
Investigator’s Desk Aid to the National Transit Systems Security Act (NTSSA) Whistleblower Protection Provision

6 U.S.C. § 1142

Table of Contents

| | |
|--|----|
| I. NTSSA in a Nutshell | 2 |
| A. Covered Entity | 2 |
| B. Protected Activity | 6 |
| C. Adverse Action | 11 |
| II. Procedures for Handling NTSSA Complaints | 11 |
| A. Complaint..... | 11 |
| B. Investigation..... | 12 |
| C. Administrative and Judicial Review | 13 |
| D. Kick-Out Provision | 13 |
| E. Election of Remedies | 13 |
| Attachment 1 (Optional Worksheet: Analyzing NTSSA Whistleblower Complaints) | 15 |
| Attachment 2 (Optional Worksheet: NTSSA Protected Activity Checklist)..... | 16 |
| Attachment 3 (Optional Worksheet: Protected Work Refusals Under Section 1142(b)) | 17 |

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 NTSSA 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 sources for the views of the Secretary of Labor on the interpretation of this whistleblower protection provision.

Abbreviations Used in this Desk Aid:

| | |
|--------------|---|
| NTSSA | National Transit Systems Security Act (typically used in this Desk Aid to refer just to the Act's whistleblower protection provision) |
| FTA | Federal Transit Administration |
| FRSA | Federal Railroad Safety Act whistleblower protection provision (49 U.S.C. 20109) |
| OSHA | Occupational Safety and Health Administration |

I. NTSSA in a Nutshell

The NTSSA whistleblower protection provision promotes safety and security in public transportation operations by protecting employees from retaliation for engaging in protected activities related to public transportation safety or security.

NTSSA's whistleblower protection provision can be found at 6 U.S.C. 1142. The procedures for OSHA's investigation and resolution of NTSSA whistleblower complaints can be found at 29 CFR Part 1982. Most of the definitions relevant to NTSSA whistleblower complaints can be found at 49 U.S.C. 5302 and 29 CFR 1982.101.

A. Covered Entity

NTSSA prohibits retaliation by a public transportation agency, contractors, and subcontractors of a public transportation agency, and a public transportation agency's officers or employees.

1. What is a "public transportation agency"?

A public transportation agency is a "publicly owned operator of public transportation eligible to receive federal assistance under Chapter 53 of Title 49" (a chapter of the U.S. Code pertaining to public transportation).

For purposes of determining whether an entity is a public transportation agency, public transportation means "regular, continuing, shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability or low income." Public transportation includes, for example, public subways, light rail systems, bus systems, some ferries, and commuter railroads.

2. When does a provider of passenger transportation not qualify as a “public transportation agency”?

If a provider of passenger transportation is not publicly owned and eligible to receive federal assistance under Chapter 53, it is not covered by NTSSA. The following entities are specifically excluded from the definition of public transportation:

- Intercity passenger rail transportation provided by Amtrak
- Intercity bus service
- Charter bus service
- School bus service
- Sightseeing transportation service
- Courtesy shuttle service of one or more specific establishments
- Intra-terminal or intra-facility shuttle services

Although these entities are not covered by NTSSA, employees may be protected under the Federal Railroad Safety Act (FRSA), Section 405 of the Surface Transportation Assistance Act of 1982 (STAA), Section 11(c) of the Federal OSH Act, or an equivalent state law.

3. Does a public transportation agency need to receive federal assistance under Chapter 53 to be covered by the NTSSA?

No. A covered public transportation agency need not actually receive federal assistance under Chapter 53 to be covered. Rather, the public transportation agency need only be *eligible* to receive such assistance. In other words, the statute does not require the actual receipt of funds; it only requires that the public transportation agency is eligible to receive federal assistance.

4. Can a state public transportation agency be a respondent under NTSSA?

Yes. However, state sovereign immunity may impact a complainant’s right to pursue the case beyond the OSHA investigation phase if the respondent is considered an arm of the state and state sovereign immunity has not been waived.

Investigators should docket and investigate NTSSA cases involving state public transportation agencies as they would NTSSA cases involving other respondents. However, if state sovereign immunity appears to be an issue in the case, the investigator should work with the supervisor and RSOL early in the investigation to determine whether state sovereign immunity applies. State sovereign immunity, where it applies, prevents complainants from pursuing a NTSSA case beyond the investigation phase but does not prevent RSOL from litigating a meritorious case. Accordingly, if the respondent can assert state sovereign immunity and the retaliation case appears to be meritorious, OSHA would need to refer the case to RSOL for litigation and should consult with RSOL in completing the investigation.

Note that state sovereign immunity does not apply to respondents that are not considered an arm of the state. Respondents not covered by state sovereign immunity typically include local public transportation agencies and private contractors and subcontractors to state and local public transportation agencies.

5. How can I determine whether a respondent is a public transportation agency covered by NTSSA?

Agencies that receive public assistance are included in a statutorily required database. This database is maintained by the Federal Transit Administration (FTA), a federal agency responsible for administering federal funding to support locally planned, constructed, and operated public transportation systems throughout the United States, including buses, subways, light rail, commuter rail, streetcars, monorail, passenger ferry boats, and inclined railways.

The FTA's National Transit Database (NTD) is, therefore, a useful resource to begin an evaluation of whether an entity is covered by NTSSA. See <https://www.transit.dot.gov/ntd>.

However, a public transportation agency may still be covered even if it is not found in the database if it is a publicly owned operator of public transportation *eligible* to receive qualifying federal assistance.

6. What types of entities may be contractors or subcontractors to public transportation agencies?

A contractor or subcontractor of a public transportation agency violates NTSSA if it retaliates against an employee for engaging in NTSSA-protected conduct, such as reporting conduct that the complainant reasonably believes is a hazard to public transportation safety or security. Whether a respondent is a covered contractor or subcontractor depends on the facts of the case. For a contractor or subcontractor to be covered, the protected activity must relate to conduct in the entity's capacity as a contractor or subcontractor to a public transportation agency. Contractors and subcontractors may include, but are not limited to, entities such as manufacturers that make operational equipment to specification for public transportation agencies or firms that repair, maintain, or test equipment for public transportation agencies.

7. Is there individual liability under NTSSA?

Officers and employees of a public transportation agency may be individually liable for retaliation in violation of NTSSA. However, the complainant must name these individuals in her/his complaint or make clear to OSHA that the complainant wants to hold the individuals liable for the retaliation.

8. Overlap between NTSSA and FRSA:

Note that when a public transportation agency is operating a commuter railroad, a short-haul passenger system, or other system that may qualify as a railroad under FRSA, there may be overlap in coverage between NTSSA and FRSA.

Investigator's Desk Aid to the National Transit Systems Security Act (NTSSA) Whistleblower Protection Provision
OSHA Whistleblower Protection Program

Last Revised: 8/26/2020

The FRSA whistleblower protection provision does not cover rail fixed guideway system operations (such as street railways, trolleys, subways, and elevated railways) that are not connected to the general railroad system of transportation. Examples of rail fixed guideway systems that are not covered under FRSA include:

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

Rail fixed guideway systems 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. For more information about determining whether a respondent may be covered under FRSA as a railroad, investigators should consult the FRSA desk aid and may need to confer with RSOL, DWPP, and/or the FRA.

9. Overlap between NTSSA and STAA or SPA or the OSH Act

Both the [FTA](#) and [Federal Highway Administration](#) provide grant funding for ferryboat systems. However, ferry operators are subject to the U.S. Coast Guard’s safety regulations. Retaliation complaints in these situations can fall under both the Seaman’s Protection Act (SPA) and NTSSA. Moreover, in situations where a public transportation agency operates a commuter bus service by contracting with a private company to provide and operate the bus, a retaliation complaint could fall under both the whistleblower provisions of the Surface Transportation Assistance Act (STAA) (codified at 49 U.S.C. § 31105) and NTSSA. In other situations, such as circumstances involving complaints about workplace hazards from employees of private contractors or subcontractors to a public transportation agency, a complaint could fall under both the OSH Act (or a state OSH Act analog) and NTSSA. In cases where a complaint implicates both NTSSA and another anti-retaliation statute, NTSSA’s election of remedies provision may require that the complainant choose between pursuing the case under NTSSA or under the other anti-retaliation statute. See Election of Remedies in section II.E below.

10. Who is a covered employee under NTSSA?

A complainant must meet the definition of “employee” to be protected under NTSSA. The Department of Labor’s regulations define an employee under NTSSA as:

- an individual presently or formerly working for a public transportation agency or a contractor or subcontractor of a public transportation agency, or
- an individual applying to work for a public transportation agency or a contractor or subcontractor of a public transportation agency, or
- an individual whose employment could be affected by a public transportation agency or a contractor or subcontractor of a public transportation agency.

11. Examples of NTSSA-Covered Employers:

- A city subway operator that receives federal funds is a NTSSA-covered employer because it is a public transportation agency that is eligible for qualifying federal assistance.
- A public transportation agency contracts with a private transportation company to operate its paratransit bus service. The private transportation company is covered because it is a contractor of a public transportation agency.
- An employee who works for a company that is a third party contractor hired for the job of manufacturing brake pads to specification for a public transportation agency. The employee complains that the brake pads are defective. The company is covered because it is a third party contractor of a public transportation agency.¹

B. Protected Activity

NTSSA identifies many different kinds of protected activity, which are divided into two separate subsections of the statute: (a) general protected activities and (b) reports and work refusals related to hazardous safety or security conditions. Although there is overlap in the two subsections, there are also some notable differences in the protected activities listed in each subsection. Attachment 2 to this Desk Aid contains a NTSSA protected activity checklist.

1. General Protected Activities, 6 U.S.C. 1142(a)

An employee is protected from retaliation under NTSSA for any lawful good faith act done, or perceived by the employer to have been done or about to be done,² to:

1. Provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct that the employee reasonably believes violates any federal law, rule, or regulation relating to public transportation safety or security or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security.

¹ A “third-party contract” is public transportation agency’s contract with a vendor or contractor, including procurement by purchase order or purchase by credit card, which is financed with Federal assistance awarded by FTA. See FTA Circular 4220, available at <https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/third-party-contracting-guidance>.

² NTSSA only explicitly provides protection for acts that the employee has done or is about to do, as well as acts that the employer perceives the employee to have done or to be about to do under section 1142(a)(1). However, based on case law under analogous OSHA-enforced whistleblower statutes, employees who are about to engage in activity protected under section 1142(b) or are perceived to have engaged in activities protected under that section also would be protected from retaliation.

Note that under this subsection, the information or assistance must be provided to: (A) a Federal, State, or local regulatory or law enforcement agency (including an office of Inspector General under the Inspector General Act of 1978); (B) any Member or Committee of Congress, or the Government Accountability Office; or (C) a supervisor or a person who has authority to investigate, discover, or address the misconduct.

2. Refuse to violate or assist in violation of any Federal law, rule, or regulation relating to public transportation safety or security.
3. File a complaint of retaliation, or cause a proceeding to be brought, or testify in a proceeding related to enforcement of the NTSSA anti-retaliation provision.
4. Cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board (NTSB).
5. Provide information to the Secretary of Transportation, the Secretary of Homeland Security, the NTSB, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with public transportation.

2. Reports and Work Refusals Related to Hazardous Safety or Security Conditions, 6 U.S.C. 1142(b)

An employee is protected from retaliation under NTSSA for:

1. Reporting a hazardous safety or security condition.
2. Refusing to work when confronted by a hazardous safety or security condition, provided that certain conditions are met as described below.
3. Refusing to authorize the use of any safety or security-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, provided that certain conditions are met as described below.

The protections in section 1142(b) apply both to concerns regarding the safe and secure operation of the public transportation system as well as occupational safety or security concerns faced by the employees themselves.

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

This subsection of NTSSA 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 public transportation safety or security 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 analogous language in FRSA to require that the employee's belief that there is a hazardous safety or security condition be made in good faith and objectively reasonable. Objective reasonableness is evaluated based on the standards described below. Thus, subsection 1142(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 condition that the employee is reporting presents a safety or security hazard related to the public transportation agency's operations or a workplace condition affecting employees' ability to perform work safely.

4. 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 employer 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.

Attachment 3 (Optional Worksheet: Protected Work Refusals Under Section 1142(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.

5. Are there any exemptions from protection under this subsection?

Security personnel, including transit police employed or utilized by a public transportation agency to protect riders, equipment, assets, or facilities, are not protected for refusing to work due to a hazardous safety or security condition. However, security personnel *are* protected for reporting, in good faith, a hazardous safety or security condition. For example, a transit police officer may not refuse to confront a person who entered a restricted area without authorization because of a broken lock. However, that same officer is protected from retaliation for complaining about the broken lock.

6. Good Faith and Reasonable Belief under the NTSSA Whistleblower Protection Provision

Several of the categories of protected activity under NTSSA 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 (1142(a)(1)) or a safety or security hazard that presents an imminent risk of death or serious injury (1142(b)(1) & (2)). Other categories of NTSSA-protected activity have been interpreted by the ARB or courts under the closely analogous provisions in FRSA to include a reasonable belief requirement. For instance, the employee must have a reasonable belief that a safety hazard or security hazard exists or that certain conduct would violate the law to be protected. The same reasonable belief requirements likely apply under NTSSA.

The good faith requirement is met if the employee has a subjective belief (i.e., actually believes) that there is a violation of law, or a safety or security hazard. 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 law relating to public transportation safety or security, or the presence of a hazardous safety or security condition. If the employee is refusing to work or refusing to authorize the use of safety-related equipment, track, or structures (1142(b)(1)(B) & (C)), 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.

7. Examples of NTSSA Protected Activity

- A station manager who works for a public transportation agency observes during an inspection of his assigned subway stations that there are unsecured gates, including gates missing locks and chains, as well as security gates with broken or ineffective locks. He reports these observations to his supervisor and the chief safety officer, expressing his concern that this may be a widespread problem and giving examples of how unsecured gates could lead to injuries or fatalities. The reports are protected.
- A rail worker, employed by a contractor for a public transportation agency, works on maintaining the tracks on a subway line. The rail worker is interviewed by the NTSB regarding recent work he performed on the subway line where a railcar derailed causing injuries to several passengers. The rail worker's conversation with the NTSB is protected.
- An employee of a public transportation agency who is responsible for testing bus routes before they become operational complains to his supervisors that (1) bus stop shelters have been installed in locations where passengers lack a safe path to the bus stop; (2) the slope of the street exceeds the maximum allowed slope at a bus stop under the Americans with Disabilities Act ("ADA") posing a safety risk to passengers in wheel chairs and passengers pushing strollers; and (3) appropriate "No Parking" signs have not been installed near the bus stops to create accessible loading/unloading zones for passengers with disabilities as required by the ADA. He refuses to certify the bus stops for use until these issues are corrected. If the employee has a reasonable belief operating the bus stops in these conditions would violate the ADA and cause a safety risk to passengers with disabilities, his complaints to supervisors and refusal to certify the bus stops' use is protected.³
- An employee of a public transportation agency works in a machine shop that fabricates and repairs track-related items. The employee complains to the state public employees' safety and health agency about workplace hazards prompting an inspection of the shop. During the inspection, the employee talks to the inspectors and demonstrates for them that a drill press is operable and not properly guarded. The employee's complaints to the state agency and providing information about the drill press in the inspection are protected under NTSSA.⁴

³ *Clara v. Utah Transit Auth.*, 2017-NTS-00002 (ALJ Aug. 13, 2018); see also 6 U.S.C. 1142(a)(2) (protecting refusal to violate or assist in the violation of a federal law, rule, or regulation relating to public transportation safety).

⁴ *Harte v. MTA*, ARB Case No. 2017-0002 (Aug. 22, 2019); see also 6 U.S.C. 1142(b) (protecting reports of a hazardous safety or security condition).

- An employee of a public transportation agency of a local government responsible for interior cleaning of a ferry boat during its overhaul observes workers performing asbestos abatement work in the lounge of the boat. Later, the workers are gone and protective sheeting has been removed but the ceiling of the area where they were performing work has been left open and dust and debris in the area remain. Believing that there has been an asbestos release, the employee reports the condition to her employer and to the OSHA state plan and the Coast Guard. Because she is an employee of a public transportation agency and reports a condition that she reasonably believes is a hazardous safety condition, she has engaged in protected activity under NTSSA, in addition to any protections she has under SPA, section 11(c) of the OSH Act or a state OSH Act analog.⁵

C. Adverse Action

NTSSA 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 NTSSA includes any action that might dissuade a reasonable employee from engaging in NTSSA-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 NTSSA Complaints

Procedures for handling NTSSA complaints are set forth in [29 C.F.R. 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 and in [OSHA’s Whistleblower Investigations Manual](#).

A. Complaint

Who may file: An employee who believes that he or she has been retaliated against in violation of NTSSA 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. If the complainant cannot make a complaint in English, OSHA will accept a complaint in any language.

⁵ *Ibale v. Alaska Marine Hwy. Sys.*, 2014-NTS-00004 (ALJ Mar. 9, 2016).

Timing: The complaint must be filed within 180 days of when the alleged adverse action took place or when the complainant learned of the adverse action. 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 NTSSA cases must be sent to the FTA.

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 NTSSA-protected activity;
2. The respondent knew of or suspected that the employee engaged in NTSSA-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 case, 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).

NTSSA 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 NTSSA-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 its 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 Administrative Review Board (ARB), which may either accept or reject the case for review. The ARB's decision is subject to discretionary review by the Secretary of Labor. A complainant or respondent may obtain review of a final, reviewable decision by the Department of Labor by appealing to the appropriate U.S. Court of Appeals.

D. Kick-Out Provision

NTSSA permits a complainant to bring a *de novo* NTSSA action in federal district court if the Department of Labor has not reached a final decision on the complainant's NTSSA 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

NTSSA contains an "election of remedies" provision that provides that an employee may not seek protection under NTSSA's whistleblower provision and another provision of law for the same allegedly unlawful act of the public transportation agency. Election of remedies issues may arise if the employer is covered by both FRSA and NTSSA or if the protected activity alleged in the complaint implicates both NTSSA and Section 11(c) of the OSH Act (or a state OSH Act analog), or another OSHA-enforced whistleblower protection statute, such as STAA or SPA. Election of remedies issues also may arise if the employee has filed a NTSSA complaint with OSHA and a complaint against the public transportation agency 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 NTSSA and any other potentially-applicable OSHA whistleblower protection statutes. 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 NTSSA or the other potentially applicable statute.

For example, if a complainant’s counsel indicates that that the complainant wishes to pursue the complaint as a NTSSA case even though Section 11(c) of the OSH Act may also apply, OSHA should generally close the case under Section 11(c) and continue investigating under NTSSA 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 NTSSA complaint with OSHA), the employer may argue that OSHA must dismiss the NTSSA complaint based on NTSSA’s election of remedies provision. 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 NTSSA 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 NTSSA whistleblower complaint.

| <i>Election of remedies may apply to retaliation claims based on the same protected activity as the NTSSA complaint, including:</i> | <i>Election of remedies generally will not apply:</i> |
|--|---|
| <ul style="list-style-type: none"> • OSH Act Section 11(c) claims and state plan state analogs • FRSA claims • Claims under other whistleblower statutes • Whistleblower claims under state statutes for same protected activity | <ul style="list-style-type: none"> • Federal Employers’ Liability Act (FELA) & other worker’s compensation claims • Title VII race, gender, national origin discrimination & retaliation claims • Age Discrimination in Employment Act (ADEA) age discrimination claims • State common law claims (e.g., termination against public policy) |

Attachment 1: Optional Worksheet: Analyzing NTSSA Whistleblower Complaints

In order to issue merit findings, answers 1 to 7 must be “yes” and answer 8 must be “no.”

| | Yes | No |
|--|--------------------------------|---------------------------------|
| Timeliness (See Desk Aid, p. 12) | | |
| 1. Was the complaint filed within 180 days of the alleged adverse action (or tolling applies)? | <input type="checkbox"/> | <input type="checkbox"/> |
| Coverage (See Desk Aid, pp. 2-6) | | |
| 2. Is respondent NTSSA-covered? (check one coverage category) | | |
| <input type="checkbox"/> Public transportation agency | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Contractor or subcontractor of a public transportation agency | | |
| <input type="checkbox"/> Employee or officer of a public transportation agency | | |
| 3. Is complainant an employee within the meaning of NTSSA? | <input type="checkbox"/> | <input type="checkbox"/> |
| Protected Activity (See Attachment 2: Optional Worksheet: NTSSA Protected Activity Checklist) | | |
| 4. Has complainant engaged in NTSSA-protected activity? | <input type="checkbox"/> | <input type="checkbox"/> |
| 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.) | <input type="checkbox"/> | <input type="checkbox"/> |
| 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 NTSSA-protected activity. Common examples include firing, demoting, or disciplining the employee.) | <input type="checkbox"/> | <input type="checkbox"/> |
| Nexus (Contributing Factor) | | |
| 7. Was complainant’s NTSSA-protected activity a <i>contributing factor</i> 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. | <input type="checkbox"/> | <input type="checkbox"/> |
| • 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? | <input type="checkbox"/> No | <input type="checkbox"/> Yes |

Attachment 2: Optional Worksheet: NTSSA Protected Activity Checklist

Check all that apply. If any box on this sheet is checked, also check "yes" on Attachment 1 item 4.

General — 6 U.S.C. 1142(a)

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 law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of federal grants or other public funds intended to be used for public transportation safety or security? (1142(a)(1))

Note 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 public transportation safety or security? (1142(a)(2))
- Filed a complaint, directly caused a proceeding to be brought, or testified in a proceeding related to the enforcement of the NTSSA whistleblower provision. (1142(a)(3))
- Cooperated with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board? (1142(a)(4))
- 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 public transportation? (1142(a)(5))

Hazardous Safety or Security Conditions — 6 U.S.C. 1142(b)

Has the complainant:

- Reported a condition that the employee believes reasonably and in good faith is a hazardous safety or security condition? (1142(b)(1)(A))
- Engaged in a protected work refusal? (1142(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? (1142(b)(1)(C)) (See Attachment 3)

Attachment 3: Optional Worksheet: Protected Work Refusals Under Section 1142(b)

