U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 October 2009

CASE NO.: 2009-FRS-00010

In the Matter Of:

ANDREW BARATI,
Complainant

v.

METRO-NORTH COMMUTER RAILROAD CO. INC.
Respondent

CASE NO.: 2009-FRS-00011

In the Matter Of:

ANTHONY SANTIAGO
Complainant

v.

METRO-NORTH COMMUTER RAILROAD CO. INC.
Respondent

CASE NO.: 2009-FRS-00012

In the Matter Of:

LARRY W. ELLIS
Complainant

v.

METRO-NORTH COMMUTER RAILROAD CO. INC.
Respondent

CASE NO.: 2009-FRS-00013

In the Matter Of:

RALPH TAGLIATELA
Complainant

v.

METRO-NORTH COMMUTER RAILROAD CO. INC.
Respondent

ORDER GRANTING COMPLAINANTS' MOTION TO COMPEL DISCOVERY

This proceeding arises from complaints of discrimination filed under the Federal Rail Safety Act (the "FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (the "9/11 Act"), Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007). The hearings are set to begin on November 17, 2009. On September 18, 2009, the Complainants filed a Motion to Compel Production of Documents and Interrogatory Responses Relevant to Punitive Damages. On September 29, 2009, Respondent filed Objection to the Complainants' motion.[1] On October 13, 2009, the Acting Assistant Secretary for the Occupational Safety and Health Administration (OSHA), an interested party, filed its response.

The FRSA provides whistleblower protection to railroad employees who engage in activity protected by the statute related to railroad safety and security. 49 U.S.C. § 20109(a) - (c). The FRSA's whistleblower provision was amended by the 9/11 Act to add a provision prohibiting a railroad carrier from denying, delaying or interfering with the medical or first aid treatment of an employee injured during the course of his employment or disciplining an employee for requesting medical treatment or for following orders or the treatment plan of a treating physician. 49 U.S.C. § 20109(c). In addition to the existing remedies for violation of the whistleblower provisions of the FRSA including reinstatement, back pay, and compensatory damages, the 9/11 Act amendments to the FRSA also provide that punitive damages may be assessed. 49 U.S.C. § 20109(e).

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[1] Complainants filed a Reply on October 9, 2009. On October 13, Respondent filed a Motion to Strike Complainants' Reply for failure to comply with 29 C.F.R. § 18.6. On October 22, Complaints filed a *Nunc Pro Tunc* Motion for Permission to File a Reply Brief to address arguments raised by Respondent's memorandum. Complainants state they do not object to Respondent filing a Sur-Reply Brief. In a separate Order issued this same day, I granted Respondent's Motion to Strike Complainants' Reply and denied Complainants' Motion to File Reply Brief.

Parties Contentions

1. Complainants' Position

The Complainants contend that Respondent is subject to punitive damages under Section 20109(e) of the FRSA. Pointing to the supremacy clause of Article VI to the United States Constitution, Complainants argue the FRSA, a federal statute which expressly applies to any "railroad carrier engaged in interstate or foreign commerce, a contractor or subcontractor of such a railroad, or an officer or employee of such a railroad carrier," controls over state common law or statutory law which may conflict. 49 U.S.C. § 20109(a). Cl. Mot. at 2-3. Complainants state Metro North is a railroad under the FRSA as it is a "commuter ... passenger service in a metropolitan or suburban area." *Id.* at 3. Complainants note that the FRSA applies to "railroad carriers engaged in interstate or foreign commerce." *Id.* Noting the FRSA defines a "railroad carrier" as "a person providing railroad transportation" Complainants argue the term "person" includes corporations created under state law. *Id.* Noting that the remedies provision of the FRSA permits punitive damages, Complainants contend that the FRSA does not exempt any type of railroad from such punitive damages. *Id.* at 3. Complainants contend that Metro North's status as a public benefit corporation under the laws of the State of New York, does not override the supremacy of the FRSA, a federal statute. *Id.* at 4.

Complainants assert that the New York Courts have established a test requiring a "particularized inquiry" in determining whether a public benefit corporation, such as Metro North, ought to be treated as if it were the State or a political subdivision citing *Grace & Company Inc. v. State University Constr. Fund*, 44 N.Y.2d 84, 87-88 (1978). Cl. Mot. at 7. In *Grace* the Court held that the Fund which was created as a public benefit corporation to administer funds for construction of facilities of the State University of New York was not the State or an agency thereof, and thus, was not subject to State statutes providing equitable relief to contractors who had been awarded State contracts and who subsequently suffered financial damage as a result of the energy crisis. In analyzing the issue before it, the Court stated:

> We begin our inquiry, then, with the proposition that public benefit corporations, such as the Fund, created by the State for the general purpose of performing functions essentially governmental in nature, are not identical to the state or any of its agencies, but rather, enjoy, for some purposes, an existence separate and apart from the state, its agencies and political subdivisions....The mere fact the Fund is an instrumentality of the State, and as such, engages in operations which are fundamentally governmental in nature does not inflexibly mandate a conclusion that it is the state or one of its agencies....

44 N.Y.2d 88. Cl. Mot. at 8. The Court held that a "particularized inquiry into the nature of the public benefit corporation and the statute claimed to be applicable to it is required" in determining whether the public benefit corporation is properly treated as the State under the specific circumstances. *Id.*

Relying on the necessity for a "particularized inquiry" in determining whether a public benefit corporation ought to be treated as the State or one of its agencies or instrumentalities in specific instances, the Complainants argue that when Metro North is acting in its capacity as a private employer, Metro North can not be treated as the State or one of its political subdivisions citing *Long Island Rail Road Co. v. Long Island Lighting Co.*, 103 A.D.2d 156, 164 (A.D.2 1984) *aff'd*, 64 N.Y.2d 1088 (1985); *People v. Miller*, 70 N.Y.2d 903 (1987). Cl. Mot. at 9-11. Complainants argue that in the present matter, Metro North was acting in its capacity as a private employer when it filed disciplinary charges against them when they reported injuries and sought medical attention. Cl. Mot. at 12. Therefore, Complainants contend that Metro North may not be treated as if it were the State or any of its political subdivisions or agencies and it is subject to punitive damages under the FRSA. *Id.* at 10, 13-16.

Finally, as to the specific discovery which is the subject of the motion to compel, Complainants seek responses to Interrogatories regarding 196 employee injuries/illness and the Production of Documents related to those same 196 employee injuries/illnesses. Cl. Mot. at 20-22. Complainants maintain the information is necessary to assist them in establishing the reprehensibility of Metro North's conduct toward them, including whether Respondent has a systemic pattern of retaliation, which warrants the imposition of punitive damages. Cl. Mot. at 14-23.

2. Metro North's Position

Metro North agrees it is subject to the FRSA. Opp. at 15. Metro North argues however, that although the FRSA provides for punitive damages in certain circumstances, punitive damages may not be assessed against it, as Metro North is a public benefit corporation under New York law, performing an essential governmental function and as such is a political subdivision of the State exempt from punitive damages. Opp. at 14-26. In this regard, Metro North explains that the Metropolitan Transit Authority ("MTA") was created by New York statute as a public benefit corporation whose purpose includes the "continuance, further development and improvement of commuter transportation," including "transportation by railroad." N.Y. Pub. Auth. L. §1264(1). Opp. at 16-17. Under New York statute the MTA has authority to "cause any one of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations of the {MTA}..." N.Y. Pub. Auth. L. § 1266(5). Opp. at 17. Metro North states that it is a wholly owned subsidiary of the MTA delegated to operate commuter rail service between New York City and suburban communities surrounding the City and in Fairfield and New Haven Counties in southern Connecticut. *Id.*

The Respondent agrees with the Complainants that a "particularized inquiry" is required in evaluating whether public benefit corporations, such as Metro North, ought to be considered the State or a political subdivision or instrumentality thereof with regard to the specific statute at issue. Opp. at 18-23. Citing *Clark-Fitzpatrick v. Long Island Railroad Co.*, 70 N.Y.2d 382 (1987), Respondent contends that punitive damages may not be assessed against public benefit corporations, such as Metro North. Opp. at 18. In *Clark-Fitzpatrick* the Court performed a "particularized inquiry" and concluded that because the Long Island Railroad was serving an essential public function by providing commuter transportation and because much of its funding derived from public sources, the LIRR should receive the same immunity from punitive damages

as the State and its political subdivisions. The Court determined that the rationale for not imposing punitive damages against a state were equally applicable to the LIRR, a public benefit corporation. Specifically, the Court noted the goal of punitive damages, punishment and deterrence, are not served where "it is ultimately the innocent taxpayer who is punished." *Clark-Fitzpatrick*, 70 N.Y. 2d at 386. Pointing out that Metro North operates at a deficit and, like the LIRR, depends upon public funding/subsidies, Respondent argues that punitive damages imposed against Metro North in the instant cases would ultimately be borne by the taxpayers. Opp. at 19, 24-26. Citing several U.S. District Court decisions involving employment discrimination or civil rights claims, Metro North contends that the courts have determined that public benefit corporations, similar to Metro North, are immune from the imposition of punitive damages. Opp. at 20-21, 24 (citations omitted). Finally, Metro North challenges Complainants' reliance upon *Miller* to support their contention that when Metro North is acting as a private employer it is not a "political subdivision of the State" and, thus, is subject to punitive damages under the FRSA, as "misplaced and exaggerated." *Id.* at 22.[2]

With regard to the specific discovery sought by the Motion, Metro North argues the request is overly broad and burdensome. Opp. at 2-3. Metro North also asserts that punitive damages may not be awarded to punish a party for injury to a third party. *Id.* at 3-5.

3. Assistant Secretary's Position

In response to the undersigned's Order Requesting Response seeking the Department of Labor's views on whether punitive damages may be assessed against public railroads, the Acting Assistant Secretary for the Occupational Safety and Health Administration, an interested party, filed a response to the Complainants' Motion and offered his position on the availability of punitive damages on October 13, 2009.[3] The Assistant Secretary contends that as a public benefit corporation Metro North should be treated as a municipality for purposes of evaluating whether it is subject to punitive damages. Sec. at 2. The Assistant Secretary acknowledges that under common law, municipalities have historically been considered immune from imposition of punitive damages. The Assistant Secretary notes however, that while the Supreme Court has acknowledged the "historical tension between municipal liability and damages imposed for punishment," the Court has recognized an exception to the common law view that municipalities were not subject to punitive damages, where such damages were expressly authorized by Congress citing *Cook County, Ill. V. U.S. ex rel. Chandler*, 538 U.S. 119, 129 (2003). Sec. at 2. The Assistant Secretary notes further that both the Second and Third Circuit Courts of Appeals have determined that the common law principle that municipalities were exempt from punitive damage assessments must give way where Congress enacts a statute expressly covering "public entities and providing generally for punitive damages." *Id. citing Cross v. New York City Transit*

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[2] Respondent also contends OSHA lacks authority to conduct a system-wide investigation necessitating discovery of the requested materials. Proceedings before the Office of Administrative Law Judges are *de novo*. Thus, it is not necessary to reach this issue in resolving the Complainants' claims. The issue here is whether the information sought is relevant to the claim, see discussion *infra*.

[3] No request to respond to the Acting Assistant Secretary's Response to the Order Requesting Response was made by Respondent.

Authority, 417 F.3d 241, 254 (2d Cir. 2005); *Potence v. Hazelton Area Sch. Dist.*, 357 F.3d 366, 372-3 (3d Cir. 2004).

The Assistant Secretary points out that the FRSA applies to public or state run railroads as well as privately run railroads. Sec. at 3-4. The Assistant Secretary argues that the whistleblower protection provisions of the FRSA prohibiting a railroad carrier engaged in interstate or foreign commerce from retaliating against employees for engaging in certain protected activities includes Metro North. The Assistant Secretary asserts that the whistleblower protection provision of the FRSA was amended by Section 1521 of the 9/11 Act to provide that relief under the enforcement provision in subsection (d) "may include punitive damages in an amount not to exceed $250,000." 49 U.S.C. § 20109(e)(3). *Id.* at 4. The Assistant Secretary argues that as public railroad corporations are included within the definition of "railroad carrier" under the FRSA, and because the statute expressly provides that punitive damages may be assessed, Congress intended to authorize the imposition of such damages against entities such as Metro North. *Id.*

Additionally, pointing to the 9/11 Act, the Assistant Secretary notes that the Act included three virtually identical whistleblower protection provisions. Section 1413, titled Public transportation employee protection created the National Transit Systems Security Act of 2007 (NTSSA), Section 1521 titled Railroad employee protections amended the FRSA, and Section 1536 titled Motor carrier employee protections amended the Surface Transportation Assistance ACT (STAA). All three Acts contained identical provisions explicitly providing that relief for violations of the Acts may include punitive damages not to exceed $250,000. Sec. at 5-6. Finally, with regard to the specific discovery sought by Complainants' Motion, the Secretary argues that evidence related to other injured Metro-North employees is relevant to establishing the Complainants' individual retaliation claims. *Id.* at 6-7.

Discussion

1. Is Metro North Subject to Punitive Damages Pursuant to the FRSA

The parties agree that Metro North Commuter Railroad is a railroad subject to FRSA. The dispute is whether Metro North is exempt, as a public benefit corporation under New York statute, from the provision of the FRSA permitting punitive damages for violating the whistleblower provisions of the statute. Metro North is a subsidiary of the Metropolitan Transit Authority ("MTA") and operates commuter rail service between New York City and communities in Westchester, Dutchess, Putnam, Orange and Rockland Counties in New York and Fairfield and New Haven Counties in Connecticut. Opp. Exh. D. The MTA was created by New York statute as a "body corporate and politic constituting a public benefit corporation." N.Y. Pub. Auth. L § 1263. The members of the MTA are appointed by the governor and the MTA is regarding as performing an essential government function in carrying out its purpose. N.Y. Pub. Auth §§ 1263 and 1264.[4] The purpose of the MTA is the "continuance, further

[4] To the extent that Complainants rely upon *United Transportation Union* and *Long Island Railroad v. Long Island Lighting Co.*, for the proposition that operation of a railroad is not a governmental function, such reliance is not persuasive. As Respondent points out, in the intervening 27 plus years since those decisions, the nature of commuter rail transportation in the United States has changed significantly. At the time of the United

development and improvement of commuter transportation." N.Y. Pub. Auth. L. §§ 1261, 1260-1279-b; 1264(1); 1266(5). The MTA has some indicia of state instrumentality and is performing a public function. However, the MTA is not identical to the State of New York but is a separate and distinct legal entity from the State with broad powers including the power hire and fire employees, and to sue and be sued in its own right.

Courts have differed as to whether Metro North and other similar subsidiary corporations of the MTA, as well as other New York public benefit corporations, are to be treated as State agencies, political subdivisions of the State or municipalities with respect to various statutes sought to be applied to them. *Rose v. Long Island Railroad Pension Plan,* 828 F.2d 910, 915-919 (1987) (in determining whether the Long Island Railroad's Pension Plan was a "government plan" under ERISA, a federal statute, the Court held that the MTA, a public benefit corporation and parent corporation to the Long Island Railroad, was an instrumentality of a political subdivision of the State of New York (the MTA) because it performs a government function on behalf of New York, is wholly owned by the MTA and it is administered by board members appointed by the governor. Therefore, the Pension Plan of the Long Island Railroad, was a "governmental plan" excluded from ERISA coverage);[5] *Grace,* 44 N.Y.2d at 88-90 (holding the public benefit corporations, such as the Fund, are not identical to the State or its agencies and a "particularized inquiry into nature of the instrumentality and the statute claimed to be applicable to it is required." *Id.* at 88. Court held Fund created to receive and administer funds for construction of facilities at State University of New York was not subject to law authorizing adjustment in costs to contractors for State contracts due to increased energy costs); *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 386-88 (applying "particularized inquiry" in suit alleging breach of contract, fraud and gross negligence with regard to track improvement project, court held Long Island Railroad, a subsidiary of the MTA, ought to receive the same immunity from punitive damages as do the State and its political subdivisions); *People v. Miller*, 70 N.Y.2d 903 (1987) (applying "particularized inquiry" analysis held Metro North Railroad not treated as State or one of its political subdivisions for purposes of applying State criminal code making it a crime to offer false instrument against conductor who submitted false timesheets to Metro North); *Majer v. Metropolitan Transportation Authority*, 1992 WL 110995 (S.D.N.Y. 1992) (Metro North treated like a municipality in determining that punitive damages were not available against it for violations of state labor laws); *Sewell v. New York City Transit Authority*, 1992 WL 202418 (E.D.N.Y. 1992) (public benefit corporations such as the New York City Transit Authority treated like municipal agencies for purposes of Section 1983). In each of the cases cited, the Court examined the nature of the entity and the statute claimed to be applicable, in other words, engaged in a particularized inquiry, in determining whether New York public benefit

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Transportation decision, the Court noted there were only 17 commuter railroads in the country and just two of them were publicly owned and operated. At present, there are twenty-two commuter railroads and all appear to be wholly or largely publicly owned and operated. *See* Opp. at Ex. G. Thus, state and local government entities have an interest in and are currently involved in the functioning of most, if not all, commuter railroads. Metro North operates a large commuter railroad. On the evidence presented, Metro North is a publicly owned railroad.

[5] The Second Circuit noted that Congress expressly excluded public pension plans from ERISA coverage. ERISA broadly defines "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C. § 1002(32).

corporations ought to be treated like the State, a political subdivision or instrumentality of the State, or a municipality with regard to the statutes at issue. The Courts did not examine the nature of the entity in a vacuum, but rather in the context of the statute sought to be applied to the entity.

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. In order to accomplish this goal, railroad carriers and the Department of Transportation's Federal Railroad Administration ("FRA") need accurate information on injuries/illnesses experienced by employees. 59 Fed. Reg. 42,880; *see also* Cl. Mot. Ex. 6 statement of FRA Administrator before House Committee on Transportation and Infrastructure, Oct. 25, 2007. In 2007 Congress expressed its concern with allegations that some railroad policies and practices had the potential to or were impeding the FRA from obtaining the information necessary to develop and administer a safety and regulatory program. Specifically, the House Committee on Transportation noted evidence that railroad employees who reported work injuries perceived they were subjected to pressure not to report the injury or discipline for reporting an injury. Cl. Mot. Ex. 6, Ex. 7. The Committee stated that the House had recently enacted its version of what later became known as the 9/11 Act which included "a uniform national standard for the protection of injured workers and allow[s] them access to immediate medical attention free from railroad interference." Cl. Mot. Ex. 7 at 0219. This provision is contained in Section 20109(c) of the 9/11 Act enacted by the full Congress. In furthering the statutory goal of improving railroad safety, the whistleblower protection provisions of the FRSA protect railroad employees from discharge, demotion, reprimand, for certain protected activities or from denial, delay, or interference with medical treatment for injuries sustained in the course of employment. 49 U.S.C. § 20109(a) and (c). Congress provided that employees who prevailed in an anti-retaliation action under the FRSA were entitled to damages which *could* include punitive damages. 49 U.S.C. § 20109(e)(2) and (3).

Punitive damages are intended to punish wrongdoing and prevent such conduct in the future. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). As a general proposition, punitive damages have not historically been imposed against States and municipalities. The rationale for this common-law practice is the view that such awards punish taxpaying citizens for the wrongdoing. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-60 (1981); *Clark-Fitzpatrick v. Long Island Railroad Co.*, 70 N.Y. 2d 382 (1987). More recently, however, the Supreme Court has recognized an exception to the common law view that municipalities were exempt from punitive damages when Congress expressly authorizes such damages. *Cook County, Ill. v. U.S. ex rel Chandler*, 538 U.S. 119, 129 (2003). The Court noted that since municipalities' common law resistance to punitive damages still obtains, "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute" citing *City of Newport*, 453 U.S. at 260, n 21. Noting the term "person" is not defined in the False Claims Act ("FCA"), the Court then examined the history of the meaning of the term as used in the statute when first promulgated. 453 U.S. at 1244-1245. In light of that history, the Court concluded that the term extended to corporations including municipal corporations. 453 U.S. 1244-1246.[6]

[6] The *Clark-Fitzpatrick* decision concluding that the Long Island Railroad was entitled to receive the same immunity from punitive damages as the State and its political subdivisions predates both the Supreme Court's *Cook County*

Following the Court's *Cook County* decision, the Second and Third Circuit Courts of Appeals have determined that punitive damages may be awarded against municipalities if the statute explicitly authorizes such an award against municipalities or public employers. *Cross v. New York City Transit Authority,* 417 F.3d 241, 254 (2d Cir. 2005); *Potence v. Hazelton Area Sch. Dist.*, 357 F.3d 366,372-73 (3d Cir. 2004). *Cross* involved an employment discrimination claim under the Age Discrimination in Employment Act ("ADEA"). The Second Circuit determined that since the definition of employer under the ADEA includes public employers and the ADEA incorporated the Fair Labor Standards Act which expressly provides for liquidated (i.e. punitive damages) to be recovered from public entities, "the ADEA authorizes the imposition of liquidated damages against government employers who engage in willful age discrimination." 417 F.2d at 257. The Second Circuit clarified that state and local government employers are subject to liquidated (punitive) damages under the ADEA. *Id.* at 254. Thus, the Second Circuit held that liquidated damages could be awarded against the Transit Authority, a public benefit corporation, for willful violation of the ADEA. *Id.* at 255-257. In the present matter, the question of whether Metro North, as a public benefit corporation, is entitled to the same immunity from punitive damages generally enjoyed by political subdivisions of the State or municipalities depends upon whether Congress expressly authorized such damages against public entities in FRSA.[7]

The language of the FRSA is a useful starting point. The employee protection provisions of the FRSA provide a railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such railroad carrier, or an officer or employee of such railroad carrier may not discharge, demote, suspend, reprimand, or in any other manner discriminate against an employee if such discrimination is due, in whole or in part, to the employee's ... engaging in specific protected activities including reporting of a railroad safety or security complaint, refusing to violate railroad safety or security law or regulations, or notifying the railroad carrier or Secretary of Transportation of a work-related injury or illness. 49 U.S.C. § 20109 (a)(1-7); 49 U.S.C. § 20109 (b). Nor shall a "railroad carrier or person covered under this section...deny, delay or interfere with medical or first aid treatment of an employee who is injured during the course of employment," or "discipline or threatening discipline to an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician...." 49 U.S.C. § 20109(c).[8] A "railroad carrier" is defined as a "person providing

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decision holding that where Congress expressly authorizes such damages the common law practice of exempting municipalities from punitive damages yields and the 9/11 Act amendments to the FRSA.

[7] In a recent decision the Department of Labor's Administrative Review Board determined that punitive damages are not awardable against a municipality citing *Newport v. Fact Concerts, Inc.* 453 U.S. at 270-71. *Michael Collins v. Village of Lynchburg, Ohio,* 2009 WL 891346 (DOL Ad.Rev.Bd) (Mar. 30, 2009) slip op. at 5 n.51. It appears the Board did not consider the Supreme Court's subsequent *Cook County* decision holding municipalities could be liable for punitive damages if Congress expressly provide for such damages.

[8] The FRSA specifically provides that damages for violation of the Act *shall* include reinstatement, backpay, with interest, compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees and reasonable attorney fees. 49 U.S.C. § 20109(e)(2). Section (e)(3) of the Act titled "Possible Relief" provides that relief for violation of the Act *may* include punitive damages in an amount not to exceed $250,000.

railroad transportation." 49 U.S.C. § 20102(3). The FRSA does not define the term "person." However, the Dictionary Act, which provides general rules of statutory construction for federal statutes directs that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise - the word[] 'person'....include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. The Supreme Court has stated that Congress intended the definition of person to include municipal corporations. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 686-89 (1978). (Municipal corporation determined to be "person" under Civil Rights Act of 1871, 42 U.S.C. §1983, and thus liable for compensatory damages for violations of the act predicated upon unlawful policy).

Similar to the Supreme Court's *Cook County* approach to determining whether municipal corporations were "persons" liable under the False Claims Act, a review of the history of the FRSA is helpful. That history demonstrates that prior to the 1994 amendments to the statute, which first used the term "railroad carrier" to describe entities covered, the FRSA used the term "common carrier by railroad" to identify the class of entities prohibited from retaliating against employees for specified protected activities. *See* 45 U.S.C. § 441(a) (1993). In cases arising under several statutes with similar language, the Supreme Court has held that Congress intended the phrase "common carrier by railroad" to include state-owned railroads. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 203 (1991) (holding that the Federal Employees Liability Act "FELA" and the Jones Act apply to the South Carolina owned railroad, the Court stated that the "entire federal scheme of railroad regulation applies to state-owned railroads."); *United States v. California*, 297 U.S. 175 (1936) (State railroad subject to Safety Appliance Act); *California v. Taylor*, 353 U.S. 553, 561-566 (1957) (Railway Labor Act applies to state-owned railroad). *See also United Transportation Union v. Long Island Railroad Company*, 455 U.S. 678, 686-690 (1982) (in holding Long Island Railroad subject to the Railway Labor Act, Court recognized historical reality of federal regulation of railroads and stated "a state that acquires a railroad does so knowing that the railroad is subject to longstanding and comprehensive scheme of federal regulation of its operations and its labor relations."). 455 U.S. at 686, 689-90.[9] There is no statement, explanation or other indication in the FRSA or its legislative history, that in amending the statute in 1994 and referring to entities covered by the statute as "railroad carriers" rather than "common carrier by railroad," that Congress intended to change longstanding precedent extending federal railway safety statutes to state-owned railroads.[10] In the absence of

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[9] The FRSA enacted in 1970 was intended to "promote safety in all areas of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA defines "railroad" as including "commuter or short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979." 49 U.S.C. § 20102. The FRSA directed that railroad safety and security laws, regulations and related orders "be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a). Under the FRSA, the Secretary of Transportation is authorized to "prescribe regulations and issue orders for every area of railroad safety..." 49 U.S.C. § 20103(a). The Secretary of Transportation delegated that authority to the Federal Railroad Administration. 49 CFR § 1.49(m). The FRA regulations apply to publicly-owned railroads.

[10] Where a statute "'uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Gulino v. New York State Education Dept.*, 460 F.3d 361, 371 (2d Cir. 2006) citing *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, (1981).

such evidence, and in the context of a long-existing history of federal regulation of railroads, both private and public, Congress was certainly aware of this history when it amended the FRSA in 2008 to include the provision permitting punitive damages where warranted.[11]

Additionally, an examination of the 9/11 Act as a whole is useful. In promulgating the 9/11 Act Congress amended the FRSA whistleblower provisions to add a provision precluding a railroad carrier's interference with medical treatment for work-related injury/illness and a provision permitting punitive damages. The 9/11 Act also included two other Acts containing whistleblower provisions: Section 1413 Public Transportation Employee Protections created the National Transit Systems Security Act of 2007 (NTSSA), and Section 1536 Motor Carrier Employee Protections amended the Surface Transportation Act. All three statutes include whistleblower protection provisions permitting the imposition of punitive damages up to $250,000. Of note, the NTSSA defines a public transportation agency as "a publicly owned operator of public transportation eligible to receive Federal assistance under chapter 53 of title 49, United States Code. 6 U.S.C. § 1131(5). It is undisputed that Metro North is a "railroad carrier" under the FRSA as it is engaged in interstate or foreign commerce providing railroad transportation between New York and Connecticut. Metro North is also a public transportation agency subject to NTSSA as it is eligible to receive Federal assistance under chapter 53, title 49, Unites States Code. Thus, Metro North is both a railroad carrier under the FRSA and a public transportation agency under NTSSA. NTSSA covers public transportation agencies, i.e., public sector entities, and Congress intended that public transportation agencies be subject to punitive damages under NTSSA. 6 U.S.C. § 1142(d)(3). Any other interpretation of NTSSA would mean that Congress enacted a statute authorizing punitive damages but that such damages could never be imposed by the agency charged with enforcing NTSSA or by the courts. In light of the history of federal regulation of both private and public railroads Congress was certainly aware that railroad carriers under the FRSA included private and publicly owned entities and it did not expressly exempt public railroad carriers from punitive damages under Section 20109 of the FRSA or state that such damages were reserved for private railroads. To construe the punitive damage provisions of the FRSA as excluding publicly owned railroad carriers when the NTSSA clearly authorizes punitive damages against public transportation agencies and Congress used the same language in both the FRSA, 49 U.S.C. § 20109(e)(3) and the NTSSA, 6 U.S.C. § 1142(d)(3), would mean that public transportation agencies, which are all publicly owned, would be subject to the imposition of punitive damages, if warranted, but that public railroad carriers would be exempt from punitive damages. Congress could not have intended such an anomalous result given that it used identical language in the punitive damages provisions of both the NTSSA and the FRSA.

After careful consideration I conclude that in the context of the FRSA, Metro North ought to be treated as an instrumentality of the State or a municipal corporation or agency. As such it is subject to punitive damages under the FRSA if Congress expressly provided for such

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[11] I am sympathetic to the concern that an award of punitive damages against a municipality has a direct impact on taxpayers. However, such concerns are replaced where Congress expressly provides for such damages. In addition, the FRSA permits, but does not require punitive damages, and the fact-finder must evaluate the totality of the circumstances in determining whether punitive damages are warranted on a case-by-case basis.

damages. I found that the FRSA covers public as well as private railroad carriers, and expressly provides that punitive damages may be imposed. Therefore, such damages may be assessed against Metro North, a municipal corporation, if warranted by the specific facts presented.[12]

2. Are the Complainants Entitled to the Discovery Sought?

Complainants seek responses to their First Set of Interrogatories with regard to the 196 employee injuries/illnesses reported by Metro North to the FRA between August 1, 2007 and December 31, 2008, and which were given an FRA Incident Number, request Respondent to identify every FRA Incident Number where a "'trial notice," "pre-trial meeting" notice, warning letter, or any other document constituting a preliminary or initial step in the disciplinary process was issued to the employee within 30 days after the employee reported the injury" or "where injury/illness was reclassified from "occupational" status to "non-occupational" status on Respondent's MD-40 Form."[13] Cl. Mot. at 21. Complainants also seek responses to their First Request for Production which requests copies of the "'trial notice," "pre-trial meeting notice," warning letter, or any other document constituting a preliminary or initial step in the disciplinary process that was issued to the employee within 30 days after the employee reported the injury..." and for every FRA Incident Number identified "produce a complete copy of the Metro North IR-2 'Incident Investigation Report,' plus any notes, records or other documents on which the change in classification from occupational to non-occupational was based." *Id.*[14] Complainants argue that the requested discovery is necessary in order for them to establish Respondent's conduct was the result of a knowing and reckless disregard for their rights as employees and to determine whether the allegedly improper conduct was an isolated mistake or part of a broad pattern of conduct toward all employees who report injuries thereby warranting the imposition of punitive damages. Mot. at 17-20.

In opposing the discovery sought, Respondent contends it is both burdensome and overbroad. Opp. at 2-5. Respondent argues the request is overbroad because the information sought would have no bearing on the factual circumstances underpinning Complainants' allegations against it. *Id.* at 3.[15] Metro North asserts that the discovery request is overly

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[12] The determination that the FRSA permits the assessment of punitive damages against public railroad carriers such as Metro North, does not necessarily mean that punitive damages are appropriate in the cases pending before me.

[13] Complainants reference Exhibit 1 to their Motion. Exhibit 1 is confusing. First, it lists 160 Incident Numbers reflecting reported injury/illness and not 196. Additionally, it appears to include injuries which occurred prior to August 1, 2007, the beginning date included in the interrogatories and requests for production served on the Respondent. Nevertheless, as both parties continue to refer to 196 injuries/illness, I will accept that as the number understood by the parties.

[14] Complainants' discovery request seeking the production of documents states that the name of the injured employee associated with the FRA Incident Number may be redacted, but that the document must be referenced to its FRA Incident Number. Cl. Mot. at 22.

[15] Respondent argues that OSHA lacks statutory authority under the FRSA to conduct a system-wide investigation in response to individual retaliation complaints that would necessitate the need for the requested information. Op. at 7-14. The matter is before the Office of Administrative Law Judges. The OALJ's review of the OSHA findings are *de novo*. Accordingly, it is not necessary for me to rule on the scope of OSHA's authority to investigate retaliation complaints under the FRSA, in order to adjudicate the claims before me in the present cases.

burdensome because it would require the review of almost 200 incidents, and reference each incident over multiple sources of information. *Id.* Metro North states that Complainants' contention that they need the information sought in order to determine whether there is systemic conduct which is relevant to establishing the appropriateness of punitive damages here is contrary to law. *Id.* at 4. Respondent maintains that punitive damages may not be used to punish a wrongdoer from harming others, citing *Philip Morris USA v. Williams,* 549 U.S. 346, 349 (2007) and *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408, 423 (2003). *Id.* at 4-7.

Proceedings under the FRSA are governed by the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st century ("AIR 21") 49 U.S.C. § 20109(d)(2). Under the AIR 21, hearings before the OALJ will be conducted in accordance with the rules and procedures in 29 C.F.R. Part 18. Section 18.14 governs discovery and provides that unless limited by order of the administrative law judge, "the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding...."[16] Thus, the scope of discovery is broad.

In evaluating whether the discovery requests "relevant" information, it is helpful to consider the elements necessary to establishing a claim and entitlement to punitive damages under the statute. The standard for establishing when punitive damages are appropriate under the FRSA appears to be an issue of first impression. Citing the Restatement of Torts, Complainants state punitive damages are warranted where there has been a "knowing and reckless disregard" of rights and that reckless indifference to the rights of others and conscious action in deliberate disregard of them may provide the necessary state of mind to justify punitive damages." Cl. Mot. at 18. Respondent suggests the standard is whether the conduct is reprehensible. Opp. at 6. At any rate, in determining whether punitive damages are warranted, one must evaluate the totality of the circumstances surrounding the claim. Upon consideration of the parties' arguments and the Supreme Court's *Philip Morris USA* and *State Farm* decisions, I am persuaded that punitive damages may not be assessed to punish wrongdoers for action against persons not parties to the claim. However, prior similar acts may be important in determining whether a wrongdoer's conduct was reprehensible and thus subject to punitive damages.

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[16] 29 C.F.R. § 18.1 provides that the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules...." The Fed. R. Civ. P. 26(b) setting forth the scope and limits of discovery is essentially the same as Section 18.14 and provides:

> (1) Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.... Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.
>
> (2)(c) On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is unreasonably cumbersome or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action;

In addition, to prevail on their claims Complainants must establish they engaged in activity the statute (FRSA) protects, that the employer knew about such activity, that the employer subjected them to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 20109(d)(2); 49 U.S.C.A. §§ 42121(a), 42121(b)(2)(B)(iii). If the employer has violated FRSA, a 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. § 42121(b)(2)(B)(iv). *See, e.g., Patino v. Birken Manufacturing Co.*, ARB Case No. 06-125, 2005 AIR 23, slip op. at 5-6 (ARB July 7, 2008); *Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-003, slip op. at 22 (ARB Jan. 30, 2004). In order to counter Respondent's defense of its actions vis-à-vis Complainants, Complainants can attempt to show the reason advanced for the adverse action was pretext. Evidence regarding the Respondent's treatment of similarly situated employees is relevant to any attempt to establish pretext. The evidence sought as to Metro North's actions with respect to the discipline of employees reporting injuries may be relevant to countering its assertion that the Complainants were disciplined for violations of policy.

After careful reflection, I conclude that the information Complainants seek as to Metro North's practices regarding the discipline of employees reporting injuries, may be relevant to both determining whether punitive damages are appropriate in these cases and also to assisting Complainants in any effort to establish that Metro North's stated reason for its actions is pretext. However, I am also mindful of Respondent's assertion that the request for information on 196 incidents which must be cross-referenced against multiple other sources of information to properly respond to the request is burdensome. It is likely that if Metro North did indeed have a practice of disciplining employees who reported work injuries, as Complainants suspect, any such practice would be revealed by examination of a lesser number of incidents. Accordingly, Metro North is directed to provide the requested information on one-third of the injury/illness reports given an FRA Incident Number filed with it between August 1, 2007 and December 31, 2008. To satisfy this direction Metro North shall begin with the first incident reported on August 1, 2007 and continue with every third incident, in order of date of occurrence, through December 31, 2008.

For the foregoing reasons, Complainants Motion to Compel is granted as modified by this Order.

SO ORDERED.

Colleen A. Geraghty

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts