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

CASE NOS. 2018-FRS-00135; 2019-FRS-00020

In the Matter of

John Buttigieg,
Complainant

v.

New Jersey Transit Rail Operations, Inc.,
Respondent

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

I, Charles C. Goetsch, am over the age of eighteen and understand the obligations of an oath. Being duly sworn, I hereby state the following:

1. I am an attorney duly admitted to the practice of law before the United States Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit, Second Circuit, and Third Circuit, as well as numerous federal district courts.

2. I represent the Complainant John Buttigieg.

3. In 1973 I received an A.B. degree *magna cum laude* and Phi Beta Kappa from Brown University, in 1976 I received a J.D. from the University of Connecticut School of Law, and in 1977 I received an LL.M. from the Harvard Law School. In 1978-1979 I was a Visiting Scholar and American Bar Foundation Fellow at the Yale Law School. I served as a law clerk to U.S. District Judge Ellen Bree Burns in the District of Connecticut from 1978-1979, and as a law

clerk to U.S. Circuit Court Judge Leonard P. Moore at the United States Court of Appeals for the Second Circuit from 1979-1980.

4. For over 40 years I have practiced in the federal courts enforcing the federal statutory rights of railroad workers. I have personally conducted over 55 federal jury and bench trials, and have briefed and argued 14 appeals before United States Court of Appeals. In 1997 I briefed and argued a railroad law case before the United States Supreme Court, *Metro North Commuter Railroad v. Buckley*, 521 U.S. 424 (1997). I have lectured at several seminars on federal rules and practice, and have authored articles and books on legal subjects. I am a long-time member of the Academy of Rail Labor Attorneys as well as other bar groups and associations. I have been selected as a "Super Lawyer" in the fields of Transportation and Plaintiff Employment Litigation.

5. The operations of our nation's railroads affects the safety of employees, passengers, contractors, drivers at crossings, and the schools, homes, and workplaces in countless communities through which passenger trains run and freight trains haul toxic materials capable of killing or poisoning thousands. However, in many ways the culture of the railroad industry is a throwback to the days before laws were enacted for the protection of workers. After the Civil War, many ex-military joined the effort to build a transcontinental railway system and expand it into every corner of the nation. There were no laws protecting the workers. In the military, unquestioning obedience to the orders of officers is a given, upon pain of court martial. In the absence of any protection for workers, a paramilitary mentality took deep root in the rail industry, with the managers acting as officers and the workers treated as enlisted soldiers. Any worker who questioned a manager's command or balked at an unsafe order was terminated.

6. As a result, for over one hundred years rail managers were free to retaliate against workers who raised safety concerns or reported an injury resulting from an unsafe condition. This perpetuated a culture that discouraged employees from reporting safety hazards or injuries. But rail workers are the eyes and ears of rail safety, and the Federal Rail Administration is charged with regulating railroad safety. By 2007 the FRA realized this retaliatory culture was handicapping its ability to promote safety on our nation's railroads, and accordingly asked Congress to conduct investigatory Hearings.

7. Congress confirmed the presence of a retaliatory culture on our nation's railroads, and responded by enacting Section 20109 of the Federal Rail Safety Act, which for the first time in history gives railroad workers whistleblower protection when they report safety hazards or injuries. Congress designed the prosecution of FRSA whistleblower cases to serve the important public benefit function of clarifying for managers and workers the boundaries of acceptable conduct on our nation's railroads, and to enforce those boundaries by penalizing violations of that standard of conduct.

8. The FRSA is a relatively new statute, and during its first decade presented significant challenges regarding how to approach and resolve critical issues. I took a lead in the prosecution of FRSA cases, and have handled numerous FRSA matters throughout the United States. I created and maintain the "Rail Whistleblower Library" located at http://www.gowhistleblower.com/Practice-Areas/Rail-Whistleblower-Library.shtml an online resource center for all aspects of FRSA matters that is relied on by OSHA Whistleblower investigators and attorneys representing railroads and employees. I gave the first CLE lectures on the FRSA at the 2011 and 2012 Annual Convention of the Academy of Rail Labor Attorneys, and the first FRSA seminar at the American Association of Justice's Annual Meeting in July 2013. I

maintain a blog at http://www.trainlawblog.com/ with over 450 subscribers where I post updates on developments in the FRSA.

9. I have obtained numerous Merit Findings and awards from OSHA and Administrative Law Judges on behalf of rail workers. I briefed three of the first FRSA appeals to the Administrative Review Board (*Santiago v. Metro North Railroad*, ARB Case No. 10-147, *Vernace v. PATH*, ARB Case No. 12-003, and *Bala v. PATH*, ARB Case No.12-048), and many since. I filed the first FRSA case in a United States District Court and in March 2012 tried the first FRSA jury trial in a U.S. District Court, resulting in a historic jury verdict awarding $1 million in punitive damages. *Barati v. Metro North Railroad*, 939 F.Supp.2d 143 (D.Conn. 2013). I argued the first FRSA case to come before a U.S. Circuit Court of Appeals, *Araujo v. New Jersey Transit Rail*, and in 2013 the Third Circuit issued a landmark Decision confirming and clarifying the legal standards federal courts must apply when deciding FRSA cases. *Araujo v. New Jersey Transit Rail*, 708 F.3d 152 (3rd Cir. 2013). I have since argued several more Circuit Court FRSA cases.

10. This case is an illustration of the retaliatory culture Section 20109 is designed to eliminate. On paper, New Jersey Transit Rail Operations professes that safety is its first priority (see, e.g. its cardinal Safety Rule: "Safety is of first importance. In case of doubt, the safe course must be taken."). But in reality, NJT maintains a culture that allows managers to disregard federal rail safety rules and regulations, and the result is reflected in published reports such as: "From January 2011 through July 2016, New Jersey Transit logged the most train accidents and the highest safety-violation fines of any U.S. commuter railroad, federal data show." https://www.bloomberg.com/politics/articles/2017-01-25/n-j-transit-rail-crew-hours-over-safety-limits-draw-scrutiny and "In June 2016, the Federal Railroad Administration, citing declining safety, started an operations audit of New Jersey Transit."

https://www.bloomberg.com/politics/articles/2017-04-27/as-christie-hounds-amtrak-new-jersey-transit-safety-fines-mount .

11. The NJT employee Complainant in this case engaged in the FRSA quintessential protected activities of reporting a safety hazard (b)(1)(A), reporting a work injury (a)(4), and filing a retaliation complaint with OSHA (a)(3). Section 20109 is designed to encourage all employees to do so and to protect them from retaliation when they do. NJT's response was to retaliate by terminating his career, sending a chilling effect throughout its ranks. That chilling effect must be remedied by awarding a full measure of damages that will make unmistakably clear to NJT's managers the boundaries of unacceptable conduct and the steep cost of violating those boundaries. An award of attorney fees is part of such damages.

12. After applying U.S Supreme Court precedent governing the award of attorney fees, in 2013 U.S. District Judge Janet Bond Arterton issued a Decision determining my reasonable hourly fee rate in a FRSA whistleblower case:

> Attorney Goetsch is undeniably a leading specialist in the law governing railroad employees' rights, and his longstanding and highly developed practice makes him more efficient, creative, and effective for his railroad employee clients than an attorney of similar trial experience in federal litigation but without the benefits of his specialization. Based on Attorney Goetsch's experience, his success in this unique case, and the case law . . . evidencing a rise in the prevailing market rate, the Court finds that an hourly rate of $525 for his work on this case is reasonable and fulfills the purpose of federal fee shifting statutes to incentivize capable attorneys to take on meritorious cases under the FRSA.

Barati v. Metro North Railroad Co., 939 F.Supp.2d 153, 156 (D. Conn. 2013).

13. In 2014 the Administrative Law Board also found that $525 is the reasonable lodestar rate for my work in AIR-21 based whistleblower retaliation cases. *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048 Slip Op. at p.2, ALJ No. 2010-FRS-026 (ARB March 5,

2014). Of note, *Bala* was a New Jersey based FRSA matter tried before an ALJ in New Jersey, and the ARB found $525 to be my reasonable hourly rate. And in 2014 another U.S. District Judge recognized $525 as my reasonable hourly rate in FRSA cases. *Brig and Buchala v. Port Authority Trans-Hudson*, 2014 U.S. Dist. LEXIS 42538 at n.3 (SDNY 2014).

14. The United States Supreme Court is clear that counsel's current hourly rate must be applied when awarding fee-shifting statute attorney's fees*: Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 716(1987) ("In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the aware on current rates or by adjusting the fee based on historical rates to reflect its present value."); *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989) ("An adjustment for delay in payment is, we hold, an appropriate factor in the determination of what constitutes a reasonable attorney's fee."). The Supreme Court more recently reaffirmed its *Missouri v. Jenkins* holding that compensation for the delay in payment is made by basing the award on current rates. *Perdue v. Kenny A. ex rel. Wynn*, 559 U.S 542, 556 (2010).

15. Now, eight years after 2013, my current hourly rate has increased to $600. I respectfully request that the Administrative Law Judge take judicial notice of the above referenced findings by the Administrative Review Board and Judges and, taking into account the controlling Supreme Court case law discussed above, apply my current hourly rate of $600.

16. The detailed list of time and labor spent on the prosecution of this case up to the present date is attached to this Petition. 153.16 hours x $600 per hour equals $91,896 in attorney's fees up to the present date. The list of costs also is attached to this Petition, confirming a total of $1,298.

May 28, 2021

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