esguerra hoped that he would learn from these transgressions and not commit them again at LaGuardia Airport. Mr. Esguerra knew that Complainant had a medical bill discrepancy and understood that he took leave from work to sort out the billing issue. (Tr. at 440-444.) However, he did not know that Complainant filed a workers' compensation claim regarding the dust and fumes in the tunnel. (Tr. at 447.)

The safety department did not single out Complainant for his alleged violations of safety regulations. Prior to Complainant's termination, Mr. Lee advised Mr. Esguerra that he could receive a reprimand for Complainant's actions and to make sure they do not smoke and that they wear their glasses. Mr. Esguerra did not speak with Mr. Colletti on the topic of Complainant's termination before his dismissal. However, Mr. Esguerra clarified that he spoke to members of the safety department on the dates he caught Complainant smoking. (Tr. 449-451.) Complainant smoked every day, according to Mr. Esguerra. (Tr. at 463.) Specifically, Mr. Esguerra caught Complainant without wearing his safety glasses on February 17, 2016, April 20, 2016, and finally on June 24, 2016. On these occasions, Mr. Esguerra warned Complainant about both smoking and the safety glasses. Mr. Esguerra did not notate a smoking violation on June 24, 2016 because the cigarette was in his mouth, but unlit. (Tr. at 452-454.)

In his report at JX 7, Mr. Esguerra testified he made one reference to Complainant's smoking, which occurred in November 2015. Although Mr. Esguerra believed that such a one-time offense sufficed for termination, he stated that Respondent FKC did not fire him at that time because he perceived that the safety department did not enforce its policy of termination for a one-time offense. Once the safety department started to cite Complainant, Mr. Esguerra realized Complainant's smoking put his own job at risk. Even though Mr. Esguerra considered Complainant a friend and one of his best workers, Mr. Esguerra felt moved to terminate him rather than suspend because he previously warned Complainant in their heart-to-heart talk and interpreted this latest violation as a "slap in the face." Prior to the termination, Mr. Esguerra last spoke to Mr. Lee about Complainant's safety violations on April 20, 2016. Although Mr. Esguerra felt his job was in jeopardy, he would not have fired Complainant just to preserve his own job. (Tr. at 454-457.)

While Mr. Esguerra did not discuss Complainant's violations with Mr. Colletti personally, Mr. Esguerra testified that Mr. Colletti discussed the issue of several workers smoking on the job with the foremen at their morning meetings. The safety department eventually instituted a policy in which it would send foremen and supervisors home if it caught their gang members smoking. This moved Mr. Esguerra to reiterate the imperative that Complainant not smoke. Mr. Esguerra was not threatened with termination if he did not fire Complainant, but he felt Complainant's continued violations put his job in jeopardy. (Tr. at 461-463.)

Complainant was the first sandhog Mr. Esguerra dismissed for safety reasons. On the day of the dismissal, Complainant was retrieving tools for the job, but had not started work. Though the rules and regulations at JX 19 do not provide that having an unlit cigarette in one's mouth constitutes a violation, Mr. Esguerra interpreted it as a safety violation just as a lit cigarette would. Mr. Esguerra omitted the unlit cigarette in his report, but testified that he fired Complainant for both not wearing safety glasses and smoking. When Mr. Esguerra found Complainant without his safety glasses that morning, he was carrying a box of tie wire and other items that could have pierced through his eye. (Tr. at 464-466.)

Mr. Esguerra chose not to draft his statement about terminating Complainant on June 24 because he wanted to avoid Friday traffic. Even though he prepared the statement the following Monday, June 27, he dated the statement June 24 because the actual termination took place on that date. When Mr. Esguerra inquired as to the dates of Complainant's violations, Mr. Lee consulted a small orange book filled with papers and notes with dates on which he spoke to Complainant about his violations. From the orange book, Mr. Lee sorted through the papers, read dates of certain infractions, and handed Mr. Esguerra papers from the book. Mr. Lee left the papers with Mr. Esguerra and did not assist him in drafting the statement. (Tr. at 468-475.)

Mr. Esguerra does not worry about his job status with Respondent FKC as a result of not operating with the company in this proceeding because he has earned his place there. Respondent FKC did not offer him the continuation of his job in exchange for making the statement at JX 7. Mr. Esguerra reiterated that he never told Complainant of his imminent firing as a result of his injury claim on June 22, 2016. Asked how Complainant could have known of his impending termination such that he sent a text message to his attorney about his termination on June 22, 2016 in the absence of a conversation between Complainant and him, Mr. Esguerra surmised that Complainant anticipated his firing in light of the heart-to-heart talk they had had. The heart-to-heart talk occurred a few days after Mr. Esguerra received the letter at JX 12, which prompted Mr. Esguerra to take a sterner tone with Complainant regarding his smoking. (Tr. at 476-485.)

On redirect examination by Respondent MTA's counsel, Mr. Esguerra recalled that he saw Complainant with the unlit cigarette in his mouth while underground when he should not have even possessed a cigarette underground. Mr. Esguerra anticipated that Complainant would light it, which is why he took action. On redirect examination by Respondent FKC's counsel, Mr. Esguerra acknowledged the possibility that rumors of layoffs could have prompted the text message from Complainant to his attorney. (Tr. at 486-489.)

On the undersigned's questioning, Mr. Esguerra testified that, even if Complainant had not smoked and his violations related exclusively to not wearing safety glasses, it would not have changed his decision to fire Complainant because management emphasized that employees' failure to wear glasses as a problem in their safety meetings. Just as foremen could be sent home if one of their gang members smoked cigarettes, the same could happen if their gang members did not wear their safety glasses. Out of all of the PPE, the safety department emphasized glasses because workers tended to remove them if they sweated or could not see as well as they could without wearing them. (Tr. at 490-492.)

The heart-to-heart talk between Complainant and Mr. Esguerra occurred within a week after Mr. Esguerra received the JX 12 letter with his paycheck. (Tr. at 493-494.) Prior to writing up Complainant, Mr. Lee had told Mr. Esguerra that he had issued warnings to Complainant regarding smoking and not wearing safety glasses. The issue of smoking frequently arose at the Monday safety meetings. The ratio that one in five workers smokes in the tunnel sounded about right to Mr. Esguerra, but his crew members did not smoke. (Tr. at 499-501.)

On redirect examination by Respondent FKC's counsel, Mr. Esguerra explained that safety memos like JX 12 can accompany paychecks and that he might also see them posted in various places in the hog house, as well as at union meetings. Mr. Esguerra had decided to fire Complainant on June 24, 2016, regardless of his prior infractions. (Tr. at 494-496.)

Peter Breslin (Tr. at 502-525)

Peter Breslin has served as the General Shop Steward at Local 147 for five years. About a week and a half before Complainant's dismissal, Mr. Esguerra approached Mr. Breslin and told Mr. Breslin that he wanted to terminate Complainant for the smoking and glasses violations. Mr. Esguerra expressed concern over losing his job over these infractions, but Mr. Breslin advised Mr. Esguerra to give him a break and explain to Complainant that if he does not straighten up, he will lose his job because the union will not fight a violation of New York City law on his behalf. The two next spoke on the day of Complainant's termination, when Mr. Esguerra brought Complainant to Mr. Breslin's office in the hog house and told Mr. Breslin that Complainant was not wearing his glasses and had a cigarette in his mouth. Mr. Breslin produced Complainant's check for the work he had completed up to that point. At no point during these interactions did anyone reference Complainant's workers' compensation claim. Mr. Breslin had not known about that, or the Notice of Claim, until this hearing. Mr. Breslin thought this case concerned a wrongful termination claim. (Tr. at 502-509.)

Mr. Breslin told Complainant on the day of his termination that he would work to return Complainant to his job, but Complainant did not attend the next union meeting to speak in support for himself. The union had opportunities for Complainant at a different site, a graveyard swing shift, but Complainant never took advantage of those opportunities. In all that time, Mr. Breslin had not seen Complainant until the date of the current hearing. (Tr. at 510-511.)

On cross examination by Complainant's counsel, Mr. Breslin testified that he did not directly communicate with Complainant about his safety issues prior to his dismissal; he left that to his foreman. Complainant never told Mr. Breslin that he had filed suit against the property owners, general contractor, or Respondent MTA or that either he was fired for these reasons. Mr. Breslin clarified that he works for the union, not Respondent FKC. (Tr. at 511-514.)

On the undersigned's questioning, Mr. Breslin estimated that one or two sandhogs had been fired for not wearing glasses and two, not including Complainant, were fired for smoking in the five years he has worked for the union. Layoffs had not occurred when Complainant was fired in June 2016. Around that time, Respondent FKC started a big safety initiative in which it demonstrated proper use of safety equipment. (Tr. at 515-517.)

On redirect by Respondent FKC's counsel, Mr. Breslin testified that a one-time smoking offense could lead to termination, but often Respondent FKC would allow such offenders to return after thirty days. Mr. Breslin considered Complainant as fired for smoking, even though he had an unlit cigarette in his mouth, because a safety officer had already caught him smoking. He could not recall whether Mr. Esguerra told him that he saw a cigarette in Complainant's mouth when he brought Complainant to his office. Mr. Esguerra has union protection and Respondent FKC cannot fire him without the union stepping in. (Tr. at 519-520.)

On re-cross examination by Complainant's counsel, Mr. Breslin testified, in the absence of Mr. Colletti's paperwork to confirm, that Complainant was the first sandhog terminated for not wearing his safety glasses. (Tr. at 521-522.)

On redirect examination by Respondent FKC's counsel, Mr. Breslin stated that he had no information that Complainant was fired because of his Notice of Claim against Respondent MTA or his workers' compensation claim. Other workers on the project filed workers' compensation, none of whom lost their jobs. (Tr. at 522-523.)

#### D. Applicable Law

In pertinent part, the Act provides that a public transportation agency may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee," if such action is due "in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done 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..." 6 U.S.C. § 1142(a)(1); see also § 1982.102(a)(1). Moreover, the Act further states that a public transportation agency shall not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for reporting a hazardous safety or security condition." 6 U.S.C. § 1142(b)(1)(A); see also § 1982.102(a)(2).

The Act provides that the burdens of proof set forth at 6 U.S.C. § 1142(c)(2) apply. Under the governing regulation, the complainant bears the burden initial burden, and must show "by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." § 1982.109(a). Once met, the burden then shifts to the respondent, who must demonstrate "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity." § 1982.109(b).

Under the Act, a prevailing employee shall be entitled to all relief necessary to make the employee whole. See 6 U.S.C. § 1142(d)(1). Specific elements of damages provided in the Act include reinstatement with the same seniority status that the employee would have had but for the discrimination; backpay with interest; and compensatory damages, including compensation for special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. See 6 U.S.C. § 1142(d)(2)(A-C). Punitive damages in an amount up to \$250,000 may also be awarded. See 6 U.S.C. § 1142(d)(3).

## E. Analysis

### 1. Coverage

While Respondent MTA does not argue the issue, Respondent FKC asserts that “NTSSA § 20109(b)(1)(A) is not Applicable in This Case.” FKC Brief at 8. Respondent FKC, arguing that it is not a railroad carrier, incorrectly cites 49 U.S.C. § 20109, the Federal Railroad Safety Act (“FRSA”), as the applicable statute. While the FRSA prohibits railroad carriers from discriminating against an employee who reports a hazardous condition, the National Transit Systems Security Act (“NTSSA”) provides the same protections to workers employed by “a public transportation agency.” 6 U.S.C. § 1142(a). “The term ‘public transportation agency’ means a publicly owned operator of public transportation eligible to receive Federal assistance.” 6 U.S.C. § 1131. Respondent MTA, “a public-benefit corporation chartered by the New York State Legislature in 1968,”<sup>5</sup> qualifies as such an agency.

Under the NTSSA, “A public transportation agency, a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee” for engaging in protected activity. 6 U.S.C. § 1142(a) (emphasis added). Michael Colletti, a safety manager for Respondent FKC, testified at deposition that in 2015 and 2016 Respondent FKC was charged with forming a tunnel to connect commuter railroad trains from Long Island City to Grand Central Station in Manhattan in a venture known as the Eastside Access Tunnel Project. (RX 6 at 10-11.) This uncontroverted testimony indicates that Respondent FKC operated as a contractor to improve the infrastructure that supports Respondent MTA’s operations.

In addition, Respondent FKC characterizes itself as a covered contractor in a safety memorandum dated May 19, 2015 on Respondent FKC letterhead, which states in part: “[Respondent FKC] reminds each employee that in accordance with the New York City Fire Department rules and regulations smoking is not permitted on any New York City construction site or in any MTA facility or construction site. In accordance with the East Side Access Health and Safety Policy, violation of the policy requires the contractor to remove any worker found smoking on the site.” (JX 11 (emphasis added.) Not only does Respondent FKC frame itself as a contractor of Respondent MTA, it also cites its right to remove a worker for smoking violations, the very reason Complainant lost his job. Based on the foregoing, the undersigned

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<sup>5</sup> See <http://web.mta.info/mta/network.htm>.

In addition to qualifying as a publicly owned operator of public transportation, Respondent MTA also receives Federal assistance. “The operating revenue of each of the component units of the MTA...does not equal the costs of operations. As a result, each year the MTA, the NYCTA, the LIRR, and Metro North operate at a deficit...Accordingly...the MTA depends on subsidies from federal, state, and city governments to pay for operating and capital costs not covered by revenue generated from fares.” New York Urban League v. Metropolitan Transp. Auth., 905 F. Supp. 1266, 1269 (S.D.N.Y. 1995)(emphasis added).

finds that both Respondents, as a public transportation agency and its contractor, qualify as covered entities under the NTSSA whistleblower provision.

In the alternative, Respondent FKC avers that even if it qualifies as a covered entity, it did not employ Complainant and therefore could not have terminated his employment, adding that Mr. Esguerra, a union foreman and not an employee of Respondent FKC, discharged Complainant. See FKC Brief at 8. This proposition stands in stark contrast to the evidence of record. The claim that Respondent FKC did not employ, and therefore could not have discharged Complainant, plainly belies the parties' stipulation that Respondent FKC hired Complainant on February 23, 2015. (Tr. at 7.) "The parties may stipulate to any facts in writing at any stage of the proceeding or orally on the record at a deposition or at a hearing. These stipulations bind the parties unless the judge disapproves them." 29 C.F.R. § 18.83(a) (emphasis added). Respondent FKC, therefore, is bound by the stipulated fact that it hired Complainant on February 23, 2015. Complainant likewise testified that he started working for Respondent FKC in February 2015. (Tr. at 37.) Butressing the existence of an employment relationship, and in contrast to Respondent FKC's position, Mr. Esguerra testified at the hearing that he too works for Respondent FKC. (Tr. at 423.) It logically follows that if Respondent FKC employed Mr. Esguerra, and Mr. Esguerra terminated Complainant's employment, Respondent FKC effectively dismissed Complainant from his position on the project.

Based on the foregoing, the undersigned finds that the evidence establishes an employment relationship between Respondent FKC and Complainant.

As to Respondent MTA, it acknowledges that Respondent FKC hired Complainant in February 2015 to work on the Eastside Access Tunnel Project. MTA Brief at 1. It did not purport to have an employment relationship with Complainant and nothing in the record suggests the existence of one between these parties. Therefore, the undersigned finds that Respondent MTA did not employ Complainant.

## 2. Protected Activity

Under the NTSSA, an employee's reporting of a hazardous safety condition to a public transportation agency or its contractor constitutes protected activity. See 6 U.S.C. § 1142(b)(1)(A). Complainant avers two instances of protected activity: filing a workers' compensation claim on February 2, 2016 and filing a Notice of Claim on June 7, 2016.

### a. Workers' Compensation Claim

Respondent MTA asserts that filing a workers' compensation claim does not constitute enumerated protected activities under the Act. Although notifying a carrier of a work-related injury is a protected activity, there is no evidence that Complainant attempted to do so. Respondent MTA further argues that, in light of the Workers' Compensation Board's determination that Complainant did not suffer a work-related injury in July 2015, Complainant did not engage in protected activity when he filed the claim because 49 U.S.C. § 20109(a)(4) only protects an employee who reported an actual work injury. See MTA Brief at 7-8. Respondent FKC likewise contends that Complainant's unsuccessful workers' compensation

claim represented a notification to Respondent FKC of a compensation claim, not a work-related personal injury. See FKC Brief at 22.

Putting aside for the moment that Respondents once again cited to the incorrect statute, the Administrative Review Board (“ARB” or “the Board”) has confronted the issue of whether the mere existence of a workers’ compensation claim amounts to protected activity in the context of the FRSA. In LeDure v. BNSF Railway Co., the ARB decided that a Federal Employer Liability Act (“FELA”) claim seeking damages for a back injury suffered while on the job constitutes protected activity under the FRSA. See ARB Case No. 13-044, ALJ No. 2012-FRS-020, slip op. at 5 (June 2, 2015). Under FELA, a protected railway employee can sue a covered carrier for “injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.” 45 U.S.C. § 51. Although the FRSA does not explicitly protect a FELA claim, the Board reasoned, the litigation expanded the notice provided to the carrier by providing more information about the extent of the employee’s work-related injury through medical examinations, discovery, and expert testimony. In that case, the employee presented more detailed medical evidence about the severity of the injury. The carrier did not know the employee was permanently disabled until the FELA litigation. See Ledure ARB Case No. 13-044 at 5. Because the FELA claim constituted more specific notification of the nature and extent of the injury, the Board affirmed the ALJ’s finding, the Board deemed the FELA matter as protected activity. Id.

The 2007 “Implementing Recommendations of the 9/11 Commission Act,” which governs both the FRSA and NTSSA, provide public transportation employees with identical whistleblower rights as railroad employees. In particular, Section 1413 states “The conference substitute adopts protections for public transportation employee whistleblowers, modeled on the protections available to railroad employees under 49 U.S.C. 20109.” H.R. Rep No. 110-259 at 340 (2007). This excerpt plainly evinces Congress’s intent to grant the same protections for both classes of workers. Therefore, if a FELA claim that uncovers new information to an employer about an employee’s work-related injury constitutes protected activity under the FRSA, it would follow that a workers’ compensation claim that does the same would qualify as protected activity in the context of the NTSSA as well.

Under Ledure, neither the outcome nor the intent of the employee’s claim, as Respondents argue, determine whether the claim constitutes protected activity. The probative issue is whether Respondents learned information about Complainant’s condition that it did not previously know. Like the FELA claim in Ledure, Complainant’s workers’ compensation claim both sounds in negligence and provides more detailed findings as to Complainant’s medical condition. Judge Ned Bertulfo of the State of New York Workers’ Compensation Board rendered a decision that Complainant provided insufficient medical evidence that he sustained occupational exposure to dust and fumes on July 11, 2016. In explaining his decision, Judge Bertulfo considered all medical reports, the claimant’s and employer’s testimonies, and deposition testimony from the carrier’s internist and pulmonologist consultant, Dr. Karetsky, and the claimant’s family doctor, Dr. Abdeljaber. (See JX 21.) He specifically referenced Dr. Karetsky’s testimony that Complainant’s “lungs were clear to auscultation and chest X-ray was normal with no clubbing, no oxygenation, no wheezing, rhonchi, rales, or stridor; that the spirometry findings were normal with normal vital lung capacity and expiratory flow rate, and

FEV<sub>1</sub>/MVC ratio without bronchodilator response; that the total lung capacity was normal and the diffusing capacity was normal.” (JX 21.)

Without Complainant filing this workers’ compensation claim, Respondent FKC would not have sent him to undergo an evaluation conducted by Dr. Karetsky, which revealed the findings recited by Judge Bertulfo. Although the findings themselves did not affirmatively establish that Complainant has a pulmonary disease caused by dust exposure, they did give Respondent FKC insight as to the present condition of Complainant’s health that they would not have otherwise learned. Nothing in LeDure suggests that the new information must reveal evidence suggestive of a disability in order for the claim to be considered protected activity, even though the employee in LeDure showed evidence of a permanent disability. At the very least, Dr. Karetsky’s testimony buttressed Respondent FKC’s belief that Complainant does not have a pulmonary disease. Without Complainant’s workers’ compensation claim, the company would not have obtained this evidence to reaffirm its position.

Respondents’ argument that Complainant did not directly notify Respondent FKC of his work-related injury misses the mark, as does the fact that Complainant was unsuccessful in proving that he actually suffered an injury in front of the Workers’ Compensation Board. As long as the litigation generated information that Respondents would not have otherwise gleaned regarding Complainant’s condition, which it did in the form of Dr. Karetsky’s testimony, that filing qualifies as protected activity under the FRSA, and by extension, the NTSSA. Therefore, the undersigned finds that filing Complainant’s workers’ compensation claim constitutes protected activity under the Act.

In the alternative, Respondent MTA avers that Complainant did not notify either Respondent about his injury “in good faith,” as provided in 49 U.S.C. § 20109(a), but did so fraudulently and dishonestly. It points to Complainant’s testimony that, prior to July 31, 2015, he did not experience shortness of breath on exertion, a doctor’s treatment note reflects that he was always issued a respirator and did not work in an area in which he had extensive dust exposure, and his testimony that he never performed shotcreting despite alleging that he was injured as a result of spraying concrete. MTA Brief at 9-10.

Indeed Complainant did not perform shotcreting. He did, however, work in proximity to dry shotcrete, which creates a lot of dust. It stands to reason that although he did not perform the dry shotcreting, he could have inhaled the dust that resulted from that process, especially in light of Complainant’s testimony that FKC took unsuccessful measures to confine the dust, including constructing bulkheads to seal off that section of the tunnel and installing fans to blow dust away, before moving the operation to the night shift with fewer people around to breathe in the dust. (Tr. at 41.) Mr. Colletti similarly testified that the safety department was trying to figure out a solution to the dust problem, before moving the shotcrete operation from the day shift to the graveyard shift. (Tr. at 303, 380.)

The treatment note Respondent MTA refers to appear in DX 14 at 37, dated May 2, 2016, in which Dr. John D. Meyer described Complainant’s occupational history: “Since moving here, he has worked as a tunnel worker/sandhog in a variety of different work areas and jobs, but he notes that up until now he was always issued a respirator, and the areas did not have the

extensive dust exposure to which he is exposed currently.” (Emphasis added). A reasonable reading of this excerpt suggests that Dr. Meyers is referring to Complainant’s past occupational history as occurring in a less dusty environment compared to his present work environment the Eastside Access Tunnel Project.

While it is unclear which job Dr. Meyers describes in that excerpt, elsewhere in the report, Dr. Meyers also remarked: “There is extensive shotcrete, along with dust, fumes from plastics used for coating the area once concrete has been applied...He began to feel ill in July 2015, 5-6 months into working in the area. He states that first he lost his voice and became hoarse, with extensive phlegm and mucous production in the back of his throat and from his chest.” DX 14 at 35-36. This timeline of this notation matches the established start date of Complainant’s time with Respondent FKC, as well as the date that Complainant had to leave work after falling ill on July 31, 2015, five or six months after he joined the project in February 2015. Therefore, the undersigned finds, contrary to Respondent MTA’s characterization, that Dr. Meyers recognized the dust-filled conditions of the Eastside Access Tunnel Project that could have given rise Complainant’s symptoms in July 2015.

Complainant filed his workers’ compensation claim, which described the onset of these symptoms felt in July 2015, in February 2016. Because the workers’ compensation claim yielded medical information regarding Complainant’s condition and because Complainant objectively believed he was reporting a hazardous condition at the time he filed, the undersigned finds that he engaged in protected activity under the Act.

#### b. Notice of Claim

Even if Complainant had actually suffered an injury, Respondent MTA argues, he did not file the Notice of Claim until nearly a year later and did not do so for the purpose of notifying pursuant to the Act. Instead, Complainant filed the Notice of Claim as a condition precedent to filing suit against Respondent MTA. See MTA Brief at 7-8.

Based purely on the contents of the record, and contrary to the workers’ compensation claim, Complainant’s Notice of Claim does not reveal new information regarding his medical condition as per LeDure. Complainant filed a Notice of Claim against Respondent MTA (JX 16) and Respondent FKC (JX 17) on June 6, 2016. Nothing in the record suggests that this adjudication has uncovered previously unknown data about Complainant’s respiratory condition. These notices simply allege that Complainant’s working conditions as a laborer exposed him to silica, cement dust, asbestos, carcinogenic chemicals, and other substances known to cause serious diseases and attribute Complainant’s exposure to Respondents’ failure to provide him with the proper respiratory equipment, properly ventilate the worksite, and inform him of the true nature of the air quality. The exposure caused injury to Complainant’s lower respiratory tract and vocal alteration, leaving him susceptible to development of additional respiratory disease and cancers as a result of toxic substances at the job site, according to the notices.

Because the Notice of Claim consists almost exclusively of allegations and does not reference any testing or medical information, it fails to provide new information that Respondents did not previously possess regarding the extent or severity of Complainant’s injury. Therefore, filing the Notice of Claim does not amount to protected activity.

### 3. Knowledge of Protected Activity

Respondent MTA argues that Complainant has failed to prove that Respondent FKC knew of his alleged protected activity. It bases its assertion on Complainant's statement to OSHA investigator Daniel Borczynski that he heard about his impending termination due to his workers' compensation only through co-workers and the lack of corroboration of Mr. Smith supporting Complainant's allegation that he was fired because of the claim, noting that Mr. Smith was not even aware of the claim. Respondent FKC cites the discovery of Complainant with a cigarette in his mouth and without his safety glasses by Mr. Esguerra as the real reason Mr. Esguerra took him to the hog house to fire him. MTA Brief at 10-11. While Respondent FKC asserts that it had no knowledge of the Notice of Claim, it does not allude to a lack of knowledge of the workers' compensation claim. FKC Brief at 9-10.

Even assuming Complainant heard through rumor that Respondent FKC planned to fire him for his workers' compensation and Mr. Smith could not corroborate Complainant's version of events, it does not necessarily follow that Respondent FKC did not know about the workers' compensation claim. In fact, the evidence of record suggests that Mr. Colletti, a safety manager for Respondent FKC, and Mr. Esguerra, the decision maker of Complainant's employment status both knew that Complainant filed the workers' compensation claim.

At the hearing, Mr. Colletti acknowledged that he testified to the air quality of the tunnels at Complainant's workers' compensation hearing. (Tr. at 308.) In fact, Respondent FKC's position statement detailed Mr. Colletti's appearance at that hearing in February 2016 by stating that Mr. Colletti:

“[T]estified at a workers' compensation claim hearing before a Hearing Judge in February 2016 regarding [Complainant's] claim for workers' compensation. [Complainant] claimed that the air quality in the tunnel in which he was working was so bad he couldn't breathe. Michael Colletti's testimony was supported by the [Respondent FKC's] third party vender...which provides an air monitoring service. Michael Colletti produced a report that showed the PEL (Permissible Exposure Limit) was good (not a lot of dust); it was below the OSHA limits. The Judge asked Michael Colletti if he himself used a respirator while in the tunnel and Colletti responded no—he didn't believe the air was dangerous.  
(JX 18 at 3.)

In light of his testimony taken at the very workers' compensation hearing at issue, it stands to reason that Mr. Colletti, as an agent of Respondent FKC, had contemporaneous knowledge of the claim at the time it was adjudicated. This representation made by Respondent FKC through its position statement stands in contrast to its earlier stance in its position statement that it “is unaware of a notice received in February 2016 as alleged,” in reference to Complainant's workers' compensation claim. (JX 18 at 1.) Based on Mr. Colletti's testimony, as supported by Respondent FKC's representation of his appearance at the hearing, the undersigned finds that Respondent FKC knew about Complainant's Workers' Compensation claim through its safety manager, Mr. Colletti.

Mr. Esguerra, both a union foreman and an employee of Respondent FKC, played a primary role in Complainant's termination when he removed Complainant from the job site upon observing a cigarette in his mouth and accompanied him to the hog house with an intent to terminate him. (Tr. at 432-433.) At Mr. Esguerra's deposition on July 7, 2017, the following exchange ensued:

Q: And were you aware that Mr. McNulty had brought a Workers' Compensation claim regarding dust and fumes in the tunnel?

A: Yes, after the fact, yes, yes.

Q: After what fact?

A: That morning, we went down to work, and I didn't see him. And, so, I asked the gang—the guys in the gang, I said: You seen Vinnie? Because...we're allowed to give someone else the opportunity to come down and work with us, to fill his spot.

So he usually would call me if he's not going to be in, and that day I didn't receive a phone call from him, so I assumed that he was downstairs. So I go downstairs, and I didn't see him. So I asked the guys, and then they told me that he was upstairs, that he went to the safety department, because his throat was hurting.

Q: All right. So this would be July 31st, 2015, about a year before.

A: Yes.

Q: Okay. So—and—but, the question was...were you aware that there was a Workers' Comp. case—

A: After, yeah, yeah, because I asked him what was going on and he told me he went—his throat was bothering him, whatever the situation as there.

And then, as time went on, a case presented itself within itself, yeah.

Q: So this would be like early 2016?

A: Okay, yeah.

Q: This is before he's fired.

A: Yes.

(RX 5 at 25-27.)

Mr. Esguerra's testimony suggests that on the day of the incident, July 31, 2015, he was informed that Complainant had left work due to sore throat, but did not know at the time that the injury later formed the basis of Complainant's workers' compensation claim. However, Mr. Esguerra also testified that "a case presented itself" at some point in early 2016, referencing his knowledge of Complainant's workers' compensation prior to his termination. At the hearing, Mr. Esguerra denied that he knew Complainant brought a workers' compensation claim regarding dust and fumes in the tunnel. (Tr. at 447.) Upon reviewing his deposition testimony, he acknowledged the answer he gave above. The undersigned puts more weight on his deposition testimony given that Mr. Esguerra provided a more detailed recollection of learning about the workers' compensation claim at the deposition as compared to a mere denial at the hearing, despite the inconsistencies between his deposition and hearing testimonies. Therefore, the undersigned finds Mr. Esguerra knew of Complainant's workers' compensation claim in early 2016.

#### 4. Adverse Action

Respondent MTA concedes that Complainant suffered an unfavorable personnel action when he was terminated on June 24, 2016. MTA Brief at 12.

#### 5. Contributing Factor

In addition to proving participation in protected activity and the existence of an adverse action, Complainant also has the burden of proving that the protected activity was a contributing factor in the adverse actions. See 6 U.S.C. § 1142(c)(2); see also C.F.R. § 1982.104(e)(2)(iv). A contributing factor is a factor “‘which, alone or in connection with other factors, tends to affect in any way’ the decision to take an adverse action.” Henderson v. Wheeling & Lake Erie Railway, ARB No. 11-013, ALJ No. 2010-FRS-12, slip op. at 11 (ARB Oct. 26, 2012). The contributing factor element of a complaint can be proven by direct evidence or indirect, circumstantial evidence. See DeFrancesco v. Union R.R. Co., ARB No. 10-114, ALJ No. 2009-FRS-9, slip op. at 6-7 (ARB Feb. 29, 2012). While temporal proximity between the protected activity and adverse action alone may at times be sufficient to satisfy the contributing factor element, ARB precedent has declined to find a contributing factor based on temporal proximity alone, where relevant and objective evidence disproves that element of a complainant’s case. See Meadows v. BNSF Railway Co., ALJ No. 2014-FRS-00045, slip op. 51 (ALJ Jun. 30, 2016).

In his brief, Complainant cites Second Circuit<sup>6</sup> case law establishing that a complainant can indirectly establish a causal connection to support a retaliation claim by showing that protected activity was closely followed in time by the adverse employment action.

From a temporal standpoint, Complainant filed his workers’ compensation claim on February 2, 2016 and was terminated on June 24, 2016. While a four-month time lapse may not seem like a long time between protected activity and adverse action in a vacuum, intervening incidents within that timeframe, as well as incidents that predated the workers’ compensation claim, impacted Mr. Esguerra’s decision to fire Complainant.

On November 18, 2015, Mr. Lee caught Complainant smoking and warned him that he could face a suspension or termination if it happened again. He testified in detail about this incident, recalling that he crossed over the flue and approached a man sitting on a box with smoke coming out of his right side around lunchtime with his back to Mr. Lee. The man identified himself as Complainant and Mr. Lee warned him that he could be fired for smoking. (Tr. at 407-408.) Mr. Lee memorialized this warning by writing “[Complainant] caught smoking cigarettes 11/18/15. I gave him a warning about smoking and he would be let go if caught again, it is against [Respondent FKC] rules...I told him about the situation that...he could be suspended and fired as well [as] [Mr. Esguerra] the foreman in charge.” (RX 2.) In July 2015, Mr. Lee learned that an unidentified sandhog had been smoking on his way to Med-Core. Mr. Lee could not definitively identify the sandhog as Complainant, however. Still, Mr. Lee considered the November 2015 incident as the second time Claimant was caught smoking. (Tr.

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<sup>6</sup> As Complainant worked in New York, New York, his claim falls within the appellate jurisdiction of the U.S. Court of Appeals for the Second Circuit.

at 416-417.) Although Mr. Colletti was on vacation on July 31, 2015 when Complainant went to Med-Core, his subordinate, Derrek Davis, reported that Complainant was smoking outside of Med-Core. (Tr. at 293.)

Unlike the subsequent instances of alleged violations cited by Respondent FKC, it did not submit supporting evidence to substantiate this safety violation, other than Mr. Colletti's hearsay testimony of what Mr. Davis reported to him in his absence. As this testimony does fall under one of the hearsay exceptions set out in 49 U.S.C. § 18.802, the undersigned admits this testimony about Complainant smoking on July 31, 2015, but grants it minimal weight. Thus, for purposes of this analysis, the undersigned finds that Complainant's first smoking violation occurred in November 2015, when Mr. Lee documented his observation of smoking and his warning to Complainant. (RX 2.)

Thereafter, Mr. Lee wrote up Complainant for not wearing his safety glasses on January 19, 2016, February 17, 2016, and April 20, 2016 and again recorded these instances. The notations simply read "I warned [Mr. Esguerra] about his crew and glasses and proper PPE," "[Mr. Esguerra], caught [Complainant] w/o glasses. Give him a warning." and "[Mr. Esguerra], [Complainant] no glasses." (RX 2.)

According to Complainant's testimony, on the morning of June 22, 2016 before Complainant's shift began, Mr. Esguerra called Complainant off the train that takes him to the worksite. He told Complainant that the company wanted to lay him off because of a claim, without specifying whether the claim referred to the workers' compensation claim or the Notice of Hearing. (Tr. at 80.) According to Complainant, Mr. Esguerra went upstairs and returned to Complainant five or ten minutes later, telling him he had nothing to worry about and Complainant continued on with his regular shift. (Tr. at 81-82.) That afternoon, Complainant sent a text message to his attorney seeking his advice regarding what had transpired that morning. (See EX 1.) Mr. Esguerra, in contrast, denied that this conversation even occurred. (Tr. at 479.) He surmised that Complainant may have felt moved to send the text message based on the conversation the two had, when Mr. Esguerra advised him to stop smoking, which transpired a few days after the issuance of the June 14, 2016 safety memorandum. (JX 12.) (Tr. at 483-484.) He also posited that Complainant's text message could have referred to rumors of impending layoffs. (Tr. at 487.)

Against this backdrop, on June 24, 2016, as Mr. Esguerra retrieved tools from the tool box, he observed Complainant with an unlit cigarette in this mouth and without his safety glasses, anticipating that Complainant would have lit the cigarette. (Tr. at 486-487.) Having already warned Complainant during their heart-to-heart talk about not smoking, Mr. Esguerra viewed Complainant standing with a cigarette in his mouth as a "slap in the face". At that point, Mr. Esguerra did not believe Complainant would cease smoking underground, which would put his job in jeopardy if he continued to tolerate Complainant's smoking. (Tr. at 432.) Mr. Esguerra accompanied him upstairs to Mr. Breslin for termination. (Tr. at 430.) Mr. Esguerra memorialized his reasons for firing Complainant on June 24, 2016 as:

In mid-November 2015, Dennis Lee (safety) observed [Complainant] smoking a cigarette and not wearing his safety glasses. At that time, Dennis Lee gave [Complainant] a verbal

warning and [Complainant] was informed if he was caught again he would be terminated. February 17th, 2016 and April 20, 2016 it happened again [Complainant] was not wearing safety glasses finally on June 24, 2016 it happened again I, Wilmar Esguerra observed [Complainant] not wearing his safety glasses for those reasons I had to terminate [Complainant] due to his lack of compliance for safety.

(JX 7.)

Observing Complainant with a cigarette in his mouth and without his safety glasses on June 24 represented the final straw for Mr. Esguerra after repeated documented smoking and PPE violations. Complainant demonstrated a documented, longstanding habit of smoking cigarettes underground and not wearing his safety glasses, which took place prior to and after the filing of Complainant's workers' compensation claim, in spite of multiple warnings and against company rules and New York City law, with possibly dire consequences if he continued to do so. Mr. Colletti emphasized the danger posed by smoking cigarettes underground in an environment that featured fire-rated wood in which one simple flick of a cigarette into a garbage can cause a fire. He even alluded to the deaths of two firemen who died as a result of smoking-related incident. (Tr. at 382.) Complainant acknowledged smoking underground and was fully aware of the consequences of this transgression. (Tr. at 139, 157, 189.) Because these documented incidents bookended Complainant's protected activity, as well as because Respondent FKC did not stray from its justification or present pre-textual justifications for firing Complainant, the undersigned finds Complainant was terminated for multiple safety violations.

Even assuming the alleged June 22 conversation took place as Complainant remembered it, the link between his protected activity and his ultimate dismissal is tenuous at best. First, Complainant attributed Mr. Esguerra's decision to fire him to an ambiguous claim, not knowing whether Mr. Esguerra was referencing the workers' compensation claim or some other claim. Second, Mr. Esguerra did not actually terminate Complainant that day. He only did so two days later upon observing Complainant with a cigarette in his mouth and without his safety glasses. As Complainant demonstrated a pattern of committing safety infractions, as documented by notes maintained by Mr. Lee, Respondent FKC terminated his employment not in retaliation for Complainant raising concerns as to the safety of the work environment, but for his own role in compromising the safety of the work environment. Filing his workers' compensation claim did not contribute to the termination of his employment.

The undersigned does note the inconsistency with which Respondent FKC enforced its policies. Mr. Colletti commented that the company gives employees more chances than they deserve. (Tr. 388.) Mr. Lee also expressed his desire to give Complainant another chance after finding him smoking in November 2015. (Tr. at 415.) Mr. Breslin testified that a one-time smoking offense could lead to termination, but Respondent FKC would often allow employees to come back after thirty days. (Tr. at 519.) Mr. Esguerra testified that catching an employee "one time is more than enough in my eyes" to terminate an employee, but also suggested that it took six months to a year to fire Complainant for smoking because, in his view, management had not enforced its policy. Moreover, he took Complainant aside and had a heart-to-heart talk in an effort to convince him to stop smoking after having already committed the violation.

Though Respondent FKC's enforcement of its disciplinary procedure may have been lacking, it does not show, in and of itself, that Complainant's filing of a worker's compensation claim contributed to his firing. Mr. Esguerra credibly testified of his efforts to convince Complainant to stop smoking underground. After candidly speaking with him, he became convinced that Complainant would continue to smoke underground when he saw him with an unlit cigarette in his mouth and after several documented instances of not wearing his safety glasses, he also had no confidence that Complainant could follow that rule either. Mr. Esguerra clearly articulated that his job would remain in jeopardy if he continued to give Complainant more chances. The instant he observed Complainant with a cigarette in his mouth and without glasses, Mr. Esguerra terminated him on the spot and was consistent in his reasoning for doing so.

Finally, Complainant argues that Respondent FKC selectively enforced its safety rules against Complainant, but fails to provide specific examples. To the contrary, Mr. Colletti testified that Respondent FKC had terminated other sandhogs in the past for smoking violations, including one that occurred a week or two before Complainant's firing. Others have been fired for personal protective equipment ("PPE") infractions. (Tr. at 375-378.) Mr. Lee recalled the terminations of approximately five or six workers for smoking violations and two for not wearing safety glasses over a period of three years. (Tr. at 412-415.) Moreover, Mr. Colletti testified to the difficulty of catching Complainant smoking because sandhogs signal to each other when safety officials are coming through the tunnel, and those that smoke can simply throw away their cigarette butts. (Tr. at 381.) This makes it easy for sandhogs to continue smoking without the likelihood of discipline, and does not indicate that Respondent selectively enforced its safety policies against Complainant.

The decision to terminate Complainant represented a culmination of prior safety violations that posed a hazard to those working in the tunnel, and was not due to Complainant's filing of a workers' compensation claim regarding the dusty conditions of the tunnel. Therefore, Complainant's claim is **DENIED**.

#### IV. CONCLUSION

For the reasons explained above, Complainant has failed to demonstrate that Respondent took an adverse employment action against him because he engaged in protected activity under the NTSSA.

#### V. ORDER

Complainant is not entitled to relief under the Act.

**SO ORDERED.**

**THERESA C. TIMLIN**  
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 fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).