Issue Date: 24 February 2011

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

CASE NO.: 2010-FRS-00037

In the Matter of:

MARK MYLAR,
Complainant

v.

UTAH TRANSIT AUTHORITY,
Respondent

and

UNITED STATES DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
Party-In-Interest

Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

Erik Strindberg, Esq., Strindberg & Scholnick, Salt Lake City, Utah, for Complainant

Scott A. Hagen, Esq., Ray Quinney & Nebeker, Salt Lake City, Utah, for Respondent

Mathew B. Finnegan, Esq., Department of Labor, Office of the Solicitor, Denver, Colorado
Party-In-Interest

ORDER DENYING UTAH TRANSIT AUTHORITY'S MOTION FOR SUMMARY DECISION

I. OVERVIEW

This matter arises out of a complaint of retaliation filed pursuant to the employee

protection provisions of the Federal Rail Safety Act, ("FRSA") 49 U.S.C. § 20109.[1] On January 7, 2008, Complainant filed a complaint with the Secretary of Labor under the whistleblower protection provisions of the FRSA alleging that Respondent retaliated against him in violation of the FRSA, when it terminated his employment on December 21, 2007. On August 16, 2010, the Secretary of Labor, through her designee, the Occupational Safety and Health Administration ("OSHA"), notified Respondent that it had completed its investigation of the complaint and determined the complaint had merit.[2] Respondent objected to OSHA's findings and requested a hearing on September 15, 2010. The matter was initially set for hearing on January 19, 2011. At the request of the parties, the date for hearing was continued to April 6, 2011.

On December 14, 2010, Respondent filed a motion for summary decision, arguing that it is not a "railroad carrier engaged in interstate or foreign commerce" under Section 20109(a) of the FRSA, and therefore, the Department of Labor and the undersigned lack jurisdiction to consider the alleged violation of the whistleblower provisions of the FRSA. OSHA and the Complainant filed separate responses in opposition to the motion for summary decision on January 7, 2011. On January 14, 2011, Respondent filed a reply.

II. FINDINGS OF FACT

The following facts appear in UTA's motion and are undisputed by Complainant Mylar or OSHA. Mot. at 3-4; OSHA Op. at 2; Cl. Op. at 2.

1. Mr. Mylar was hired by UTA on or about October 29, 2007 to serve in the position of Operation Supervisor for UTA's FrontRunner Service. Affd. Paul O'Brien ("O'Brien Aff.") at ¶ 3.

2. Mylar was terminated by UTA on or about December 21, 2007. O'Brien Aff. at ¶ 4.

3. FrontRunner is a commuter train service providing transportation between Salt Lake Central Station in Salt Lake City, Utah on the south end up to Pleasant View, Utah on the north end. O'Brien Aff. at ¶ 5.

4. FrontRunner does not travel over any state or national border, but moves entirely within the State of Utah. At its northern end, in Pleasant View, FrontRunner remains some 65 miles away from Preston, Idaho (to the north), and 85 miles away from Evanston, Wyoming (to the east). O'Brien Aff. at ¶ 6.

5. FrontRunner carries passengers only; it carries no freight. O'Brien Aff. at ¶ 7.

6. Greyhound Lines, an interstate bus carrier, and Amtrak, an interstate railway carrier, both have a station within a short walking distance of the Salt Lake Central Station. In addition, it is possible to take a UTA bus trip from Salt Lake Central Station to Salt Lake

[1] The governing regulations are at 29 C.F.R. Part 1982.

[2] The Secretary's finding ordered UTA to immediately reinstate the Complainant, and pay lost wages, compensatory damages, and attorney fees.

International Airport. However, FrontRunner does not stop at the airport. O'Brien Aff. at ¶ 8.

7. In the fiscal year 2009, Amtrak serviced Utah with a single daily train, which had a total of 31,319 "boardings and alightings" at its Salt Lake City station. Amtrak Fact Sheet, Fiscal Year 2009, State of Utah, http://www.amtrak.com/pdf/factsheets/UTAH09.pdf (last visited Dec. 13, 2010). (Exh. A).

8. In the calendar year 2009, the Salt Lake City International Airport enplaned and deplaned a total of 20,432,218 passengers. Salt Lake City international Airport, Summary Statistics for 2009, http://www.slcairport.com/cmsdocuments/airstatsSummary2009.pdf (last visited on Dec. 13, 2010) (Exh B). Thus, the train service was 0.15% of the airline travel service. Passengers making interstate journeys are far and away more likely to travel out of or into the State of Utah in a car or by airplane, than by railroad.

The following facts included in OSHA's statement of Undisputed Facts were not disputed by either UTA or the Complainant.[3]

9. UTA created FrontRunner "as part of an overall plan to meet anticipated long-term transportation needs along the Wasatch Front (a 120-mile corridor between Brigham City [i]n the north and Payson in the south, and bounded on the east by the Wasatch Range and on the west by the Great Salt Lake, Utah Lake, and Oquirrh Mountains)." OSHA Op. at EX 1 at 10-11.

10. Since launching in 2008, an average of approximately 5,000 passengers has traveled each day on FrontRunner trains. OSHA Op. at EX 1 at 14.

11. UTA has entered into or assumed provisions of over 200 agreements to which Utah Railway, Burlington Northern Santa Fe Railroad, and Union Pacific Railroad ("Union Pacific") are parties, some of which may be considered operational agreements or may have operational elements. OSHA Op. at EX 2 at 4-5.

12. In early 2002, UTA obtained from Union Pacific approximately 116 miles of rail corridor and trackage rights,[4] which UTA has used for various projects (including FrontRunner), between Brigham City, Utah in the north and Payson, Utah in the south. OSHA Op. at EX 1 at 6-7. Those cities are approximately 20 miles apart.

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[3] OSHA suggests that it "is reasonable and plausible to believe that some of UTA's 5,000 daily passengers use FrontRunner to connect with Greyhound buses or Amtrak trains that depart Salt Lake City for destinations outside of Utah." OSHA Op. at 16. UTA concedes it is possible for an individual to get to or from the Greyhound bus or Amtrak station at the start or conclusion of an interstate journey using FrontRunner. But it argues such a trip on FrontRunner is not part of a continuous interstate journey and, the trip on FrontRunner requires a separate ticket. Rep. at iv.

[4] "Trackage" rights are agreements that allow one rail carrier to use the tracks of another rail carrier. (citation omitted).

13. Since September 2008, UTA has owned trackage rights to run FrontRunner on 4.5 miles of Union Pacific's line between Ogden, Utah and Pleasant View, Utah (the "Joint Trackage"), enabling FrontRunner to run twice daily on those rails. OSHA Op. at EX 1 at 5-7.

14. Under the Passenger Rail Access Agreement that gives UTA rights to use the Joint Trackage (the "Trackage Agreement"), Union Pacific retained significant control over FrontRunner operations on the Joint Trackage.

    a. UTA's rights under the Trackage Agreement give UTA access to and joint use of the Joint Trackage. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Union Pacific. OSHA Op. at EX 3, EX B thereto at 3 ¶ 2.4.
    b. The movement of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Union Pacific's authorized representatives and in accordance with such reasonable operating rules as Union Pacific shall from time to time institute. *Id.*
    c. UTA controls the movement of FrontRunner trains between Salt Lake City and Ogden, Utah, but the movement of FrontRunner Trains from Ogden to Pleasant View, Utah is "dispatched by the Union Pacific Control Center in Omaha, Nebraska." OSHA Op. at EX 4 at 11.
    d. Under the Trackage Agreement, Union Pacific has exclusive responsibility for maintaining and repairing the joint trackage. OSHA Op. at EX 3, EX B thereto at 2 ¶¶ 2.1 and 2.3.
    e. Union Pacific at its sole discretion, will make changes in or additions to the Joint Trackage "[i]n the event that UTA desires that the Joint Trackage be improved." OSHA Op. at EX 3, EX B thereto at 2 ¶ 2.2.
    f. Before FrontRunner's launch, Union Pacific made "a commercially reasonable effort to provide UTA with locations on the Joint Trackage for a reasonable number of stations, including one station at Brigham City and a second station between Brigham City and Ogden." *Id.*
    g. The Trackage Agreement also provides that UTA shall operate its equipment over the Joint Trackage with its own employees, but before such employees are permitted to operate equipment over the Joint Trackage, they shall be required to pass the applicable rules examination required by Union Pacific of its own employees. OSHA Op. at EX 3, EX B thereto at 4 ¶ ¶ 2.7 and 2.8.

15. UTA has contracted with Nomad Digital to provide free wireless Internet ("WiFi") service to all passengers on FrontRunner trains. OSHA Op. at EX 1 at 8. Nomad is based in the United Kingdom. *Id.*

16. Union Pacific regularly brings trains across the FrontRunner tracks to access the Tesoro Corporation's oil refinery at 474 West 900 North, in Salt lake City. OSHA Op. at EX 2 at 9.

17. In September 2010, UTA agreed to sell two new commuter rail locomotives to the Massachusetts Bay Transportation Authority (MBTA). OSHA Op. at EX 1 at 9-10.[5]

18. UTA acknowledges that it is "engaged in a business affecting interstate commerce" within the meaning of the test for federal jurisdiction under the Commerce Clause of the United States Constitution. *Id.* at 4.

19. UTA acknowledges that the Department of Transportation's Federal Railroad Administration ("FRA") periodically inspects UTA and that UTA must comply with certain FRA rules and regulations. OSHA Op. at 7 citing UTA Mot. at 6.

20. Specifically UTA is required to comply with FRA service hours regulations with respect to FrontRunner train operators, controllers and line and signal technicians. OSHA Op. at EX 2 at 10.

21. In June 2001, UTA sold one of its locomotives to a coalition of transit rail agencies in Minnesota. OSHA Op. at EX 1 at 10.

22. UTA purchased rails from a company located in Colorado and used those rails on the FrontRunner line. OSHA Op. at EX 1 at 7-8.

23. The Complainant's job duties included "control[ling] the movement of rail vehicles while in service..." and "direct[ing] other Rail Operations Supervisors, train operators, and support personnel to provide the necessary response for service problems such as delays, accidents, breakdowns, passenger disruptions, safety issues, etc." OSHA Op. at EX 1 at 11.

The following facts are drawn from Complainant Mylar's opposition to UTA's motion for summary decision and are supported by the documentary evidence provided.

24. At the time of Mylar's discharge, UTA was operating FrontRunner trains with trainee operators in preparation of beginning public service. This included carrying employees for training purposes, and permitting public elected officials and other VIPs to ride the trains during these runs. Cl. Op. at Ex B (Interrog. # 3) thereto; Mot., O'Brien Aff at ¶10.

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[5] UTA objects to this alleged fact, which cites an on-line newspaper source, as hearsay. Hearsay statements may be admitted as exceptions to the hearsay rule. One exception, is for public records and reports from public offices or agencies. 29 C.F.R. 18.803(8). Other exceptions not specifically covered are recognized if the statement has "equivalent circumstantial guarantees of trustworthiness... if the judge determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; (iii) and the general purposes of these rules and the interests of justice will best be served by admission of the statement..." 29 C.F.R. 18.803(24). UTA's objection to this fact, could mean there was a material fact in dispute. However, I take notice of the fact that, as it happens, the MBTA announced last week, with great fanfare and amid widespread publicity and news coverage, the addition and first trips of two new locomotives purchased from the UTA. Accordingly, the fact of the locomotive sale by UTA to the MBTA can no longer be credibly disputed.

25. The FrontRunner was built with the expectation that "the Salt Lake City Intermodal Terminal will provide commuter rail riders a transit connection to the UTA light rail system and local bus service, as well as intercity bus and Amtrak services." Cl. Op. at EX C UTA 00512.

26. The FrontRunner trains stop at the Intermodal Terminal as does the Amtrak California Zephyr train, and Greyhound Buses. Cl. Op. at EX B (Req. For Adm. Nos. 4-6).

27. UTA entered into a Full Funding Grant Agreement in 2006 by which the Federal Transit Administration ("FTA") agreed to contribute over $489 million to complete FrontRunner's construction. Cl. Op. at 3, EX C (Resp. to OSHA Req. for Admission No. 19).[6]

III. CONTENTION OF THE PARTIES

UTA contends that the undersigned lacks jurisdiction to adjudicate the alleged violation because UTA's FrontRunner is not a railroad carrier engaged in interstate or foreign commerce under the FRSA's employee protection provision. Mot. at 1, 5. In this regard, UTA acknowledges that it is a "railroad carrier" as defined by Section 20102 of the FRSA and that it is covered by some provisions of the FRSA. Mot. 5-6. UTA admits that it is engaged in an industry that "affects" interstate commerce, but UTA denies that it is "engaged in" interstate commerce. Mot. 6. UTA maintains that the employee protections in Section 20109 of the FRSA, apply only to a railroad carrier "engaged in interstate or foreign commerce" and, since UTA is not engaged in interstate or foreign commerce, it is not subject to Section 20109 of the statute. Mot. at 5; Rep. at 1-3. In support of its assertion, UTA contends that there is a distinction between the phrase "affecting" interstate commerce and "engaging in" "interstate commerce" by citing *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) and *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) *overruled on other grounds in Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 761(1984). Mot. 8-11. UTA argues that the phrase "engaged in" interstate commerce in the transportation industry, means to be a provider of interstate or foreign transportation. Mot. 7-11 (citing *Estate of Zaritz v. Manitou and Pikes Peak Railway Co.*, 604 F.2d 652 (10th Cir. 1979) and *Yellow Cab*, 332 U.S. 218); Rep. at 3-4. The Railroad maintains that because FrontRunner does not transport persons or freight in a continuous interstate journey, it is not "engaged in" interstate commerce. Mot. at 11. UTA also argues that cases decided under the Railway Labor Act further demonstrate that UTA is not a railroad carrier engaged in interstate commerce. Mot. at 11-14. UTA asserts that FrontRunner is a commuter rail service without interline arrangements that link it to interstate journeys and thus, it is not engaged in interstate commerce. Mot. at 14-16. UTA contends that its ancillary business activities such as buying and selling products and services outside Utah do not qualify as being "engaged in interstate or foreign commerce." Mot. at 16-17; Rep. at 4. Next, UTA asserts that even if it is found to be "engaged in interstate commerce" because FrontRunner had not yet begun operations when the Complainant was terminated, this complaint is outside the

[6] Mylar alleges additional facts which, if proven, would establish additional federal grant monies to UTA. *See* Cl. Op. at 3 (Nos. 3-4). In its reply, UTA objects to Mylar's proffered facts (Nos. 3-4) on hearsay and foundation grounds. Rep. at vii. To the extent that the alleged facts objected to are material, summary decision would not be appropriate.

coverage of the employee protection provision of Section 20109. Mot. at 17-19; Rep. at 9. Lastly, in its reply, and in response to the Complainant's opposition, UTA argues that the Complainant may not amend his complaint to bring it under the National Transit System Security Act ("NTSSA"), as he failed to exhaust his administrative remedies under that statute. Rep. at 10.

In his opposition, the Complainant contends that the phrase "engaged in interstate commerce" as used in Section 20109 has not been defined by Congress or the Federal Railroad Administration. Complainant contends that the Secretary of Labor's assertion of jurisdiction is permissible because UTA is engaged in interstate commerce within the meaning of the FRSA, Congress intended the employee protection provision of 20109 of the FRSA to extend to employees of intrastate commuter rail operators, and DOL has concurrent jurisdiction of the complaint under the NTSSA. Cl. Op. at 10-26. In support of its assertion that UTA is engaged in interstate commerce, Complainant points to UTA's acquisition of goods and services from entities located outside Utah. Cl. Op. at 11-14 (citing *United States v. American Building Maintenance Indus.*, 422 U.S. 271 (1975)). Complainant also contends that UTA is engaged in interstate commerce because many passengers use its FrontRunner service as part of their interstate travel. Cl. Op. at 14-16. Complainant contends that UTA's interpretation of the FRSA is overly narrow and that the *Estate of Zaritz* and *Yellow Cab* cases are not controlling. Cl. Op. at 16-19. Complainant also argues that Section 20109 of the FRSA applied to UTA at the time he was employed. Cl. Op. at 19-20. Complainant contends that Congress intended the employee protection provision of Section 20109 to extend to employees of intrastate commuter rail operations. Cl. Op. at 20-26. Finally, and in the alternative, the Complainant states that the Department of Labor has concurrent jurisdiction under the whistleblower provisions of the NTSSA and, if Section 20109 of the FRSA does not apply, then the whistleblower provision of the NTSSA does apply and, Complainant would not oppose a reclassification of his complaint under the NTSSA. 6 U.S.C. § 1142. Cl. Op. at 26 - 27.

In opposing the motion, OSHA contends that UTA in its operation of FrontRunner, is engaged in interstate commerce under Section 20109(a) of the FRSA (citing *Cusack v. Trans-Global Solutions, Inc.*, 222 F. Supp 2d 834 (D. Tex. 2002)). OSHA Op. at 9-16. OSHA notes that UTA's FrontRunner operations regularly use facilities used in interstate commerce. OSHA Op. at 11. OSHA contends that the cases cited by UTA in support of its argument that FrontRunner is not covered by Section 20109 of the FRSA, are inapposite as the substance and purpose of the statutes in those cases differ from the FRSA. *Id.* at 13-14. OSHA maintains that under a "plain meaning" reading of Section 20109(a) of the FRSA, UTA is "engaged in interstate commerce." *Id.* at 14-16. Pointing to FrontRunner's use of track owned by Union Pacific, the fact that it carries 5,000 passengers daily between their homes in the suburbs to work in Salt Lake City, and UTA's purchase and sale of supplies and equipment from entities beyond the state borders, OSHA states UTA is "engaged in" interstate commerce. *Id.* at 15-16. OSHA argues UTA's interpretation of Section 20109 contradicts Congressional intent of improving safety and security on the Nation's railroads, and leads to an absurd result. *Id.* at 20-24. In this regard, OSHA asserts that under UTA's interpretation of the FRSA, employees of a commuter railroad that crosses state lines would be protected from adverse employment action when they report safety or security issues, but employees of commuter railroads that do not cross state

borders would not. *Id.*[7] In addition, OSHA contests UTA's assertion that during Complainant's employment it was not "engaged in" interstate commerce as it was just preparing to operate. OSHA Op. at 17. OSHA states that during the Complainant's employment, UTA was engaged in interstate commerce because it engaged in numerous interstate transactions, such as contracts to purchase locomotives from an Idaho company, contracts for the construction of FrontRunner, contracts for rails for Front Runner purchased from a supplier in Colorado. *Id.* at 19-20.

IV. DISCUSSION

A. Standard of Review-Summary Decision

The standard for granting summary judgment or decision set forth at 20 C.F.R. §18.40(d) is derived from Federal Rules of Civil Procedure (FRCP) 56.[8] Section 18.40(d) permits an Administrative Law Judge to enter summary decision, "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issue as to any material fact and that a party is entitled to summary decision." 20 C.F.R. §18.40(d) (1994). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, a genuine issue exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Id.* at 249.

In deciding a Rule 56 motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). In other words, the Court must look at the record as a whole and determine whether a fact-finder could rule in the non-movant's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. If the non-movant fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323. The parties' submissions have not argued that there are issues of material fact in dispute. Rather, the dispute is a legal one, that is, the interpretation of the employee protection provision of Section 20109 of the FRSA.[9]

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[7] OSHA points out that as a result of geographic proximity, commuter railroads on the East Coast would be covered while those in other parts of the country would not be, leading to segmented enforcement of railroad safety laws. OSHA Op. at 23.

[8] Rule 56(c) provides that summary decision shall be rendered "if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

[9] Complainant contends that although UTA has designated its filing as a motion for summary decision, it is essentially a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Cl. Op. at 1 n.1.

B. Elements of a Claim Under the FRSA

Section 20109(a) of the FRSA provides that a "railroad carrier engaged in interstate or foreign commerce...may not discharge...or in any other way discriminate against an employee" because the employee in good faith engaged in actions protected by the FRSA and intended to improve railroad safety. 49 U.S.C. § 20109(a). Section 20109(b)(1)(A) states that a "railroad carrier engaged in interstate...commerce shall not discharge...or in any other way discriminate against an employee, for reporting in good faith a hazardous safety or security condition." 49 U.S.C. § 20109(b)(1)(A).[10] The whistleblower protection provision of the FRSA provides that actions under the statute are governed by the analytical framework and burdens of proof applied under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). 49 U.S.C. § 20109(d)(2)(A)(i).[11]

C. Is UTA Covered by the Employee Protection Provision of Section 20109 of the FRSA?

The FRSA defines a railroad as "any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including -- commuter or other short-haul railroad passenger service in a metropolitan or suburban area ...." 49 U.S.C. § 20102(2)(A)(i). Section 20102(3) defines a "railroad carrier" in pertinent part as "a person providing railroad transportation ...." UTA admits that it is both a railroad and a railroad carrier under the FRSA, and that it is subject to other requirements of the FRSA. Mot. 6; *see also* 49 U.S.C. § 20101. But UTA contends that the employee protection provision in Section 20109(a) of the FRSA apply narrowly only to railroads "engaged in interstate commerce." Mot. at 6. While UTA concedes that it is a railroad carrier that is engaged in an industry that "affects" interstate commerce, it denies that it is "engaged in interstate commerce." Mot. at 6. UTA argues the terms "affecting" commerce and "engaged in" commerce have different meanings, and that Congress used the more limited "engaged in" language in the employee protection provision of Section 20109 of the FRSA. *Id.* OSHA and the Complainant argue that the phrase "engaged in interstate commerce" is not defined in the FRSA and ought not be given the narrow interpretation suggested by UTA. OSHA Op. at 13-16, 20-24; Cl. Op. at 20-26. They maintain that the construction urged by UTA is not consistent with the FRSA's plain language or its

[10] In their submissions, UTA, OSHA, and the Complainant all make reference to Section 20109(a) as the relevant statutory provision. Mot. 5-6; OSH Op. 9-10, 11,13, 16; Cl. Op. 9. However, OSHA's Finding of violation cites 49 U.S.C. § 20109(b)(1)(A)(1) as "protect[ing] employees who report, in good faith, a hazardous safety or security condition" and finds that UTA violated that provision when it terminated the Complainant after he sent an e-mail raising a security issue to his supervisor. OSH Find. at 3. I note, however, that both 49 U.S.C. §§ 20109(a) and 20109(b) contain identical language covering a "railroad carrier engaged in interstate or foreign commerce."

[11] To prevail in an AIR 21 case, a complainant must prove by a preponderance of the evidence that he engaged in activity the statute protects, that the employer knew about such activity, that the employer subjected him to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. §§ 42121(a), 42121(b)(2)(B)(iii). If the employer has violated AIR 21, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv). *See, e.g., Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-003, slip op. at 22 (ARB Jan. 30, 2004); *see also*, 29 C.F.R. Part 1982 (75 Fed. Reg. 53522 (Aug. 31, 2010)).

purpose. The preliminary issue in dispute is whether UTA is "engaged in interstate commerce" within the meaning of Section 20109 of the FRSA, and is thus a covered employer.

The first step in interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co., Inc.* 534 U.S. 438, 450 (2002) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)); see also, *Dodd v. U.S.*, 545 U.S. 353, 359 (2005); *U.S. v. Gonzales*, 520 U.S. 1, 4 (1997); *In re Wise*, 346 F.3d 1239, 1241 (10th Cir. 2003). The parties disagree as to the meaning of the statutory language and there is some inconsistency in the cases relied upon by the parties. In addition to considering the meaning of the "engaged in" interstate commerce language of the employee protection provision of the FRSA, the statute, like other statutes, must be construed with reference to the statutory context and in a manner consistent with the FRSA's purpose. *Circuit City*, 532 U.S. at 118; *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."). The language at issue, "engaged in" interstate commerce, has been interpreted by the Supreme Court in a number of cases.

In *Circuit City*, the Supreme Court stated that "Congress uses different modifiers to the word 'commerce' in the design and enactment of its statutes." *Circuit City*, 532 U.S. at 115.[12] The Court remarked that where Congress uses the phrases "affecting commerce" or "involving commerce," it "'signals an intent to exercise [its] commerce power to the full.'" *Id.* (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)). The Court continued stating that unlike the words "involving" or "affecting" commerce the general words "in commerce" and the specific phrase "engaged in commerce" are "understood to have a more limited reach." 532 U.S. at 115.[13] *See also, Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (words "affecting commerce," are "words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."); *Jones v. United States*, 529 U.S. 848, 856, (2000) (noting "the recognized distinction between legislation limited to activities 'in commerce' and legislation invoking Congress's full power over activity substantially 'affecting ... commerce'"); *Am. Bldg. Maintenance*, 422 U.S. at 279-81 (discussing the limited scope of federal jurisdiction associated with the phrase "engaged in commerce" or "in commerce" as opposed to "the broad 'affecting commerce' jurisdictional language").

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[12] *Circuit City* involved the interpretation of the Federal Arbitration Act. In construing the FAA, the Court noted that the FAA was intended to compel judicial enforcement of arbitration agreements and was a response to American courts hostility to enforcement of arbitration agreements. In construing the FAA provision which exempts from mandatory arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," the Court looked to the broad purpose of the FAA in narrowly construing the "engaged in" commerce language as excluding from the FAA only employment contracts of persons employed as seamen, railroad workers, or those employed in other transportation industries. 532 U.S. at 112-115.

[13] Though the Supreme Court made these pronouncements in the context of interpreting a provision of the Federal Arbitration Act, it cautioned against "a variable standard for interpreting common, jurisdictional phrases." *Circuit City*, 532 U.S. at 117. Of course, "statutory jurisdictional formulations [do not] 'necessarily have a uniform meaning whenever used by Congress,'" *Id.* at 118 (quoting *Am. Bldg. Maintenance*, 422 U.S. at 277), but must be construed " with reference to the statutory context in which [they are] found and in a manner consistent with the [statute's] purpose." *Id.*

In *Am. Bldg. Maintenance* the Supreme Court concluded that to be "engaged in commerce" the companies had to participate directly in the sale, purchase, or distribution of goods or services in interstate commerce.[14] The Court held that although the acquired janitorial service companies used equipment and supplies manufactured outside of the State, they did not purchase those supplies directly from out of state companies, but rather from local companies, and therefore they were not 'engaged in commerce' within the meaning of section 7 of the Clayton Act. 422 U.S. at 285.[15] Later, in *United States v. Robertson*, 514 U.S. 669, 671-672 (1995) the Court reinstated a conviction under the Racketeer Influence and Corrupt Organizations Act (RICO) that was based upon the Government's failure to establish the enterprise "affected" interstate commerce.[16] Citing *Am. Bldg. Maintenance*, the Court reaffirmed its view that a corporation is generally engaged in commerce "when it itself is directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce." 514 U.S. 671-672. The Court held it was not necessary to decide whether the gold mine in *Robertson* "affected" commerce because the defendant's Alaska gold mine was "engaged in" interstate commerce because of activities which included the purchase of $125,000 in gold mining claims in another state and the purchase of mining equipment and supplies from out of state vendors.

The Court has also interpreted the "in commerce" and "engaged in interstate commerce" language in the context of the transportation industry. In *Yellow Cab Co.*, 332 U.S. 218, a case arising under the Sherman Anti-Trust Act, the United States alleged that the appellees conspired to restrain and to monopolize interstate trade and commerce in taxicab services in Chicago. Two types of taxi service were at issue. One type was a contract taxi service in which the taxi company arranged with the railroads to transport train passengers on interstate journeys from one Chicago train station to the other in the continuance of the interstate trip. The train passengers had purchased a single train ticket for an interstate trip, part of which included a contracted taxi ride from one Chicago train station to the other. The second type of taxi service was regular local taxi cab service within the Chicago city limits where a taxi cab could pick up passengers and take them to destinations within Chicago.[17] The Court held the first type of service was "engaged in commerce" but the second was not and, therefore, was not subject to the anti-trust statute. In finding the local taxi service was not in interstate commerce, the Court was influenced by the taxi cab company's lack of a "contractual or other arrangement with the interstate railroads." 322 U.S. at 231. The Tenth Circuit has interpreted the "engaged in

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[14] *Am. Bldg. Maintenance* involved application of Section 7 of the Clayton Act which prohibited a corporation engaged in commerce from acquiring another corporation engaged in commerce where the effect of such acquisition may be to substantially lessen competition. 422 U.S. at 275.

[15] Following *Am. Bldg. Maintenance*, Congress amended the language of the Clayton Act, 15 U.S.C. § 18, changing its coverage from businesses "engaged in commerce" to those "affecting commerce." H.R. Rep. No. 871, 96th Cong., 2d. Sess. 4-7 (1980).

[16] The RICO statute prohibits the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a). *See also* 514 U.S. 670.

[17] The court acknowledged that some passengers using the regular taxi service were using the taxi to begin or end an interstate trip.

interstate commerce language" appearing in the Federal Employer's Liability Act ("FELA")[18] narrowly. *Estate of Zaritz v. Manitou and Pikes Peak Railway Company*, 604 F.2d 652 (10th Cir. 1979). There, the Tenth Circuit determined that because the railroad, which provides sightseeing rides for tourists, operated only in Colorado and did not further the interstate travel of its passengers, the railroad was not "engaged in interstate commerce" and, was not subject to liability under FELA.

One Court has construed the "engaged in interstate commerce" language in Section 20109 of the FRSA. In *Cusack v. Trans-Global Solutions, Inc.*, 222 F. Supp. 2d 834 (S.D. Tex. 2002), in a case in which a railroad employee sought to enforce an award in his favor by the National Railroad Adjustment Board (NRAB) under the Railway Labor Act, the District Court, in resolving the matter, considered whether Econo-Rail's operations were such that it was engaged in interstate commerce.[19] The District Court stated "[i]t is an old and well established doctrine that 'interstate commerce' is a broad term and generally encompasses everything affecting the channels of interstate commerce, moving in interstate commerce, or utilizing the instrumentalities of interstate commerce." 222 F. Supp. 2d at 840 (citing *United States v. Morrison*, 529 U.S. 598 (2000) (where the Court determined the civil remedy provision of the Violence Against Women Act was unconstitutional as exceeding Congress' authority under the Commerce Clause)).[20] The *Cusack* Court found that because the railroad used Union Pacific's rail lines, that was sufficient to bring it within the engaged in interstate commerce language of Section 20109. 222 F. Supp. 2d at 840. The District Court's *Cusack* decision does not acknowledge a distinction between the "engaged in" and "affecting" commerce language.

These cases leave little doubt that the Supreme Court has determined that there is a distinction between the phrase "engaged in" interstate commerce and "affecting" commerce. The terms are not used interchangeably. OSHA's assertion that the phrase "engaged in" interstate commerce is to be given its "plain" meaning of "involved in" ignores Supreme Court decisions construing this language in other statutes. That said, in interpreting the meaning of the "engaged in" interstate commerce language in the FRSA I am guided by the Court's decisions in *Am. Bldg. Maintenance* and *Yellow Cab* as well as by the intent of the statute. UTA appears to state that the interpretation of the "engaged in" interstate commerce language laid out in *Yellow Cab* and *Estate of Zaritz* is narrower than that set forth in *Am. Bldg. Maintenance*. Rep. at 3. UTA overstates the reach of the decisions in *Yellow Cab* and *Estate of Zaritz*. Those cases only

[18] The FELA is an exception to the no fault scheme of workers' compensation statutes covering employees in most other industries and businesses. FELA requires injured employees to establish negligence in order to recover for workplace injuries, but it also subjects the railroad to tort liability for such employee injuries. Because of the potential tort liability, the application of the FELA has been construed narrowly, consistent with the statute's purpose.

[19] Econo-Rail had three locomotives at a Union Carbide Plant in Seadrift, Texas. One was used only within the Union Carbide plant, one was kept as a backup in emergencies, and the third one was maintained and used outside the Union Carbide plant to receive and switch cars brought to the plant by Union Pacific Railroad. This locomotive was also used to switch cars at an additional Union Carbide plant across a state road. The Union Pacific line is used to service two customers. 222 F.Supp. 2d at 840. It does not appear that Econo-Rail contested this aspect. Rather, it focused upon the argument that its operations were confined to the Union Carbide property.

[20] The statute at issue in *Morrison* did not include the "engaged in" interstate commerce language and the Court analyzed the statute under the "affecting" commerce analytical framework.

establish that if the local or intrastate transportation provider has no contracts or other arrangements with interstate railroads in providing its service, or does not transport passengers or freight across state lines, or as part of a continuous interstate journey, the provider is not "engaged in interstate commerce." These two cases do not preclude a finding that a transportation entity is "engaged in" interstate commerce if the entity participates directly in the sale, purchase, or distribution of goods or services in interstate commerce. Reconciling the decisions in *Am. Bldg. Maintenance* and *Yellow Cab,* a railroad is "engaged in" interstate commerce within the meaning of the employee protection provision of the FRSA if it provides its transportation services through arrangements with interstate railroads, or transports passengers across state lines, or participates directly in the sale, purchase, or distribution of goods or services in interstate commerce.

Applying this interpretation to the present case, FrontRunner operates a commuter rail service within Utah. FrontRunner operates on track, a portion of which is owned, controlled and used by Union Pacific Railroad under a Trackage Agreement between the two railroads. Union Pacific is a large national railroad and it uses this same 4.5 mile section of track in its interstate freight operations. When the FrontRunner train is operating on the 4.5 miles of its journey that is on Union Pacific track, the movement of FrontRunner trains is controlled by Union Pacific Railroad dispatchers in Omaha, Nebraska and not by UTA's control facility in Utah. Union Pacific is also responsible for maintenance of the 4.5 miles of track. FrontRunner employees operating FrontRunner trains on the 4.5 miles of Union Pacific track are required by the Trackage Agreement to pass the same tests as Union Pacific employees operating that railroad's trains.[21] In providing its passenger service, UTA has an explicit arrangement with interstate railroads (Union Pacific) and indeed its FrontRunner operations could not run its full route without its interface and contractual arrangements with the interstate railroad. Additionally, UTA buys and sells materials for its FrontRunner operation directly from entities located outside of Utah. For example, UTA has sold and purchased locomotives, cars, rails and other supplies to and from out of state companies or businesses. These factors, taken together, are sufficient to establish that UTA's FrontRunner is "engaged in interstate commerce" within the meaning of the employee protection provision of Section 20109 of the FRSA.

This construction of the "engaged in interstate commerce" language of the whistleblower protection provision in 20109 of the FRSA furthers the purpose of the statute. Congress declared that the purpose of the FRSA is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. When the employee protection provisions of Section 20109 were enacted Congress intended the protections "to extend to all railroad employees." H.R. Rep. No. 96-1025, at 16, reprinted in 1980 U.S.C.C.A.N. 3830, 3840-3841 (UTA Mot. Ex E.) . Congress stated that the legislation "ensures that certain protections of the Occupational Safety and Health Act (OSHA) are extended to railroad employees not otherwise covered by OSHA." H.R. Rep. No. 96-1025, at 3, reprinted in 1980 U.S.C.C.A.N. 3830, 3840-3841. The 9/11 Act's overarching goal was to improve safety and security for American citizens and businesses. After the 9/11 Commission Report, Section 20109 of the FRSA was amended to strengthen existing whistleblower protections for railroad workers and the statute was broadened to include railroad employee protections for raising security concerns, among other issues. H.R. Rep. 110-336 (Sept. 19, 2007); *see* 49 U.S.C. §

[21] Additionally, Union Pacific brings its trains across the FrontRunner tracks to access the Tesoro oil refinery.

20109. Indeed, Congress recognized that in order to improve safety and security on the railroads, railroad employees play a key role and are to be encouraged to raise safety or security issues with supervisors and/or government officials, so the issues can be addressed, without fear of reprisal for doing so. The Conference Report reflects Congress' intent by stating:

> The Conference notes that railroad carrier employees must be protected when reporting a safety or security threat or refusing to work when confronted by a hazardous safety or security threat or refusing to work when confronted by a hazardous safety or security condition to enhance the oversight measures that improve transparency and accountability of the railroad carriers. The Conference, through this provision, intends to protect covered employees in the course of their ordinary duties. The intent of this provision is to ensure that employees can report their concerns without fear of possible retaliation or discrimination from employers.

H.R. Rep. No. 110-259 at 348 (2007) (Conf. Rep.). The potential safety or security issues railroad employees are exposed to are the same, whether the commuter railroad operates wholly intrastate or crosses state borders. UTA admits it is covered by the FRSA with regard to safety regulations. UTA's assertion that the employee protection provisions intentionally exclude a class of employees from protection for reporting safety or security violations of the very safety standards which it admits it is covered by is puzzling. Congress did not intend to protect some commuter railroad employees who raise safety or security concerns but not others.[22] Such a result also runs counter to Congress' direction that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C.§ 20106. For the forgoing reasons, I find that UTA is "engaged in interstate commerce" and is subject to the employee protection provision in Section 20109 of the FRSA.

D. Was UTA Covered by the FRSA's Employee Protection Provision When It Terminated The Complainant?

Having determined that UTA is subject to Section 20109 of the FRSA, I now consider UTA's contention that timing is important and, that because FrontRunner had not begun public service operations, it was not engaged in interstate commerce at the time it terminated the Complainant, and is not covered by the FRSA with regard to the present complaint. At the time UTA fired Complainant, FrontRunner was training its train operators, testing operations and running trains along its route carrying UTA officials and politicians. FrontRunner was working to ensure that its trains and procedures were operating smoothly in anticipation of beginning full public service operations. Complainant's duties to supervise and train locomotive operators

[22] UTA objects to Complainant's suggestion that it believes it should be able to discharge whistleblowers without consequence, stating it "simply believes it is not covered by 20109. UTA may be covered by state laws or other federal laws." Rep. at 8 n.9. UTA's suggestion that in promulgating the FRSA, Congress could "simply have determined that employees of intrastate railroads should be covered by state law or by other federal laws applicable to transit workers" would be more persuasive had UTA acknowledged it was covered by the federal law applicable to transit workers. However, UTA never states it or its FrontRunner operation *is* covered by any state or federal law protecting its employees who report safety or security issues, and it never explicitly identifies any state or federal law addressing employee protections for reporting safety or security issues to which it *is* subject.

involved him directly in FrontRunner's preparatory activities and furthered UTA's operations. Necessarily one aspect of this preparatory work, is ensuring that any safety or security issues are identified and properly resolved. To construe Section 20109 as applying to UTA only after its public service began undermines Congress' goal of encouraging railroad employees to come forward with safety or security concerns and protecting those employees who do, from discharge, suspension or retaliation. Indeed, if railroad employees are not protected by Section 20109 until the railroad is open for public service, those employees are likely to be less willing to raise safety or security concerns during preparatory testing activities. Moreover, as discussed above, at the time UTA terminated Complainant, UTA had an arrangement with Union Pacific to use a portion of Union Pacific's track to operate FrontRunner train service. Additionally, UTA sold and purchased equipment and supplies from businesses and entities outside Utah. I find that UTA was engaged in interstate commerce when it fired the Complainant. Accordingly, for all of the reasons discussed, UTA's motion for summary decision is denied.

E. Is UTA Subject to the Employee Protection Provisions of the National Transit Systems Security Act?

For the sake of completeness in light of the lengthy period of time that has expired since the complaint was filed, and assuming arguendo, that UTA is not engaged in interstate commerce pursuant to Section 20109 of the FRSA, and thus not covered by the employee protection provision of the FRSA, I will address Mylar's assertion, in the alternative, that his claim is also covered by the National Transit Systems Security Act (NTSSA). 6 U.S.C. §§ 1131, 1142; Cl. Op. at 26. The Secretary of Labor has concurrent enforcement authority under the NTSSA. Public transportation agencies are subject to the National Transit Systems Security Act. 6 U.S.C. §§ 1131, 1142. The NTSSA grew out of the 9/11 Commission Report and it defines a public transportation agency as "a publicly owned operator of public transportation eligible to receive Federal Assistance under chapter 53 of Title 49." 6 U.S.C. § 1131. UTA and FrontRunner have received grants and assistance from the Federal Transit Administration, making UTA a public transportation agency subject to the NTSSA. *See* Cl. Op. at EX C. In enacting the NTSSA, Congress recognized that "182 public transportation systems throughout the world have been primary targets of terrorist attacks." The Conference Report, in adopting the Senate provision, noted the Senate version of what became 6 U.S.C. § 1132, "finds that public transit is a top target of terrorism worldwide, that the Federal Government has invested significant sums in creating and maintaining the nation's transit infrastructure, that transit is heavily used and that the current Federal investment in security has been insufficient and greater investment is warranted." H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.), reprinted in 2007 U.S.C.C.A.N. 119.

In order to enhance safety and security, the NTSSA protects employees of public transportation agencies who report safety or security issues occurring within public transit systems, or who prevent some aspect of system operations while acting in good faith to prevent a hazardous safety or security condition. 6 U.S.C. § 1142(a)-(b).[23] The legislative history reflects

[23] Subsection (a) proscribes discrimination against public transportation agency employees as follows:

> A public transportation agency . . . (or employees thereof) shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination 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

that in promulgating the NTSSA, Congress "adopted protections for public transportation employee whistleblowers, modeled on the protections available to railroad employees under 49 U.S.C. 20109 ...." H.R. Rep. 110-250 (2007) (Conf. Rep.) at 340.

In its reply, UTA has not conceded that its FrontRunner operation is subject to the NTSSA.[24] To the extent that UTA would suggest that it is neither covered by the employee protection provisions of Section 20109 of the FRSA nor by Section 1142 of the NTSSA, but rather is governed by regulations at 49 C.F.R.225.33(a),[25] it ignores the issues identified in the 9/11 report. And it ignores the fact that in the recent amendments to the employee protection provisions of Section 20109 of the FRSA, Congress explicitly transferred authority for enforcing and adjudicating whistleblower protections for railroad employees from the Federal Railroad

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about to be done -
(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation, relating to public transportation safety or security (or fraud, waste or abuse ...) if the information or assistance is provided to or an investigation stemming from the provided information is conducted by –
(A) . . .
(B) . . .
(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct.

6 U.S.C. 1142(a).

Subsection (b)(1), Hazardous Safety or Security Conditions, proscribes discrimination against public transportation agency employees who:

(A) report a hazardous safety or security condition;

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

[24] Given the events leading to the 9/11 report and, the overriding national interest in improving safety and security in modes of public transportation, it is difficult to conclude that Congress legislated to improve employee protections for railroad employees, including commuter rail employees in systems operating across state lines as argued by UTA (FRSA) and for employees of public transit agencies (NTSSA), while excluding employees of commuter rail systems such as UTA's. UTA's employees are presented with the same safety and security hazards and issues as employees of railroads and public transit systems and presumably are similarly expected to assume an important role in minimizing safety and security hazards.

[25] The regulations at 49 C.F.R. Part 225 titled Railroad Accidents/Incidents: Reports Classification, and Investigations are intended to assist the Federal Railroad Administration in carrying out its responsibilities to improve railroad safety and injury reporting. 49 C.F.R. 225.33(a) requires each railroad to maintain an Internal Control Plan which includes a policy statement declaring the railroads commitment to complete and accurate reporting of all accidents, incidents, injuries and occupational illnesses, and to compliance with the accident reporting regulations, as well as, a commitment to the principle that harassment or intimidation of any person that is calculated to discourage or prevent the person from reporting an accident, incident or injury will not be tolerated. This regulation is focused on increasing the accuracy of injury reporting to aid the FRA in developing railroad safety standards and in encouraging proper medical treatment for injuries, and it does not specifically address protecting railroad employees who report safety or security issues to either the railroad or appropriate government agencies from retaliation by the railroad.

Administration to the Department of Labor.[26] Similarly, in creating the new NTSSA, Congress enacted specific employee protection provisions and assigned the Department of Labor authority for enforcing and adjudicating the whistleblower provisions for employees of public transportation agencies.

UTA's contention, that Mylar may not amend his complaint to allege a violation of the NTSSA is unpersuasive. Pursuant to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, a complaint may be amended "if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint." 29 C.F.R. § 18.5(e). The Complainant's initial complaint alleged violations of the FRSA and the NTSSA. His claim that he was terminated for reporting a safety or security issue under the NTSSA is premised upon the same factual basis as the FRSA claim and reasonably within the scope of the original complaint. The legal analysis applied in evaluating claims under the employee protection provisions of the FRSA are the same as those applied under the NTSSA. 49 U.S.C. § 42121(b); 6 U.S.C. § 1142 (3)(2)(B); *see also*, 29 C.F.R. § 1982.104. Moreover, UTA has had notice of the basis of and the facts underlying the claim of unlawful termination since the claim was filed on January 7, 2008.[27] UTA has not alleged any prejudice or inability to defend against the claim should Complainant be permitted to amend the claim to allege a violation of the employee protection provision of the NTSSA.[28] Therefore, Complainant would be permitted to amend his complaint, if the FRSA had not covered UTA's FrontRunner commuter railroad operations.

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[26] Prior to the recent amendment of the FRSA, whistleblower retaliation complaints by railroad carrier employees were subject to mandatory dispute resolution pursuant to the Railway Labor Act ("RLA") (45 U.S.C. 151 *et seq.*) which included whistleblower proceedings before the NRAB as well as other dispute resolution procedures. *See* 75 FR 53522 -53523 (August 31, 2010). UTA has argued that it is not subject to the RLA, leaving its employees who report safety or security issues protected only by any Internal Control Plan (ICP) procedures if any such employee protections exist in UTA's ICP. Mot. at 12, 14.

[27] The Complainant's initial complaint alleged violations of the FRSA and the NTSSA. The OSHA investigator informed Complainant that because the FRSA and the NTSSA have "election of remedies" provisions, he would have to inform OSHA under which law he wished his complaint to be investigated by OSHA. Cl. Op. at EX E. At OSHA's instruction, Complainant informed OSHA he wished to pursue his claim under the FRSA. OSHA's apparent requirement which serves to preclude complainants from alleging violations of the FRSA and the NTSSA in cases where there may be uncertainty as to which statute applies is concerning. The doctrine of election of remedies is founded on equity. *See Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527, 530 (10th Cir. 1962). "A fruitless attempt to recover on an unavailing remedy does not constitute an election which will deprive a person of rights which are availing by a different and appropriate remedy; the remedy must at least be to some extent efficacious in order to constitute an election." *Id.* at 530-31 (citing *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 490 (1919) (holding a case dismissed for lack of subject matter jurisdiction cannot be an election)). The election of remedies concept is intended to preclude a party from recovering twice for the same alleged harm or claim. Wright & Miller: Federal Prac. & Proc. § 4476 (2010). The election of remedies doctrine assumes a decision on the merits has been rendered. Here, the Complainant has not yet had his claim challenging his discharge heard on the merits, and cannot, therefore, be said to have elected one remedy the FRSA to the exclusion of the NTSSA.

[28] Proceedings before the Office of Administrative Law Judges under the NTSSA are *de novo*. UTA, would have an opportunity to fully defend the claim, if the complaint were amended and it proceeded under the NTSSA.

Based upon the forgoing findings of fact and conclusions of law, UTA's motion for summary decision is denied.

SO ORDERED.

Colleen A. Geraghty

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts