**U.S. Department of Labor**

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**Issue Date: 20 December 2010**

CASE No.: 2010-FRS-00038

In the Matter of

**ORLANDO VASON**
Complainant

v.

**PORT AUTHORITY TRANS HUDSON (PATH)**
Respondent

## DECISION AND ORDER DENYING RESPONDENT'S MOTION FOR ATTORNEY FEES AND DISMISSING CASE

This matter arises under the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, as amended by § 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, (hereinafter, "9/11 Commission Act"), Pub. Law No. 110-53. The employee protection provisions of the FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad security and safety from retaliatory discipline or discrimination by their employer.

### Procedural History

On April 30, 2009, the Complainant submitted a complaint to Occupational Safety and Health Administration (OSHA) alleging that the Respondent retaliated against him in violation of the FRSA. On August 23, 2010, OSHA issued its determination, informing the parties that, upon investigation, "there is no reasonable cause to believe that Respondent violated FRSA." On September 23, 2010, the Respondent filed a "Motion for Attorney's Fees" with the Chief Administrative Law Judge, to which the Complainant responded, through counsel, on October 6, 2010.

This matter was assigned to me for adjudication on October 1, 2010. On October 19, 2010, I issued an "Order to Show Cause Why this Matter Should not be Dismissed Based on Lack of Authority to Grant Respondent's Attorney's Fees." In my Order, I stated that there is no provision authorizing the award of attorney's fees to respondents for claims brought under FRSA, and I directed the Respondent to show cause why this matter should not be dismissed, based on a lack of statutory authority to award such fees.

On October 21, 2010, through Counsel, Respondent filed "Respondent's Memorandum in Further Support of its Application for Attorney's Fees."[1] On October 25, 2010, through counsel, Complainant filed "Complainant's Response to PATH's Memo in Further Support."[2] Neither of these items referred to my Order of October 19, 2010. I have not received any additional filings from either party, so I presume the parties are satisfied that their submissions adequately respond to my Order.

The Parties' Submissions

In the Motion for attorney's fees, the Respondent asserted that the FRSA allows an award of attorney's fees to an employer if the Secretary of Labor finds that a complaint is frivolous or has been brought in bad faith. Motion at 1. The record indicates the Complainant, an employee of the Port Authority Trans-Hudson Corporation (PATH), filed an administrative complaint against PATH under the FRSA. On August 23, 2010, on behalf of the Secretary of Labor, the Regional OSHA Administrator rejected the Complainant's complaint. The Secretary's Findings, which the Respondent provided as an Exhibit to the Motion, discussed in some detail the Complainant's complaint. The Complainant was determined to have engaged in protected activity, but he was unable to establish that he suffered discrimination or had been subjected to adverse action because of his protected activity. In the Motion, the Respondent asserted: "The [OSHA] investigation disclosed that there was never any factual support for the allegations that the actions of PATH were in retaliation for reporting a work place injury. There is no showing that the charges were made in good faith, or even that they were filed as the result of an honest mistake. The only reasonable inference is that the complaints were frivolous and made in bad faith." Motion at 5.

In the Complainant's "Memorandum in Opposition to PATH's Motion for Attorney's Fees" the Complainant asserted that the FRSA does not have a provision authorizing an award of attorney's fees to an employer. As the Complainant stated: "PATH's Motion is fatally flawed because this case was brought under the FRSA, not the NTSSA, and the FRSA does not allow a respondent to file for any such attorney fees." Opposition at 1-2.

In the "Memorandum in Further Support," the Respondent asserted that the FRSA specifically states that actions brought under that title are governed by the rules and procedures set forth in 49 U.S.C. § 42121(b), and that provision permits attorney's fees to be awarded to an employer when the complainant's complaint is determined to be "frivolous or brought in bad faith." Memorandum at 1-2. See 49 U.S.C. § 42121(b)(3)(D). The Respondent also asserted: "The frivolity and bad faith of the complaint in this matter is beyond peradventure" and stated that the Complainant's allegations of reprisal were "totally unsubstantiated." Respondent's Memorandum at 2.

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[1] Though this matter had been assigned to me, Respondent filed this item with Administrative Law Judge Theresa C. Timlin, of the Cherry Hill District office, as well as with the Office of Administrative Law Judges' National Office in Washington, DC.

[2] Complainant's counsel filed this item with Judge Timlin and the National Office.

## Discussion

The FRSA, at 49 U.S.C. § 20109, provides protections for railroad employees who engage in certain protected activities. Prior to 2007, the FRSA focused on the protection of employees who made complaints regarding hazardous conditions or other matters involving railway safety. Pub. L. 103-272, § 1(e), 108 Stat. 867. At that time, the statute did not prescribe any specific procedures for adjudication, and did not refer to the procedures of any other statute in Title 49. See 49 U.S.C. § 20109 (2007).

The FRSA was amended on August 3, 2007, as part of the "9/11 Commission Act." Pub. L. 110-53, § 1521, 121 Stat. 444. This statute was enacted specifically to implement the recommendations of the 9/11 Commission.[3] The 2007 amendment expanded the Act to provide protection for employees who made complaints regarding railroad security. It also added to the FRSA, for the first time, a new subsection that prescribed procedures for adjudicating complaints. Actions under the FRSA are to be "governed under the rules and procedures set forth at [49 U.S.C.] Section 42121(b)." §1521(c)(2), 121 Stat. 447. In addition, a separate subsection set forth remedies for successful complainants. §1521(d), 121 Stat. 447, codified at 49 U.S.C. § 20109(e). The FRSA amendment at § 1521 did not provide any specific remedy to an employer that has been the subject of a frivolous complaint.

A separate provision of the "9/11 Commission Act" instituted the National Transit Systems Security Act (NTSSA), Pub. L. 110-53, § 1413, 121 Stat. 414, codified at 6 U.S.C. § 1142. See Pub. L. 110-53, §§ 1401-1413, 121 Stat. 400-17, codified at 6 U.S.C. §§ 1131-42. This provision provided protections against retaliation against employees of public transportation agencies who report hazardous safety or security conditions or engage in other specific types of protected activity. The NTSSA at § 1413(c) set forth specific procedures for adjudicating complaints, and listed the remedies that may be ordered in cases where a complainant is a prevailing party. In addition, NTSSA included a provision authorizing the Secretary of Labor to award attorney's fees in an amount not exceeding $1,000 to a "prevailing employer" where the Secretary has determined that an employee's complaint is "frivolous" or has been "brought in bad faith." § 1413(c)(3)(D), 121 Stat. 417, codified at 6 U.S.C. § 1142(c)(3)(D).

Interim regulations, governing both the FRSA and the NTSSA, were published on August 31, 2010, and were effective on that date. See "Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act," 29 Fed. Reg. 53,522 (Aug. 31, 2010), codified at 29 C.F.R. part 1982. The regulation paralleled the provisions of § 1521 and § 1413 of the "9/11 Commission Act" by providing for recovery of attorney's fees against a complainant who filed a frivolous or bad faith complaint under the NTSSA but not the FRSA. Specifically, the regulation states:

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

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[3] Pub. L. 100-53, § 1(a), 121 Stat. 266.

75 Fed. Reg. 53,532, codified at 29 C.F.R. § 1982.109(d)(2). See also 75 Fed. Reg. 53,523 (discussion of Secretary's authority under NTSSA to award prevailing employer an attorney's fee). The regulation does not contain any provision for recovery of attorney's fees by the employer against a complainant who filed a complaint under the FRSA.

The Respondent asserts that the FRSA's incorporation of "the rules and procedures" of 49 U.S.C. § 42121(b) includes incorporation of § 42121(b)(3)(C), a provision that authorizes the award of attorney's fees to a prevailing employer in cases where the Secretary of Labor determines a complaint is frivolous or brought in bad faith. The Complainant asserts that, because § 1521 does not specifically authorize such an award of attorney's fees, there is no statutory authority for such action.

In general, in the absence of explicit Congressional authority, attorney's fees are not a recoverable cost of litigation. Runyon v. McCrary, 427 U.S. 160, 185 (1976). It is plain that there is no explicit provision in the FRSA regarding an employer's ability to recover attorney's fees. However, as the FRSA does refer to 49 U.S.C. § 42121(b), which contains a provision authorizing an employer's recovery of attorney's fees, the issue warrants examination.

It is clear that there was no Congressional grant of authority to award attorney's fees prior to the 2007 amendment to the FRSA. If there is such authority, it is contained in the "9/11 Commission Act." The NTSSA, established in § 1413 of the "9/11 Commission Act," has clear language granting such authority. In contrast, the FRSA amendment, at § 1521 of the "9/11 Commission Act," does not. Congress's Joint Conference Report, H.R. Rep. 110-259 (July 20, 2007) does not address the apparent discrepancy between the two provisions, § 1413 and § 1521, regarding awards of attorney fees to employers. Hence, the intent of Congress as to the reason, if any, for this discrepancy is unknown.

I note, however, that § 1521(c)(2) of the "9/11 Commission Act" does not incorporate § 42121(b) in its entirety, but only the "rules and procedures" of that provision.[4] It can reasonably be inferred, therefore, that Congress intended that only a portion thereof, and not the whole provision, is applicable in FRSA complaints, and I so find. Based on the record before me, including the parties' arguments, I am not prepared to conclude that § 42121(b)(3)(C), the attorney fee provision, which authorizes an award of money, is either a "rule" or a "procedure." I also find that Congress's reference in § 1521 to a portion of § 42121 should not be construed as an "explicit grant of authority," in the absence of any evidence in the legislative history that specifically mentions at portion of § 42121(b) pertaining to attorney's fees. Notably, the governing regulation, which does not authorize recovery of attorney fees by employers in FRSA cases, constitutes the position of the Department of Labor on this subject. 75 Fed. Reg. 53,532 (Aug. 31, 2010), codified at 29 C.F.R. § 1982.109(d)(2). While the regulation is not determinative on the issue before me, it is worthy of deference and respect. See generally

[4] Indeed, § 1521(c)(2) specifies burdens of proof, statutes of limitations, and civil actions to enforce as among the "rules and procedures" of § 42121 that are incorporated. It does not mention provisions regarding remedies or awards of attorney fees. Of interest, the FRSA's remedies are listed in a separate subsection, § 1521(d), and not in § 1521(c).

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (agency's reasonable interpretation of a statute is entitled to deference).

Moreover, even assuming arguendo that § 1521 incorporates the attorney fee award provision for employers of § 42121(b)(3)(C) in its entirety, and that this incorporation is evidence of Congress' explicit grant of authority to award attorney's fees to an employer, the Respondent fails to establish entitlement to a fee award in this specific case. Under § 42121(b)(3)(C), the Secretary of Labor may award attorney's fees to the employer only after the Secretary finds that the complaint is frivolous or brought in bad faith. The Respondent in this case argues, essentially, that the Complainant's case is frivolous because the OSHA Regional Director found that the FRSA had not been violated. I note that the OSHA Regional Director's findings do not state, or even imply, that the Complainant's complaint was frivolous or brought in bad faith. As discussed above, upon investigation, the OSHA Regional Director found the Complainant had engaged in protected activity. Where the Complainant's complaint fell short, according to the OSHA Regional Director's findings, was that the Complainant was unable to establish that his protected activity played a role in any adverse action. OSHA Regional Administrator Findings at 3-4.

Contrary to the Respondent's assertion, the OSHA Findings do not reflect that the Complainant's factual allegations were unsubstantiated. Rather, the OSHA Findings indicate that the Respondent's actions, of which the Complainant complained, did not constitute retaliation under the FRSA. Moreover, the OSHA Regional Director made no finding that the Complainant lied or misled the investigating officials. Nor is there any indication, from the record before me, that the Complainant has abused the FRSA complaint process (for example, by submitting repeated complaints on the same issue).

I cannot conclude, as the Respondent apparently asserts, that any complaint that OSHA has determined not to establish a violation of the FRSA must perforce be frivolous or filed in bad faith. To the contrary, I find, based on the record before me, that there is no evidence whatsoever to indicate that the Complainant's complaint was frivolous, or was filed in bad faith.

In light of the foregoing, then, I DENY the Respondent's Motion for Attorney's Fees. As the only issue before me is the matter of an attorney fee award to the Respondent, I DISMISS this case.

SO ORDERED.

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**ADELE H. ODEGARD**
Administrative Law Judge

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

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

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

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

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

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).