Investigator's Desk Aid to the Federal Railroad Safety Act (FRSA) Whistleblower Protection Provision

49 U.S.C. § 20109

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This Desk Aid represents the Occupational Safety and Health Administration's (OSHA's) summary of the scope of coverage and protected activity and the procedures for investigating and adjudicating retaliation complaints under FRSA as of the "last revised" date listed below. This Desk Aid is internal guidance directed to OSHA personnel and is subject to change at any time. This Desk Aid is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. This document is intended only to provide clarity for OSHA personnel regarding existing requirements under the law or agency policies. There may be a delay between the publication of significant decisions or other authority under this whistleblower protection provision and modification of the Desk Aid. The Code of Federal Regulations; documents issued in compliance with Executive Orders 13891 and 13892 and the Administrative Procedure Act, as applicable; and decisions of the Department of Labor's Administrative Review Board remain the official source for the views of the Secretary of Labor on the interpretation of this whistleblower protection provision.

Abbreviations Used in this Desk Aid:

FRSA	Federal Railroad Safety Act (typically used in this Desk Aid to refer just to the Act's whistleblower protection provision)
FRA	Federal Railroad Administration
NTSSA	National Transit Systems Security Act whistleblower protection provision (6 U.S.C. § 1142)
URT	Urban Rapid Transit
OSHA	Occupational Safety and Health Administration

I. FRSA in a Nutshell

FRSA promotes safety in railroad operations and reduces railroad-related accidents by protecting employees from retaliation for engaging in protected activities including reporting alleged violations of federal law relating to railroad safety or security and reporting work-related injuries or hazardous safety or security conditions.

FRSA's whistleblower protection provision can be found at 49 U.S.C. § 20109. The procedures for OSHA's investigation and resolution of FRSA whistleblower complaints can be found at 29 CFR Part 1982. Most of the definitions relevant to FRSA whistleblower complaints can be found at 49 U.S.C. § 20102 and 29 CFR 1982.101.

A. Covered Entity

FRSA generally prohibits retaliation by any railroad carrier engaged in interstate or foreign commerce, as well as the railroad carrier's officers or employees. In many instances, FRSA also prohibits retaliation by railroad contractors and subcontractors. Coverage under FRSA varies slightly depending on the category of protected activity that is at issue in the complaint.[1]

1. Railroad Carriers

FRSA defines a "railroad carrier" as a person providing railroad transportation. "Railroad" is defined as any form of non-highway ground transportation that runs on rails or electromagnetic guideways. This includes commuter or short-haul railroad passenger service in a metropolitan or suburban area and high speed ground transportation systems that connect metropolitan areas, regardless of whether those systems use new technologies not associated with traditional railroads. However, the definition of "railroad" does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

[1] Coverage for complaints under 20109(a) differs from coverage of complaints under 20109(b) or (c) if the respondent is contractor or subcontractor of a railroad carrier.

Covered railroad carriers generally include:

- Freight railroads
- Long-distance, intercity passenger railroads
- Commuter railroads
- Short-haul passenger service (e.g., airport to downtown or to resort)
- High speed ground transportation systems that connect metropolitan areas, regardless of technology used
- Most tourist, scenic, and excursion railroads

The discussion below provides more information regarding coverage issues that may arise regarding different types of railroad carriers. When coverage questions arise, consult with the Regional Solicitor of Labor (RSOL), the Directorate of Whistleblower Protection Programs (DWPP), or the Federal Railroad Administration (FRA), as needed.

Commuter Railroads

The FRSA whistleblower protection provision applies to commuter railroads. Sometimes, questions arise regarding whether an employer is a commuter railroad covered by FRSA or an Urban Rapid Transit (URT) employer excluded from FRSA's definition of a railroad. OSHA generally will consult the FRA's Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, 49 CFR Part 209, Appendix A, for guidance in determining whether the employer is a covered commuter railroad.

Generally, an employer is a commuter railroad covered by the FRSA whistleblower protection provision if:

(1) it serves an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area;
(2) its primary function is moving passengers between jobs in the city and homes within the greater metropolitan area, and moving passengers from station to station within the immediate urban area is, at most, an incidental function; and
(3) the vast bulk of the system's trains operate in morning and evening peak periods, with few trains at other hours.

Examples of covered commuter railroads include:

- Metra and Northern Indiana Commuter Transportation District (NICTD) (Chicago area)
- Virginia Railway Express (VRE) and Maryland Area Regional Commuter (MARC) (Washington, D.C. area)
- Metro-North, the Long Island Railroad (LIRR), New Jersey Transit (NJ Transit), and the Port Authority Trans-Hudson (PATH) (New York area)

Note that commuter railroads do not necessarily need to connect to the general railroad system and may be operated by state, local, or regional authorities, corporations, or other entities. When

a commuter railroad is operated by a public transportation agency, it is also covered under the National Transit Systems Security Act (NTSSA) whistleblower protection provision.

Urban Rapid Transit Operations

The FRSA whistleblower protection provision does not cover URT operations (such as street railways, trolleys, subways, and elevated railways) that are not connected to the general railroad system of transportation. To determine whether a URT is connected to the general system and therefore covered under the FRSA whistleblower protection provision, it is necessary to consider whether the URT has a portion of operation conducted as part of or over the lines of the general system, shares track with another railroad, crosses another railroad's tracks at grade, or connects to the general system by operating in a shared right-of-way. If any of these criteria are satisfied, the URT may qualify as a covered railroad.

Generally, a URT *is not* likely to be covered, if it is a subway or elevated operation with its own track system on which no other railroad may operate, has no highway-rail crossings at grade, operates within an urban area (which may include the suburbs), moves passengers from station to station within the urban area as one of its major functions, and provides frequent service even outside of morning and evening peak periods.

Examples of URTs that are <u>not covered</u> under FRSA include:

- Metrorail (also known as Metro) (Washington, D.C. area)
- Chicago Transit Authority (CTA) Rail (also known as the "L") (Chicago area)
- Subway systems in New York, Boston, and Philadelphia

URTs operated by public transportation agencies are covered under the NTSSA whistleblower protection provision regardless of whether they are connected or unconnected to the general railroad system of transportation.

Intercity Passenger Railroad Operations

All intercity passenger railroad operations are covered under FRSA. This would include, for example, any intercity high speed rail with its own right of way but that is not physically connected to the general railroad system. Examples of intercity passenger railroad operations include Amtrak (also known as National Railroad Passenger Corporation) and Alaska Railroad.

Short-Haul Passenger Railroad Operations

Short-haul passenger railroad operations are generally covered under FRSA even if they do not connect to other railroads. These operations might include, for example, a railroad designed primarily to move intercity travelers from a downtown area to an airport, or from an airport to a resort area. When a short-haul passenger railroad is operated by a public transportation agency, it is also covered under the NTSSA whistleblower protection provision.

Tourist, Scenic, and Excursion Railroads

Tourist, scenic, and excursion railroads are generally covered. However, note that the FRA does not exercise jurisdiction over tourist, scenic, and excursion railroads if they run either: (1) on smaller than 24-inch gauge (which, historically, have never been considered railroads under federal railroad safety laws); or (2) off the general system and are considered "insular" (which means that the railroad is limited to a separate enclave in such a way that there is no reasonable expectation that public safety—except safety of a business guest, a licensee of the tourist operations, or a trespasser—would be affected by the operation). Thus, coverage questions may arise with respect to these entities, and the Regional Solicitor of Labor (RSOL) and Directorate of Whistleblower Protection Programs (DWPP) should be consulted in these circumstances.

Plant Railroads

In some circumstances, a railroad operates only within a single industrial operation with no or minimal connection to the general railroad system of transportation. FRA rules generally do not apply to "plant railroads" unconnected to the general railroad system. Coverage under the FRSA whistleblower protection provision in these cases will depend on the presence and degree of connection between the railroad and the general railroad system.

2. Officers and Employees of Railroad Carriers

Officers and employees of railroad carriers may be individually liable for violations of the FRSA whistleblower protection provision. However, the complainant must name these individuals in the complaint or make it clear to OSHA that the complainant wants to hold the individuals liable.

3. Contractors and Subcontractors of Railroad Carriers

Section 20109(a) prohibits contractors and subcontractors of railroad carriers from discharging or otherwise retaliating against an employee for engaging in any of the protected activities listed in that subsection. For example, a contractor of a railroad carrier is prohibited from retaliating against an employee of the contractor for providing information to the employer regarding conduct that the employee reasonably believes violates FRA rules or for providing information to the National Transportation Safety Board regarding facts related to a railroad accident.

For a contractor or subcontractor to be covered under FRSA, the facts of the case must relate to the contractor or subcontractor's work in its capacity as a contractor or subcontractor of a railroad carrier. Contractors and subcontractors covered under section 20109(a)(1) may include, but are not limited to:

- Manufacturers of railroad equipment
- Repair shops
- Track maintenance contractors
- Staffing firms
- Medical contractors

Section 20109(b) does not cover contractors and subcontractors. Section 20109(c) is interpreted to apply only to railroad carriers and officers and employees of railroad carriers.

4. Employee Coverage

The Department of Labor's regulations define an employee under FRSA as an individual presently or formerly working for a railroad carrier or for a contractor or subcontractor of a railroad carrier, an individual applying to work for a railroad carrier or for a contractor or subcontractor of a railroad carrier, or an individual whose employment could be affected by a railroad carrier or a contractor or subcontractor of a railroad carrier. FRSA coverage is **not** limited to any particular category of employee such as "employees who perform safety sensitive functions" or "operating employees."

B. Protected Activity

FRSA identifies approximately a dozen different kinds of protected activity, divided into three separate sections: (a) "general" protected activity; (b) "hazardous safety or security conditions;" and (c) "prompt medical attention." Although there is overlap in the three sections, there are also some notable differences. Attachment 2 to this Desk Aid (Optional Worksheet: FRSA Protected Activity Checklist) outlines the specific protected activities identified in the statute.

1. General Protections *(20109(a))*

Who is prohibited from engaging in retaliation under this subsection?

49 U.S.C. § 20109(a) prohibits retaliation by railroad carriers, contactors, subcontractors, officers, and employees of railroad carriers.

What conduct is protected?

Under this first subsection, FRSA identifies seven different kinds of protected activity paraphrased below and on Attachment 2. These general protected activities are:

1. Providing information, directly causing information to be provided, or otherwise directly assisting in any investigation regarding conduct that the employee reasonably believes is a violation of any federal law, rule, or regulation related to railroad safety or security or gross fraud, waste, or abuse of federal grants or other public funds intended to be used for railroad safety or security (*20109(a)(1)*);

   Note that under this subsection, the information must be provided to or the investigation must be conducted by: (1) a federal, state, or local regulatory or law enforcement agency (including an office of Inspector General under the Inspector General Act of 1978); (2) any member or committee of Congress or the Government Accountability Office; or (3) a person with supervisory authority over the employee or authority to investigate, discover, or address the misconduct.

2. Refusing to violate or assist in the violation of any federal law, rule, or regulation relating to railroad safety or security (*20109(a)(2))*;

3. Filing a complaint, directly causing a proceeding to be brought, or testifying in a proceeding related to the enforcement of the FRSA and other railroad safety and security laws listed in the statute (*20109(a)(3))*;

4. Notifying or attempting to notify the railroad carrier or the Secretary of Transportation of a work-related personal injury or illness of an employee (*20109(a)(4))*;

5. Cooperating with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board (*20109(a)(5))*;

6. Providing information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any federal, state, or local regulatory or law enforcement agency regarding facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation (*20109(a)(6))*; and

7. Accurately reporting hours on duty (*20109(a)(7))*.

FRSA explicitly provides protection in this category for acts that the employee has done or is about to do, as well as acts that the railroad perceives the employee to have done or to be about to do.[2] For each of the activities under this section, the employee's conduct is protected if it was lawful and done in good faith.

Examples of Protected Activity:

- A train conductor reports to his supervisor and the dispatcher that, because of delays earlier in the day, his time will expire under federal hours of service rules if a relief conductor is not provided by a certain time. The relief conductor is not provided. The supervisor instructs the conductor that he expects no further delays in the train reaching its destination, and the conductor continues working for an additional hour after his hours of service expire. When the conductor arrives at the train's destination, he accurately records his time and complains to the railroad's safety hotline that he has been forced to violate hours of service requirements. Subsequently, the FRA investigates his hours of service violation, after learning about it through reports required of the railroad. The conductor provides information to FRA investigators. The conductor engaged in activity protected under section 20109(a)(1) by reporting the imminent hours of service violation to his supervisor and to the dispatcher and by reporting to the hotline that he had been forced to violate hours of service rules. The conductor's cooperation with FRA

[2] Based on case law under analogous OSHA-enforced whistleblower statutes, employees who are about to engage in activity protected under sections 20109(b) and (c), or are perceived to have engaged in activities protected under those sections, also would be protected from retaliation.

investigators is protected under sections 20109(a)(1) and (6). The conductor's accurate recording of his hours of service is protected under section 20109(a)(7).

- An employee slips on loose ballast, which shifts underneath his feet, causing his right ankle to turn outward, while walking along the track to reach a switch. He finishes his shift with no impairment to walking or other duties, but notices that the ankle is slightly sore. When he awakens the next morning, the ankle is swollen and painful. Realizing that he has sustained a work-related injury, he calls his supervisor to report the injured ankle and supplies the railroad's investigators with information regarding the accident. His initial report and his cooperation with the investigators are both protected activities under section 20109(a)(4).

- An employee is instructed not to run an air brake test on a train car. The employee genuinely and reasonably believes the test is required by federal safety law and it would be a violation not to run it. She runs the test despite her instructions not to. Her conduct is protected under section 20109(a)(2).

- After an employee reports a workplace injury, the railroad issues a notice of disciplinary investigation to the employee in connection with the injury. Believing that the disciplinary investigation is in retaliation for the injury report, the employee files a FRSA whistleblower complaint. The employee's filing of a FRSA whistleblower complaint is protected activity under section 20109(a)(3) and may also be protected under section 20109(a)(1).

2. Hazardous Safety or Security Conditions (*20109(b)*)

Who is prohibited from engaging in retaliation under this subsection?

49 U.S.C. § 20109(b) prohibits retaliation by railroad carriers, officers, and employees of railroad carriers.

What conduct is protected?

Under this second subsection, employees are protected from retaliation for:

1. Reporting, in good faith, a hazardous safety or security condition (*20109(b)(1)(A)*);

2. Refusing to work when confronted with a hazardous safety or security condition related to performance of the employee's duties, if certain conditions exist (*20109(b)(1)(B)*); and

3. Refusing to authorize the use of safety-related equipment, track, or structures, that the employee is responsible for inspecting or repairing, when the employee believes that the equipment, track, or structures present a safety or security hazard, if certain conditions exist (*20109(b)(1)(C)*).

This subsection applies both to concerns regarding the safe and secure operation of the railroad as well as occupational safety concerns faced by the employees themselves.

What requirements must be met for a report of a hazardous safety or security condition to be protected?

This subsection of FRSA does not mandate that safety or security concerns be reported in any specific way or to any specific person. An employee's complaint can take any form - it can be in person, on the phone, in an email, etc., and it need not be made through any formal channels. This section also does not require that the employee believe that the hazardous safety or security condition relates to a specific violation of railroad safety laws, rules, or regulations to be protected. Nor does it require that the employee believe that the safety or security concern presents an imminent danger of death or serious injury.

The Department of Labor's Administrative Review Board (ARB) and most courts have interpreted this subsection to require that the employee's belief that there is a hazardous safety or security condition be objectively reasonable in addition to requiring that the report be made in good faith. Objective reasonableness is evaluated based on the standards described below. Thus, subsection 20109(b)(1)(A) broadly protects an employee who reports a hazardous safety or security condition in the workplace so long as the employee has a good faith, reasonable belief that the workplace condition presents a safety or security hazard related to the railroad carrier's operations or employees' ability to perform work safely.

What conditions must be met for an employee's refusal to work or refusal to authorize the use of safety-related equipment, track, or structures to be protected?

For a refusal to work when confronted with a hazardous safety or security condition or a refusal to authorize the use of safety-related equipment, track, or structures to be protected, several statutory conditions must be met:

1. The refusal must be in good faith and the employee must not have a reasonable alternative to the refusal to work or refusal to authorize the use of equipment, track, or structures; and

2. The situation must be such that a reasonable individual, in the circumstances then confronting the employee, would conclude that the hazardous condition presents an imminent danger of death or serious injury and the urgency of the situation does not allow sufficient time to eliminate the danger without the refusal to work or the refusal to authorize the use of equipment, track, or structures; and

3. The employee, where possible, must have notified the railroad carrier of the existence of the hazard and the intention not to perform further work, or not to authorize the use of the equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

Note that these work refusal protections do not apply to security personnel employed by a railroad carrier to protect individuals or property transported by the railroad.

Attachment 3 to this Desk Aid (Optional Worksheet: Protected Work Refusals Under Section 20109(b)) provides more information regarding how to analyze cases in which the complainant alleged that he or she suffered retaliation for refusing to work when confronted with a hazardous safety or security condition or refusing to authorize the use of safety-related equipment, track, or structures because of a safety or security hazard.

Examples of protected activity:

- An employee is directed to walk over a bridge with no walkway, side rails, or lighting while conducting a crew change. The employee is concerned about falling from the bridge. She complains verbally to her supervisor and in a written statement to a trainmaster regarding the instructions. The employee's reports are protected assuming that she has a good faith, reasonable belief that walking over the bridge is unsafe.

- An employee smells a foul, smoky odor at his worksite and verbally reports it to his supervisor. He is concerned about the health risks and asks to be assigned to a smoke-free area. The employee's report and request are protected activity as long as he has a good faith, reasonable belief that the conditions present a safety concern.

- A train engineer is involved in an altercation with the train's conductor and fears for his safety. The employee believes that communication between an engineer and a conductor is essential for safe train operation and that the altercation threatens his safety and prevents adequate communication. The employee calls his manager and files a written report regarding the incident, both of which are protected if the employee has a good faith, reasonable belief that the conductor's behavior presents a safety hazard.

- An employee responsible for cleaning cars on a passenger train reports that he believes he sees bed bugs in a sleeper car recently treated for bed bug infestation. His report is protected as long as he has a good faith, reasonable belief that he observed bugs.

3. Prompt Medical Attention *(20109(c))*

What conduct is prohibited?

Under this subsection, a railroad carrier, or an officer or employee of a railroad carrier is prohibited from:

1. Denying, delaying, or interfering with the medical or first aid treatment of an employee who is injured during the course of employment. If an employee who is injured during the course of employment requests transportation to a hospital, the railroad must promptly arrange to have the injured employee transported to the

nearest hospital where the employee can receive safe and appropriate medical care *(20109(c)(1))*; and

2. Disciplining or threatening to discipline an employee for requesting medical or first aid treatment, or for following a treatment plan of a treating physician for an injury that occurred during the course of employment. Discipline is defined for purposes of this subsection as to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of a reprimand on an employee's record (*20109(c)(2))*.

   This subsection includes an exception to the prohibition on discipline stating it is not a violation for a railroad carrier to refuse to allow an employee to return to work following medical treatment if that refusal is pursuant to FRA medical standards for fitness for duty. Or, if there are no pertinent FRA standards, a carrier's own standards for fitness for duty.

Examples of Unlawful Conduct:

- A railroad carrier's manager attempts to influence the medical treatment of an employee injured on the job by pressuring the treating doctor not to prescribe medication.

- Railroad carrier personnel delay taking an employee to the hospital following a workplace injury so that they can complete a reconstruction of how the employee's injury occurred.

- An employee requests to be taken to the hospital following a workplace injury and the railroad carrier takes the employee to a hospital of the railroad carrier's choice when other open facilities are closer.

- Railroad carrier managers pressure an employee to return to work earlier than the treating doctor has permitted following a work-related injury by implying that the employee will be suspended if he does not return to work immediately.

4. Good Faith and Reasonable Belief under the FRSA Whistleblower Protection Provision

Several of the categories of protected activity under FRSA explicitly require that the employee's conduct be in good faith and that the employee have a reasonable belief that there is a violation of the law (*20109(a)(1)),* or a safety or security hazard that presents an imminent risk of death or serious injury (*20109(b)(2) & (3))*. Other categories of FRSA-protected activity have been interpreted by the ARB or courts to include a reasonable belief requirement. For instance, the employee must have a reasonable belief that a safety hazard (*20109(b)(1)),* potential violation of the law *(20109(a)(2))*, or work-related injury (*20109(a)(4))* exists to be protected under FRSA.

The good faith requirement is met if the employee has a subjective belief (i.e., actually believes) that there is a violation of law, a safety or security hazard, or a work-related injury. Good faith is generally presumed unless the respondent provides evidence of bad faith.

The reasonableness requirement is met if, in addition to being held in good faith, the employee's belief is objectively reasonable. In other words, it must be possible that a reasonable person in the employee's circumstances would share the employee's belief. A report or work refusal based on a reasonable but mistaken belief is protected. In determining whether the employee had an objectively reasonable belief, the employee's training, experience, and educational background are relevant. A report will meet the reasonable belief requirement so long as a reasonable person in the same circumstances with the same training and experience could also believe that there is a violation of federal railroad safety or security law, a safety or security hazard, or a work-related injury. If the employee is refusing to work or refusing to authorize the use of safety-related equipment, track, or structures (*20109(b)(2) & (3)*), the statute requires that a reasonable person in the employee's position would agree that there is an imminent danger of death or serious injury and insufficient time to eliminate that danger.

C. Adverse Action

FRSA provides that an employer may not "discharge, demote, suspend, reprimand, or *in any other way discriminate*" against an employee for engaging in protected activity. An adverse action under FRSA includes any action that might dissuade a reasonable employee from engaging in FRSA-protected activity. Examples of adverse actions include, but are not limited to, firing, demoting, denying overtime or a promotion, or disciplining the employee.

Under ARB precedent, notices of investigation, warnings, and safety counseling sessions are considered presumptively adverse if they are considered discipline by policy or practice, they are routinely used as the first step in a progressive discipline policy, or they implicitly or expressly reference potential discipline.

II. Procedures for Handling FRSA Complaints

Procedures for handling FRSA complaints are set forth in 29 CFR Part 1982. Below is a summary of the procedural provisions most relevant to the OSHA investigation. More information is also available in the "What to expect during an OSHA Whistleblower Investigation" section of OSHA's website, in OSHA's FRSA Fact Sheet, and in the OSHA Whistleblower Investigations Manual.

A. Complaint

Who may file: An employee who believes that he or she has been retaliated against in violation of FRSA may file a complaint with OSHA. The employee may also have a representative file on the employee's behalf.

Form: The complaint need not be in any particular form. Oral or written complaints are acceptable, including OSHA's Online Complaint form. If the complainant cannot make a complaint in English, OSHA will accept a complaint in any language.

Timing: The complaint must be filed within 180 days of when the alleged adverse action took place. Equitable tolling principles may extend the time for filing in limited circumstances, consistent with the guidance in OSHA's Whistleblower Investigations Manual.

Distribution of complaints and findings to partner agencies: Complaints and findings in FRSA cases must be sent electronically to the FRA.

B. Investigation

Upon receiving a complaint, OSHA will evaluate the complaint to determine whether the complaint contains a *prima facie* allegation of retaliation. In other words, the complaint, supplemented as appropriate with interviews of the complainant, should allege that:

1. The employee engaged in FRSA-protected activity;
2. The respondent knew of or suspected that the employee engaged in FRSA-protected activity;
3. The employee suffered an adverse action; and
4. The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

If the complaint meets these requirements, OSHA will ask for a position statement from the respondent and proceed with the investigation. If it does not meet these requirements, and the complainant does not agree to administrative closure of the complaint, OSHA will dismiss the complaint with notice to the complainant and the respondent of the right to request a hearing before a Department of Labor administrative law judge (ALJ).

FRSA uses a "contributing factor" standard of causation. Thus, following its investigation, OSHA will find that retaliation occurred if it determines that there is reasonable cause to believe that FRSA-protected activity was a contributing factor in the decision to take adverse action against the complainant and the respondent has not shown by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. A contributing factor is a factor which, alone or with other factors, in any way affects the outcome of a decision.

If OSHA finds reasonable cause to believe that retaliation occurred, it will issue findings and a preliminary order stating the relief to be provided. The relief may include reinstatement, back pay, compensatory damages, other remedies for the retaliation (such as a neutral reference), punitive damages not to exceed $250,000, and reasonable attorney fees and costs.

If OSHA does not find reasonable cause to believe that retaliation occurred, it will issue findings dismissing the complaint.

If the complainant and respondent agree to settle their case during the investigation, they must submit the settlement agreement for OSHA's review and approval.

C. Administrative and Judicial Review

Either the complainant or the respondent may object to OSHA's findings within 30 days and request a hearing before an ALJ. Filing objections will stay OSHA's order for all relief except reinstatement, which is *not* automatically stayed. If no objections are filed, OSHA's findings become the final order of the Secretary of Labor, not subject to review.

The ALJ proceeding is a *de novo*, adversarial proceeding in which both the complainant and the respondent have the opportunity to seek documents and information from each other in discovery and to introduce evidence and testimony into the hearing record. OSHA does not typically participate in the ALJ proceeding. Documents and other information submitted to OSHA during the investigation do not automatically become part of the record in the ALJ proceeding. However, both the complainant and the respondent may introduce evidence that they obtained or used during OSHA's investigation in the ALJ proceeding. The ALJ may hold a hearing or dismiss a case without a hearing if appropriate. Either the complainant or the respondent may appeal the ALJ's decision in the case to the Department of Labor's ARB, which may either accept or reject the case for review. A complainant or respondent may obtain review of an ARB decision or an ALJ decision which the ARB has declined to review by the appropriate U.S. Court of Appeals.

D. Kick-Out Provision

FRSA permits a complainant to bring a *de novo* FRSA action in federal district court if the Department of Labor has not reached a final decision on the complainant's FRSA claim, 210 days have passed since the filing of the complaint with OSHA, and the delay is not due to the bad faith of the complainant.

E. Election of Remedies

FRSA contains an "election of remedies" provision that provides that an employee may not seek protection under FRSA's whistleblower provision and another provision of law for the same allegedly unlawful act of the railroad carrier. Election of remedies issues may arise if the railroad is covered by both FRSA and NTSSA or if the protected activity alleged in the complaint implicates both FRSA and Section 11(c) of the OSH Act.[3] Election of remedies issues

[3] The legislative history of FRSA's election of remedies provision indicates that it was aimed at clarifying the relationship between the anti-retaliation protections provided in FRSA and a possible separate remedy for some railroad employees under Section 11(c) of the OSH Act. Floor debate regarding the FRSA election of remedies provision noted certain railroad employees, such as employees working in shops, could qualify for both FRSA anti-retaliation protections and the existing remedy under Section 11(c) of the OSH Act. The intention was that an employee could pursue a claim under FRSA or Section 11(c) of the OSH Act, but not both. *See* 126 Cong. Rec. 26,532 (1980) (statement of Rep. James Florio).

also may arise if the employee has filed a FRSA complaint with OSHA and a complaint against the railroad under another statute in another forum.

Because an OSHA investigation is an informal proceeding and coverage and protected activity may not always be clear at the outset of the investigation, OSHA may docket a case and commence an investigation under FRSA and any other potentially-applicable OSHA whistleblower protection statute. However, at an appropriate time during the investigation, and after consulting with the complainant or, if applicable, the complainant's attorney, OSHA should limit the investigation to FRSA or the other potentially applicable statute.

For example, if a complainant's counsel indicates that the complainant wishes to pursue the complaint as a FRSA case even though Section 11(c) of the OSH Act may also apply, OSHA should close the case under Section 11(c) and continue investigating under FRSA after documenting the communication with the complainant's counsel in the case file.

In cases in which the complainant is pursuing employment-related claims under another provision of law in a forum outside of OSHA (for example, the complainant has filed a complaint for wrongful termination in state court under a state law and has filed a FRSA complaint with OSHA), the employer may argue that OSHA must dismiss the FRSA complaint based on FRSA's election of remedies provision. If this occurs, OSHA should request documentation, such as a copy of the complaint filed in the other proceeding, and should review the subject matter of the complaint, consulting with RSOL as needed, to determine whether the other proceeding alleges retaliation for the same protected activity that is alleged in the FRSA complaint. The chart below provides examples of the types of situations in which the election of remedies provision most often requires or does not require dismissal of a FRSA whistleblower complaint.

Election of remedies may apply to retaliation claims based on the same protected activity as the FRSA complaint, including:	*Election of remedies generally will not apply:*
• OSH Act Section 11(c) claims • NTSSA claims • Claims under other whistleblower statutes • Whistleblower claims under state statutes for same protected activity	• CBA[4] grievance/arbitration • FELA[5] worker's compensation claims • Title VII race, gender, national origin discrimination claims and retaliation claims • ADEA[6] age discrimination claims • State common law claims (e.g., termination against public policy)

[4] Collective Bargaining Agreement
[5] Federal Employees Liability Act
[6] The Age Discrimination in Employment Act

III. Resources and Relevant FRA Regulations

The FRA website contains a wealth of information that can be helpful to OSHA investigators in FRSA whistleblower cases, including railroad safety information, advisories, compliance guides, and FRA regulations, as well as many other materials. The FRA's Office of Safety Analysis webpage is a valuable resource for railroad safety information, including accidents and incidents, inventory and highway-rail crossing data.

The OALJ maintains both a FRSA Whistleblower Digest and FRSA Whistleblower Digest Supplement. These resources may be found at the OALJ Whistleblower Collection page.

The following chart lists some of the FRA regulations that are most frequently relevant to OSHA's FRSA whistleblower investigations:

Regulation	Title
49 CFR Part 213	Track Safety Standards
49 CFR Part 214	Railroad Workplace Safety
49 CFR Part 217	Railroad Operating Rules
49 CFR Part 218	Railroad Operating Practices
49 CFR Part 219	Control of Alcohol and Drug Use
49 CFR Part 220	Railroad Communications
49 CFR Part 220 Subpart C	Electronic Devices
49 CFR Part 221	Rear End Marking Device – Passenger, Commuter and Freight Trains
49 CFR Part 222	Use of Locomotive Horns at Public Highway-Rail Grade Crossings
49 CFR Part 225	Railroad Accidents/Incidents: Reports Classification, and Investigations
49 CFR 228	Passenger Train Employee Hours of Service; Recordkeeping and Reporting; Sleeping Quarters

Attachment 1: Optional Worksheet: Analyzing FRSA Whistleblower Complaints

In order to issue merit findings, answers 1 to 7 must be "Yes" and answer 8 must be "No."	Yes	No
Timeliness		
1. Was the complaint filed within 180 days of the alleged adverse action (or tolling applies)?	☐	☐
Coverage (See Desk Aid, pp. 2-6)		
2. Is respondent FRSA-covered? (check one coverage category) ☐ Railroad carrier ☐ Contractor or subcontractor of a railroad carrier ☐ Officer of a railroad carrier ☐ Employee of a railroad carrier	☐	☐
3. Is complainant an employee within the meaning of FRSA?	☐	☐
Protected Activity (See Attachment 2: Optional Worksheet: FRSA Protected Activity Checklist)		
4. Has complainant engaged in FRSA-protected activity?	☐	☐
Employer Knowledge		
5. Did respondent know or suspect that complainant engaged in the protected activity? (Remember that knowledge may be imputed to respondent using a cat's paw theory or the small plant doctrine if warranted by the evidence.)	☐	☐
Adverse Action		
6. Did respondent discharge or take other adverse action against the employee? (Adverse action is any action that could dissuade a reasonable employee from engaging in FRSA-protected activity. Common examples include firing, demoting, or disciplining the employee.)	☐	☐
Nexus (Contributing Factor)		
7. Was complainant's FRSA-protected activity a *contributing factor* in respondent's decision to take adverse action against the complainant? Evidence that protected activity contributed to an adverse action includes, but is not limited to: • Close timing (temporal proximity) between the protected activity and the adverse action. • Evidence of hostility towards the protected activity. • Disparate treatment of complainant as compared to other employees following the protected activity. • Changes in respondent's treatment of complainant after the protected activity. • Indicators that respondent's stated reasons for the adverse action are pretext.	☐	☐
Affirmative Defense		
8. Is there clear and convincing evidence that respondent would have taken the same action against complainant absent the protected activity?	☐ No	☐ Yes

Attachment 2: Optional Worksheet: FRSA Protected Activity Checklist

Check all that apply. If any box on this sheet is checked, also check "yes" on Attachment 1 item 4. Note that railroad contractors and subcontractors are specifically listed as covered employers only under section 20109(a).

General — 49 U.S.C. 20109(a) *(Coverage--railroad carriers, contractors, subcontractors, officers, and employees)*

Has the complainant lawfully and in good faith (or has the employer perceived that the complainant is about to or has):

- ☐ Provided information, directly caused information to be provided, or otherwise directly assisted in any investigation regarding conduct that the employee reasonably believes is a violation of any federal railroad safety or security law, rule, or regulation or gross fraud, waste, or abuse of federal grants or other public funds intended for railroad safety or security? (*20109(a)(1))*

  Note that under this subsection, the information must be provided to or the investigation must be conducted by:
  (1) a federal, state, or local regulatory or law enforcement agency (including an office of Inspector General under the Inspector General Act of 1978);
  (2) any member or committee of Congress or the Government Accountability Office; or
  (3) a person with supervisory authority over the employee or authority to investigate, discover, or address the misconduct.

- ☐ Refused to violate or assist in the violation of any federal law, rule, or regulation relating to railroad safety or security? (*20109(a)(2))*

- ☐ Filed a complaint, directly caused a proceeding to be brought, or testified in a proceeding related to the enforcement of the FRSA and other railroad safety and security laws listed in the statute. *(20109(a)(3))*

- ☐ Notified or attempted to notify the railroad or the Secretary of Transportation of a work-related personal injury or illness of an employee? (*20109(a)(4))*

- ☐ Cooperated with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board? *(20109(a)(5))*

- ☐ Provided information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any federal, state, or local regulatory or law enforcement agency regarding facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation? *(20109(a)(6))*

- ☐ Accurately reported hours on duty? *(20109(a)(7))*

Hazardous Safety or Security Conditions — 49 U.S.C. 20109(b) *(Coverage--railroad carriers, officers, and employees)*

Has the complainant:

- ☐ Reported, in good faith, a hazardous safety or security condition? *(20109(b)(1)(A))*

- ☐ Engaged in a protected work refusal? *(20109(b)(1)(B))* (See Attachment 3)

- ☐ Engaged in a protected refusal to authorize use of any safety-related equipment, track, or structures that the complainant is responsible for inspecting or repairing? *(20109(b)(1)(C))* (See Attachment 3)

Prompt Medical Attention — 49 U.S.C. 20109(c) *(Coverage--railroad carriers, officers, and employees)*

Has the complainant:

- ☐ Experienced a delay, denial, or interference with medical or first aid treatment by the railroad or railroad personnel or experienced a failure by the railroad or railroad personnel to transport the complainant to the nearest, appropriate hospital upon request following a work-related injury? *(20109(c)(1))* (***NOTE**: If this box is checked, OSHA should find a violation and order appropriate remedies for the delay, denial, or interference with medical or first aid treatment.)*

- ☐ Requested or received medical or first aid treatment for a work-related injury or followed a treating physician's orders or treatment plan for a work-related injury? *(20109(c)(2))*

Attachment 3: Optional Worksheet: Protected Work Refusals Under Section 20109(b)