

No. 06-75112

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. MACLEAN,
Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent

On Petition for Review of Respondent's August 31, 2006 "Final Order on Sensitive Security Information in connection with *MacLean v. Department of Homeland Security*, No. SF-0752-06-0611-I-1 (M.S.P.B.)"

PETITIONER'S OPENING BRIEF

Peter H. Noone (Mass. Bar No. 631341)
Avery, Dooley, Post & Avery
90 Concord Avenue
Belmont, Massachusetts 02478
Telephone (617) 489-5300
Facsimile (617) 489-0085

Counsel for Appellant
Robert J. MacLean

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FRAP 34(A)(1) STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes oral argument would be appropriate and useful for the disposition of this case. Petitioner's petition for review raises the issues of whether the August 31, 2006 Final Order on Sensitive Security Information ("the Order") issued by the Department of Homeland Security ("Respondent" or "DHS") retaliates against Petitioner for a protected whistleblower disclosure; denies Petitioner due process; constitutes impermissible retroactive administrative action; violates the Anti-Gag Statute; stands contradicted by Respondent's failure to follow numerous Sensitive Security Information ("SSI") policies with respect to the subject information; fails to meet Respondent's own interpretation of SSI; applies a vague regulation that must be construed against the drafting party; and seeks through forum shopping to lower Respondent's burden of proof. Upon information and belief, these are issues of first impression in the Ninth Circuit.

I. STATEMENT OF JURISDICTION

Respondent's Order, which Petitioner challenges, states that "[p]ursuant to 49 U.S.C. § 46110, any person disclosing a substantial interest in this Order may, within 60 days of its issuance, apply for review by filing a petition for review in an appropriate U.S. Court of Appeals." Excerpt of Record ("E.R.") at 2. Petitioner contends that he has a substantial interest in the Order; that his petition for review was timely filed; and that the United States Court of Appeals for the Ninth Circuit Court is an appropriate venue.

Petitioner's substantial interest in this Order is clear from the Order's title, which explicitly references Petitioner's Merit Systems Protection Board ("MSPB") appeal. E.R. at 1. Indeed, the Order's first paragraph refers to Petitioner by name. Id. Moreover, the Transportation Security Administration ("TSA") has removed Petitioner from his position as a Federal Air Marshal ("FAM") for having disclosed the very information that the Order designates as SSI. Appendix to Request for Judicial Notice ("App.") at 1-3. Not only did Respondent issue the Order in the midst of Petitioner's MSPB appeal of that removal action, but Respondent's purpose for doing so was, as indicated in the Order itself, "to facilitate judicial review" of Petitioner's "challenge [to] the U.S. Department of Homeland

Security’s position that certain information relevant to the above-captioned matter is Sensitive Security Information (SSI).” E.R. at 1.

Petitioner’s petition for review was timely filed because the Order, which issued on August 31, 2006, indicates a 60-day filing period. E.R. at 2; see also 49 U.S.C. § 46110. Petitioner filed on October 27, 2006.

The United States Court of Appeals for the Ninth District is an appropriate venue for Petitioner’s petition for review because the Ninth District encompasses Petitioner’s residence, Coto de Caza, CA. For orders issued pursuant to 49 U.S.C. § 46110, such as the Order, a petitioner “may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides...” (emphasis added). Petitioner currently resides in Coto de Caza and resided there at all times relevant to the instant petition for review, including August 31, 2006, the date on which Respondent issued the Order.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Order is invalid because Respondent retaliated against Petitioner for making a disclosure protected by the Whistleblower Protection Act (“WPA”) when it issued the Order designating Petitioner’s disclosure about the cancellation of Remain Overnight Missions as SSI.
2. Whether the Order is invalid because Respondent denied Petitioner due process by issuing the Order without giving Respondent, a concerned party, the opportunity to raise objections on the administrative record.
3. Whether the August 31, 2006 Order, which states that the information Petitioner disclosed on July 29, 2003 was SSI *at that time*, is invalid because it constitutes retroactive administrative action.
4. Whether the Order is invalid because Respondent violated the Anti-Gag Statute by using public funds to enforce unlawful restraints on speech shielded by the WPA and other good government statutes.
5. Whether the Order is invalid because it stands contradicted by Respondent’s failure to follow numerous SSI policies with respect to the subject information.
6. Whether the Order is invalid because it disregards Respondent’s own interpretation of SSI.

7. Whether the Order is invalid because it applies a vague regulation that must be construed against the drafting party.

8. Whether the Order is invalid because it seeks through forum shopping to lower the applicable standard of review, thereby insulating its retaliatory removal action against Petitioner.

III. STATEMENT OF THE CASE

Petitioner, a former Federal Air Marshal (“FAM”), challenges Respondent’s August 31, 2006 Order designating information that Petitioner disclosed more than three years earlier as SSI. The procedural history behind the Order is as follows.

On July 29, 2003, Petitioner received a text message to his government-issued mobile telephone indicating that all RON missions would be canceled. The text message contained no SSI markings of any kind. For reasons that will be discussed below, Petitioner disclosed the contents of this unmarked text message to a member of the media.

On September 13, 2005, Respondent issued Petitioner a notice of proposed removal. App. at 7-9. The notice of proposed removal alleged that Petitioner disclosed the subject text message to the media in late July 2003. Id. On the basis of this and other allegations, the notice of proposed removal charged Petitioner with (1) Unauthorized Media Appearance, (2) Unauthorized Release of Information to the Media, and (3) Unauthorized Release of SSI. Id. Upon information and belief, this was Respondent’s first attempt to designate the subject text message as SSI.

In Petitioner’s written and oral replies to the notice of proposed removal, he admitted disclosing the subject text message, but denied that it

contained SSI. Petitioner also raised defenses based on the First Amendment and the WPA.

On April 10, 2006, Respondent issued Petitioner a notice of removal. App. at 1-3. The notice of removal failed to sustain charges (1) and (2), but it did sustain the charge of Unauthorized Release of SSI. Id. As in the notice of proposed removal, Respondent alleged that the subject text message was SSI. Id. The notice of removal, however, was not an Order issued by the Secretary of Transportation and it did not advise Petitioner that he could only appeal Respondent's SSI determination to a United States Court of Appeals pursuant to 49 U.S.C. § 46110. See id. Instead, the notice of removal advised Petitioner of his right to appeal Respondent's decision to the MSPB. App. at 4.

Accordingly, Petitioner timely appealed his removal to the MSPB. A central argument in Petitioner's MSPB appeal was, and is, that the impending cancellation of RON missions was not SSI on July 29, 2003. As discovery began, Petitioner therefore sought to identify the TSA official most knowledgeable about SSI. On June 22, 2006, TSA sent Petitioner's counsel a letter representing David Graceson, a Senior Security Analyst for Respondent's SSI Program, as Respondent's "person most knowledgeable" regarding Sensitive Security Information." App. at 11. In TSA's Answers

to Interrogatories, dated July 10, 2006, it listed Mr. Graceson as a possible witness for the defense who would testify that the information in question was not SSI, “as described in Agency policies and regulations.” App. at 13.

But on July 31, 2006 TSA moved to quash Mr. Graceson’s deposition and requested a protective order that would prohibit Petitioner from discovering, and the MSPB from considering, any information regarding the SSI determination underlying TSA’s removal action against Petitioner.¹

App. at 15-25. The AJ denied TSA’s motion on August 21, 2006, finding that the issue of whether the subject information was SSI “is an element of the agency’s burden of proof on the charge proper.” App. at 27.

Accordingly, the AJ ordered that the deposition of Mr. Graceson “may proceed.” Id.

It was only on August 31, 2006, after the AJ allowed Mr. Graceson’s deposition, that Andrew Colsky, Director of TSA’s SSI Office, issued the Order that Petitioner presently challenges. E.R. at 1-2. In fact, the Order was an attachment to TSA’s Request for Reconsideration of the discovery order denying TSA’s motion to quash Mr. Graceson’s deposition and for a protective order. See App. at 28.

¹ Whereas TSA had earlier indicated that Mr. Graceson would testify as an expert on the content and meaning of the SSI regulations Petitioner allegedly violated, TSA now claimed that “[t]he governing SSI regulations speak for themselves.” App. at 18. Nevertheless, TSA’s motion did attempt to interpret those regulations by suggesting, by implication but not assertion, that Petitioner’s disclosure violated 49 C.F.R. § 1520.7(j) because it concerned “FAM deployment.” See App. at 15-16.

The AJ denied TSA's Request for Reconsideration on September 8, 2006. App. at 37-38. The AJ noted that Respondent issued the Order "[a]fter the appellant's removal, and after the appellant filed the [MSPB] appeal, and after [the AJ] made the order allowing Mr. Graceson's deposition." App. at 38. The AJ further noted that Respondent "could have made such a Final Order before it proposed the appellant's removal, and could have based its proposal on the determination therein.... Instead, it chose to make an ad hoc determination that was not a Final Order...and removed the appellant on that basis." Id.

Despite the AJ's ruling, Respondent refused to produce Mr. Graceson for deposition. Instead, Respondent produced an affidavit from Mr. Graceson alleging that he was not involved in the decision to remove Petitioner. App. at 86. Strangely, Mr. Graceson's affidavit made no mention of whether he, as Respondent's previously-designated expert on SSI, had been involved in the decision to determine that the information Petitioner disclosed was SSI. See id. Also strange was the fact that Mr. Graceson failed to sign his affidavit. See id.

Rather than allow Mr. Graceson to testify regarding Respondent's SSI regulations, as the AJ had ordered, Respondent issued the Order, which attempted to divest the MSPB of jurisdiction over the matter. Although

issued long “after the fact” (App. at 38), the Order purports to determine that the text message Petitioner disclosed on July 29, 2003 “constituted SSI under the SSI regulation then in effect, 49 C.F.R. § 1520.7(j).” E.R. at 1. Respondent issued the Order at a time when, by TSA’s own admission, the subject information was not SSI. App. at 129-130.

On October 27, 2006, Petitioner filed his Petition for Review challenging the Order’s validity.

IV. STATEMENT OF FACTS

On July 29, 2003, while working as a FAM for the Federal Air Marshal Service (“FAMS”), Petitioner received a text message to his government-issued mobile phone. See E.R. at 1. Respondent sent this text message to all FAMs and TSA supervisors. App. at 88. The text message indicated that all FAM remain overnight (“RON”) missions would be canceled up to August 9, 2003. E.R. at 1. The cancellation of RON missions was to begin on August 1, 2003. See App. at 4 and 6.

The text message’s author, an anonymous agent of Respondent, did not mark this information as SSI, nor did any subsequent recipient. See, e.g., App. at 88-90. The sender did not attach a limited distribution statement or safeguard the information in a password-protected format. See id. Instead, the sender chose to disseminate the message to FAMs’ mobile phones and not to their secure Personal Digital Assistants (“PDAs”). See E.R. at 1 and App. at 99.

Just three days earlier, on July 26, 2003, Respondent had distributed an urgent information circular to all U.S. airlines, airport security managers, and FAMs. The information circular conveyed critical DHS intelligence information regarding planned terrorist attacks, including a “possible hijacking plot involving five-man teams that might try to seize planes and

fly them into government, military, or economic targets.” App. at 6.

Respondent expected that these hijackings could occur in the summer of 2003 using weapons concealed as common travel items. App. at 5.

Respondent underscored the extent and immediacy of the danger when it gave Petitioner a one-on-one security briefing regarding these hijacking plots. On the basis of the information circular, the security briefing, and other DHS terror warnings, as well as his experience as a FAM, Petitioner believed that the cancellation of RON missions was evidence of a substantial and specific threat to public safety and could lead to catastrophic loss of life.

Petitioner was also aware that, under the Aviation and Transportation Security Act (“ATSA”), Respondent should give “priority” protection to “long distance flights” similar to those hijacked on September 11, 2001. 49 U.S.C. § 44917(b). On the basis of his knowledge of ATSA, as well as his experience as a FAM, Petitioner believed that the cancellation of RON missions was a violation of law and an act of gross mismanagement.

Faced with a grave danger to public safety, caused by Respondent’s unlawful withdrawal of FAMs from high-risk flights, Petitioner brought his concerns about the cancellation of RON missions to his supervisor. When Petitioner’s supervisor declined to convey these concerns up the chain of command, Petitioner brought them to the attention of an OIG operator.

Special Agent Davidson of the Oakland DHS OIG Field Office fielded Petitioner's call to OIG's 1-800 hotline number. Special Agent Davidson asked for Petitioner's location and provided him with the telephone number for OIG's San Diego office. When Petitioner called this number, however, he was told he had reached an audit office and referred back to Oakland. Unable to apprise OIG of the danger Respondent created by canceling RON missions, Petitioner believed he had a responsibility to alert the public.

On or about July 29, 2003, Petitioner disclosed the contents of the unmarked text message to a member of the press. At that time, Petitioner had no indication that the text message contained SSI. To the contrary, Respondent's failure to mark the message as SSI, failure to attach a limited distribution statement, and decision to send the message to insecure mobile telephones without password protection all indicated to Petitioner that the information was not SSI.

Contrary to the text message, the cancellation of RON missions was not an official FAMS decision on July 29, 2003 or anytime thereafter. Then-Director Thomas Quinn confirms that he made no final decision to cancel RON missions and did not approve the subject text message. App. at 100-101, 103-104, and 107. Immediately after Respondent resumed RON missions, TSA spokesperson Robert Johnson explained that the proposed

cancellation of RON missions was “premature and *a mistake* by the people who were involved.” App. at 6 (emphasis added).

In the end, Respondent did not cancel RON missions. On July 31, 2003, prior to the scheduled cancellations, Respondent resumed FAM coverage on “the full schedule of cross-country and international flights.” App. at 66.

Consistent with Respondent’s failure to treat the text message as SSI prior to Petitioner’s disclosure, Respondent showed remarkably little concern for the information afterwards. Neither the Director nor any other TSA official marked the text message as SSI upon receiving it, despite their obligation to protect unmarked SSI. See App. at 98 and 107 (failing to recall even receipt of text message) and 90 (admitting failure to mark).

Respondent did not even inquire into who authored and distributed the text message, despite the fact that it contained no SSI markings, possessed no password protection, and mistakenly announced the cancellation of RON missions before the Director had even made a decision. See App. at 104-106. For more than two years, Respondent did not communicate with Petitioner in any formal manner that he had engaged in misconduct through disclosing this information.

On the basis of these facts, Petitioner demonstrates below that the subject information was not SSI in July 2003. Petitioner did not disclose specific information that could endanger aviation security; Petitioner made a protected disclosure of information that *exposed* a danger facing aviation security. Years after Petitioner blew the whistle on Respondent's unlawful and irresponsible failure to protect at-risk American aircraft, Respondent retaliated by removing him from his position on a charge of unauthorized disclosure of SSI. The Order attempts to shield that removal action from MSPB scrutiny by implicating federal appellate review of Respondent's SSI determination at a reduced evidentiary standard. Instead of protecting SSI, the Order attempts to protect Respondent's blatant act of retaliation.

V. SUMMARY OF ARGUMENT

Petitioner is a former FAM whom Respondent punitively terminated because he would not remain silent about a grave danger facing the American people.

On July 26, 2003, Respondent issued all FAMs an “information circular” providing a detailed account of imminent terrorist plots to hijack aircraft. Petitioner even received a personal, one-on-one security briefing advising him that these planned terrorist attacks could take place as early as that summer and required heightened FAM vigilance.

But then on July 29, 2003 Respondent issued all FAMs a text message indicating that Remain Overnight (“RON”) missions would be canceled beginning August 1, 2003. During a time of elevated terrorist threats, the text message indicated that Respondent would remove FAM protection from especially at-risk flights. Petitioner reasonably believed this information evidenced a violation of law, a threat to public safety, an abuse of authority, and gross mismanagement.

Although years later Respondent would claim the text message contained SSI, on July 29, 2003 Respondent disseminated the text message by unsecured cell phone with no SSI markings, no limited distribution statement, and no password protection, in violation of numerous TSA

policies. Upon receiving the text message, Petitioner had no indication that this information was SSI. Instead, Petitioner had a reasonable basis to believe that disclosing the information could avert a public danger and remedy unlawful administrative action. Accordingly, Petitioner took his concerns to his supervisor and then to the Office of the Inspector General (“OIG”). When these efforts failed to result in corrective action, Petitioner felt an obligation to alert the American people to Respondent’s unlawful and potentially deadly decision to withdraw FAM protection from at-risk flights.

Almost immediately after Petitioner’s disclosure, Respondent announced that RON missions would continue and publicly disavowed the cancellation plan, calling it “premature” and “a mistake.” Director Quinn would later acknowledge that he never made a decision to cancel RON missions and never authorized the unmarked text message.

Nearly three years later, Respondent punished Petitioner for his whistleblowing disclosure by removing Petitioner from his position as a FAM on the pretense that the unmarked information he disclosed was SSI. Although the notice of removal charged Petitioner with unauthorized disclosure of SSI, Respondent made no official SSI determination, just an ad hoc allegation. It was only after Petitioner appealed his removal to the Merit Systems Protection Board (“MSPB”), where the Administrative Judge

announced that Respondent would have to prove that SSI determination as an element of the charge, that Respondent issued the Order.

This timing demonstrates that Respondent did not issue the Order for the purpose of protecting the subject information, which was no longer SSI in August 2006. Instead, Respondent issued the Order for the purpose of evading review by the MSPB, which requires Respondent to prove its charge by a preponderance of the evidence. By issuing the Order, Respondent attempts to insulate its removal action by reducing Respondent's burden of proof to a showing of substantial evidence.

But even by that low standard the Order cannot withstand scrutiny. The Order is invalid for each of the following eight reasons.

First, the Order is retaliatory on its face because it singles out Petitioner's protected whistleblower disclosure as SSI. Respondent has no authority to curtail Petitioner's rights under the WPA. Second, the Order denies Petitioner due process by depriving him of his statutory right to raise objections prior to the Order's effective date. Third, the Order is invalid because it is an impermissible retroactive administrative action, reaching back more than three years to designate information as SSI. Fourth, the Order is invalid because it violates the Anti-Gag Statute by spending public funds to enforce unlawful restraints on speech. Fifth, the Order is invalid

because Respondent's failure to follow any of its own SSI policies with respect to the subject information conclusively demonstrates that the information was not SSI. Sixth, the Order is invalid because it contradicts Respondent's own interpretation of SSI by protecting non-specific information that could not possibly be used to the detriment of transportation security. Seventh, the Order is invalid because it applies an ambiguous regulation that must be construed against the drafting party. Eighth, and finally, the Order is invalid because its purpose is forum shopping, a move Respondent hopes will shield its unlawful removal action from MSPB scrutiny.

VI. ARGUMENT

49 U.S.C. § 46110(c) vests this Court with the authority to affirm, amend, modify, or set aside Respondent’s Order. Under judicial review, Respondent’s findings of fact are conclusive only “if supported by substantial evidence.” 49 U.S.C. § 46110(c). The findings of fact underlying the Order fail to meet even this low evidentiary standard. For the following eight reasons, the Order is invalid and should be set aside.

A. The Order is Invalid because it is Retaliatory on its Face by Singling out Petitioner’s Protected Whistleblower Disclosure as SSI

The Order is invalid because, on its face, the Order retaliates against Petitioner for disclosing information protected by the WPA. The WPA protects two types of disclosures. First, the WPA protects any disclosure that an employee “reasonably believes² evidences a violation of any law, rule, or regulation.” 5 U.S.C. § 2302(b)(8)(A)(i). Second, the WPA protects any disclosure that an employee “reasonably believes evidences gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” 5 U.S.C. § 2302(b)(8)(A)(ii). The only restrictions on protected disclosures are that

² In *White v. Dept. Air Force*, the court reaffirmed that term’s definition as follows: “The proper test is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence [listed misconduct].” 391 F.3d 1377, 1381 (Fed.Cir. 2004).

they must not be “specifically prohibited by law” or “by Executive Order.”

Id. As demonstrated below, Petitioner’s disclosure meets all requirements for both categories WPA protection.

1. Petitioner Disclosed Respondent’s Violation of the Aviation Transportation Security Act

Petitioner reasonably believed that the cancellation of RON missions violated federal law because ATSA requires Respondent to give “priority” protection to “long distance flights, such as those targeted on September 11, 2001.” 49 U.S.C. § 44917(b). Petitioner’s familiarity with ATSA and his experience as a FAM led him to believe that RON missions often involve long distance flights similar to those hijacked on September 11, 2001.³ When Petitioner received the July 29, 2003 text message canceling RON missions, therefore, he believed that Respondent was withdrawing FAM protection from long distance flights, in violation of ATSA.

Petitioner’s belief was reasonable for two reasons. First, Petitioner’s belief was shared by at least one high-ranking FAMS official. David Adams, Special Agent in Charge for the Office of Public Affairs, also believed that the cancellation of RON missions was a violation of ATSA.

App. at 92.

³ Section F below will argue that the general public is unaware of the specific meaning of “RON missions.” For now, it suffices to point out that although the general public does not know whether RON missions involve “long distance flights,” being unfamiliar with both terms, Petitioner, as an experienced FAM, reasonably believed this to be the case.

Second, Respondent endeavored to cancel RON missions at a time of heightened terror alerts. Just three days earlier, on July 26, 2003, DHS sent an urgent information circular to all FAMs, including Petitioner. The information circular provided revealed numerous details of terrorist plots uncovered by DHS, including a “possible hijacking plot involving five-man teams that might try to seize planes and fly them into government, military, or economic targets.” App. at 6. That plot, in particular, suggested strong parallels to the September 11, 2001 hijackings referenced in ATSA. With DHS warning that this terrorist attack could take place in the summer of 2003, Petitioner was reasonable to conclude that the cancellation of RON missions evidenced a violation of ATSA, which requires Respondent to prioritize the protection of “long distance flights, such as those targeted on September 11, 2001.” 49 U.S.C. § 44917(b).

Indeed, in hindsight the merits of Petitioner’s concerns are not in dispute. Even Respondent conceded that the text message canceling RON missions was premature and disavowed it. See App. at 6.

2. Petitioner Disclosed a Substantial and Specific Threat to Public Safety, an Abuse of Authority, and Gross Mismanagement

Petitioner reasonably believed that the cancellation of RON missions created a substantial and specific threat to public safety because it would

leave cross-country and high fuel-load flights unprotected at a time when DHS was warning of imminent terrorist attacks against American aircraft. App. at 4-6. Canceling RON missions in the wake of these terrorist warnings created a substantial threat because it could have contributed to catastrophic loss of life. The threat was specific because the removal of FAM protection would have increased the vulnerability of airline transportation to hijacking attacks similar to those that took place on September 11, 2001.⁴ Id.

Petitioner also reasonably believed that Respondent abused its authority⁵ and engaged in gross mismanagement⁶ because ATSA provides that long distance flights should be treated as “high security risks” and given “priority” protection. 49 U.S.C. § 44917(a)(2) and (b). This language suggests statutory limits on Respondent’s authority to leave long distance flights uncovered. More precisely, ATSA suggests that long distance flights

⁴ Sections F and G below demonstrate that the information Petitioner disclosed was not “specific” as 49 C.F.R. § 1520.7(j) requires and the Order alleges. In no way, however, does this imply that canceling RON missions did not pose a “specific” threat to public safety, disclosures about which the WPA protects. Although the cancellation of RON missions did not constitute specific information to a public unaware of the special meaning of that term, it did create a very specific danger of terrorist activity against American aircraft.

⁵ Abuse of authority is “an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.” *D’Elia v. Dept. of Treasury*, 60 MSPR 226, 232-35 (1993). There is no *de minimus* standard.

⁶ “[G]ross mismanagement means a management action that creates a substantial risk of significant adverse impact on Respondent’s ability to accomplish its mission.” *Embree v. Dept. of Treasury*, 70 MSPR 79, 85 (1996).

should be the *last* flights from which Respondent withdraws FAM coverage. Under ATSA, RON missions should be a permanent component of the aviation security measures implemented by Respondent. Petitioner's reasonable belief that Respondent abused its authority and grossly mismanaged by canceling RON missions was based on his knowledge of ATSA, his experience as a FAM, the DHS information circular warning of imminent hijacking attempts, and the one-on-one security briefing he received concerning possible hijacking plots. In Petitioner's eyes, Respondent could cancel RON missions only by abandoning its core mission of protecting the nation's aviation security system and providing priority coverage to its most at-risk aircraft.

3. Neither Law nor Executive Order Prohibited Petitioner's Disclosures

The WPA protects Petitioner's July 29, 2003 disclosure regarding the cancellation of RON missions because no "law" or "Executive Order" prohibited it. In the absence of a statutory prohibition or a restrictive Executive Order, the WPA protects "any" disclosure of a violation of law, threat to public safety, abuse of authority, or gross mismanagement. 5 U.S.C. § 2302(b)(8)(A).

The SSI regulation in effect on July 29, 2003 did not apply to Petitioner's disclosure, as section F below demonstrates. But even

assuming, for the sake of argument, that Petitioner did disclose SSI as defined by 49 C.F.R. § 1520.7(j), this would in no way deprive his disclosure of WPA protection because this SSI regulation was neither law nor Executive Order.

The regulation was not “law” because both the plain language and the legislative history of the WPA use “law” to mean statute, not regulation. See Kent v. General Servs. Admin., 56 M.S.P.R. 536 (1993) (finding that the WPA’s “statutory language” and “legislative intent” display “a clear legislative intent to limit the term ‘specifically prohibited by law’ in section 2302(b)(8) to statutes and court interpretations of those statutes”).

The plain language of the WPA makes it clear that “law” does not include regulation by conferring protection on disclosures that evidence “a violation of any law, rule, *or* regulation.” 5 U.S.C. § 2302(b)(8)(A)(i) (emphasis added); see also id. (observing that “[t]he phrase ‘specifically prohibited by law’ follows other statutory language referring to a violation of law, rule, or regulation”).

The WPA’s legislative history reinforces this conclusion by reflecting “Congress’ concern with internal agency rules and regulations impeding the disclosure of government wrongdoing.” Kent, 56 M.S.P.R. 536. Indeed, the relevant legislative history shows that “prohibited by law” refers to

“statutory law and... not... to agency rules and regulations.” *Id.* (quoting H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2860, 2864). As a regulation, therefore, 49 C.F.R. § 1520.7(j) is not “law” and cannot prevent the disclosure of information that the WPA protects.

Neither is 49 C.F.R. § 1520.7(j) an Executive Order. This is clear from the deposition of Mr. Colsky, who exclusively refers to the SSI “regulation” and never describes it as an Executive Order. *See* App. at 109-131. Likewise, the Order is not an Executive Order because it came from Mr. Colsky, not the President.

The WPA protects Petitioner’s disclosure, therefore, because no law or Executive Order prohibits Petitioner from revealing Respondent’s violation of law, threat to public safety, abuse of authority, and mismanagement. By designating Petitioner’s protected disclosure as SSI, Respondent’s Order violates the WPA by attempting to insulate Respondent’s retaliatory removal action. This is clear on the Order’s face, which specifically targets Petitioner and his whistleblowing activity. E.R. at 1.

B. The Order is Invalid Because it Denies Petitioner Due Process by Depriving Petitioner of His Statutory Right to Raise Objections Prior to the Order’s Effective Date

Although issued pursuant to 49 U.S.C. § 46110, the Order violates its provisions by denying Petitioner the opportunity to raise objections as the statute contemplates. By its plain language, 49 U.S.C. § 46110(d) allows this Court to consider an objection to the Order “only if the objection was made in the proceeding conducted by the Secretary or Administrator....”⁷ This provision contemplates a notice and comment period during which affected parties may raise objections to prospective agency orders. In violation of this statutory requirement, however, Respondent issued the Order without providing Petitioner notice and opportunity to raise objections.

C. The Order is an Impermissible Retroactive Administrative Action

Respondent’s Order is a patently retroactive effort to transform Appellant’s disclosure of unmarked information into a regulatory violation. Issued on August 31, 2006, at a time when the subject text message was no longer SSI, the Order asserts that Petitioner’s disclosure constituted SSI “on July 29, 2003.” E.R. at 1. The Order’s retroactivity is contrary to law, contrary to Respondent’s past practice, and fundamentally inequitable.

First, the Order is contrary to law because, as Respondent is aware, the law disfavors retroactivity and a “statutory grant” of administrative

⁷ The statute does allow first-time objections in a petition for review for good cause shown. See 49 U.S.C. § 46110(d). Petitioner’s good cause for not previously raising any of the objections put forth in the present Petitioner’s Brief is that Respondent afforded him no notice and opportunity to do so.

authority “will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (finding retroactivity so disfavored that courts should be “reluctant” to allow it even where there exists “substantial justification”). No substantial justification for the Order exists, let alone an express statutory grant of retroactive authority that would allow Respondent to designate information as SSI more than three years after the fact.

To the contrary, Respondent faces an express statutory mandate to *remove* the SSI designation from most information that is three years old. See App. at 39-42, esp. 40 section 525. Respondent not only lacked statutory authority to designate the subject information SSI, Respondent had a statutory obligation *not* to do so.

Second, by issuing the Order retroactively, Respondent violated its own past practice. Although Mr. Colsky alleges that 49 C.F.R. § 1520 allows the retroactive designation of SSI after the information’s disclosure, he points to no specific provision to support that conclusion. See App. at 125-126. Moreover, Mr. Colsky, who has issued numerous orders, cannot recall one instance where he designated information as SSI after an employee had disclosed it to the public. App. at 125. The Order’s

retroactive timing sets it apart from all prior DHS orders and underscores its invalidity. In contrast to all prior orders, Respondent issued the Order years after the disclosure of the subject information, at a time when, by Respondent's own admission, the information was not SSI. App. at 129-130.

D. The Order Violates the Anti-Gag Statute by Spending Public Funds to Enforce a Non-Disclosure Regulation that Lacks Congressionally-Mandated Whistleblower Protection Language and by Curtailing Petitioner's Statutory Rights under the WPA

The Order and the regulation relied upon in therein violate the Anti-Gag Statute⁸ in six ways.

⁸ This appropriations amendment has been unanimously passed by Congress since 1988. The current version can be found in SEC. 820 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act of 2006, which became PL 109-115 on November 30, 2005: SEC. 820. "No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: 'These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the WPA (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling.' : Provided, that notwithstanding the preceding paragraph, a nondisclosure policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure forms shall also make it clear that they do not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law" (emphasis added).

First, the Anti-Gag Statute bans spending to implement or enforce any nondisclosure policies, rules or agreements that do not contain a specific addendum drafted by Congress. The addendum *must* contain a provision that states in part, “[t]hese restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by...section 2302(b)(8) of title 5, United States Code, as amended by the WPA (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats). . . .” See fn. 8 above. Neither the Order nor 49 C.F.R. § 1520 contained the mandatory addendum. As a result, Respondent’s expenditure of funds to terminate Petitioner’s employment and to implement and enforce the Order is in direct violation of the Anti-Gag Statute.

Second, in violating the Anti-Gag Statute, Respondent has committed still another violation of the WPA. As demonstrated in section A above, Petitioner’s disclosures fall within the ambit of WPA protection. Accordingly, Respondent may neither propose nor take any personnel action based on Petitioner’s protected disclosure. The primary intent of the Anti-Gag Statute is to prevent agencies from creating restrictions on unclassified information that would cancel these statutory disclosure rights. This is demonstrated by the statute’s direct reference to the WPA itself.

Respondent not only violated the letter of the Anti-Gag Statute, therefore, but the spirit of it as well.

Third, if Respondent had drafted its Order and its SSI regulations in compliance with the Anti-Gag Statute, neither would have prohibited Petitioner's disclosure. In other words, Respondent *created* Petitioner's alleged violation of 49 C.F.R. § 1520 by omitting the Anti-Gag Statute addendum stipulating that the regulation does not curtail any statutory protections for whistleblowing activity. As seen above, Petitioner's disclosures fell squarely within the WPA, and by law its language must supersede the regulatory provisions used to remove him.

Fourth, by omitting the Anti-Gag Statute addendum, Respondent's Order and SSI regulations violate the corresponding provisions for all DHS personnel. Respondent's violation of the Anti-Gag Statute in this instance appears to be deliberate because, as demonstrated by the DHS Non-Disclosure Agreement, Respondent is well aware of the required Anti-Gag Statute addendum. See App. at 43-45, esp. 45 section 14.

Fifth, Respondent's Order constitutes still another prohibited personnel practice under 5 U.S.C. § 2302(b)(12), which bans personnel actions that violate "any law, rule or regulation implementing or directly

concerning merit system principles.” The Anti-Gag Statute, which explicitly preserves the MSPB whistleblower right, constitutes such a law.

Sixth, Respondent’s violation of the Anti-Gag Statute is continuous and on-going because Respondent has not ceased spending funds throughout this litigation to enforce its Order and its SSI regulations. Even more damning, Respondent’s SSI regulations, which clearly qualify as a nondisclosure policy, continue to lack the provision required by the Anti-Gag Statute, creating the potential that Petitioner’s situation will be repeated endlessly.

E. The Order is Invalid because Respondent’s Failure to Follow Any of its SSI Policies with Respect to the Subject Information Conclusively Demonstrates that it was not SSI

On July 29, 2003, Respondent disseminated the subject text message through an insecure medium with no SSI markings, no distribution limitation statement, and no password protection. See App. at 88-89. This patent disregard for confidentiality demonstrates that the cancellation of RON missions was not, in fact, SSI. Respondent’s careless manner of disseminating the subject text message, which violated no fewer than four policies designed to protect against unauthorized disclosures, leaves no doubt that the information was never SSI.

First, Respondent enacted a policy document on November 12, 2002 entitled “Interim Sensitive Security Information, Policies and Procedures for Safeguarding Control.” App. at 46-58; see also App. at 116-124. This policy works in conjunction with 49 C.F.R. § 1520.7(j) and interprets it. App. at 124. According to the Interim SSI Policy, all SSI must be marked as such. App. at 47-49 and 119-120. The text message that Petitioner disclosed bore no SSI markings of any kind. App. at 88-89.

Second, the Interim SSI Policy required that any recipient of unmarked SSI mark the information prior to redistribution. App. at 47 and 120. Although Respondent distributed the text message to all FAMs and supervisors (App. at 88), no evidence exists that even one recipient marked the information as SSI. For example, Mr. Adams, the Special Agent in Charge of Respondent’s Office of Public Affairs, received the unmarked text message but did nothing to mark the message as SSI. App. at 88-91. The fact that neither the sender nor even one recipient of the subject text message put protective markings on it demonstrates that Respondent did not, in fact, consider this information to be SSI.

Third, in addition to appropriate SSI markings, the Interim SSI Policy required that SSI be labeled with a limited distribution statement. App. at 47-48 and 119. It is undisputed that Respondent disseminated the subject

text message with no limited distribution statement, again suggesting that Respondent did not consider this information to be SSI.

Fourth, the Interim SSI Policy provided that cellular telephones pose a heightened “risk of interception and monitoring” and therefore provided that “[i]ndividuals needing to pass SSI by telephone must avoid these devices unless the circumstances were exigent or the transmissions are encoded or otherwise protected.” App. at 52; see also App. at 121-122. The cancellation of RON missions was clearly not SSI because Respondent transmitted this information by text message to government-issued cellular telephones, without encoding, at a time when no exigent circumstances required it. Even assuming, for the sake of argument, that exigent circumstances did exist, the sender could have transmitted the subject information to the intended recipients’ password-equipped PDAs designed to allow access to authorized parties only. Perhaps that is why former Director Quinn assumed that FAMS would not transmit information by text message rather than by PDA. App. at 99. By transmitting the cancellation of RON missions by text message instead of by PDA, in the absence of exigent circumstances, Respondent demonstrated that it did not regard that information as SSI.

F. The Order is Invalid Because it Contradicts Respondent's Own Interpretation of SSI by Protecting Non-specific Information that Could Not Possibly be Used to the Detriment of Transportation Security

The information that Petitioner disclosed, the cancellation of RON missions, does not constitute SSI, as an examination of 49 C.F.R. § 1520.7(j) confirms. Respondent has taken great lengths to conceal its misuse of the regulation, including misidentifying the regulation that applies to Petitioner's disclosure; misquoting the applicable regulation; failing to specify how the subject information fits into the definition of SSI; disregarding the plain language of the regulation; ignoring its own interpretation of SSI; and overlooking the critical fact that Petitioner disclosed a mistaken, unauthorized, and premature decision to cancel RON missions, not an official FAMS action.

First, Respondent misidentified the regulation that applies to Petitioner's disclosure by charging Petitioner with violating an amended version of the regulation that did not exist at the time of Petitioner's disclosure. When Respondent removed Petitioner in April 2006 for allegedly disclosing SSI, the notice of removal alleged that Petitioner had

violated 49 C.F.R. § 1520.5(b)(8)(ii). App. at 1. This allegation was incorrect because, as the Order would later concede, a regulation with that citation was not in effect on July 29, 2003, the date of Petitioner’s disclosure. See E.R. at 1, fn. 1.

Second, Respondent also misquoted the applicable regulation, 49 C.F.R. § 1520.7(j), by omitting language that sets strict limits on what qualifies as SSI. According to the notice of removal, the regulation protects information concerning “deployments, numbers, and operations of... Federal Air Marshals.” App. at 1. Correctly stated, however, 49 C.F.R. § 1520.7(j) pertains to information concerning “*specific* numbers of Federal Air Marshals, deployments or missions...” (emphasis added). Respondent exaggerated the scope of the information that can be designated SSI by omitting the limiting word “specific,” which prefaces the term “numbers of Federal Air Marshals” and arguably modifies “deployments or missions” as well.⁹ This omission is particularly glaring in light of the opening words of 49 C.F.R. § 1520.7(j), which protect only “*specific* details of aviation security measures” (emphasis added).

Third, the Order fails to identify precisely how the information Petitioner disclosed fits within the regulatory definition of SSI. The Order

⁹ See section G below.

leaves this issue unresolved by offering the inconclusive statement that Petitioner disclosed information that “concerned specific FAM deployments *or* missions” (emphasis added). E.R. at 1. If the Order is Respondent’s position on the question of which term – deployment or missions – describes the content of Petitioner’s disclosure, then Respondent takes no position. After all, the Order does not specify whether Petitioner’s disclosure concerned deployments or missions, although Mr. Colsky, Respondent’s designated expert on SSI, maintains that the two terms have different meanings and are not co-extensive. App. at 112.

Fourth, the Order disregards the plain language of 49 C.F.R. § 1520.7(j) by making no findings of fact pertaining to the *specificity* of the subject information. As demonstrated above, Respondent previously obscured an essential limitation on SSI by omitting the word “specific” from the notice of removal. The Order continues this obfuscation by omitting any supporting evidence for its bald assertion that the information Petitioner disclosed “concerned *specific* FAM deployments or missions on long-distance flights.” E.R. at 1. The Order cites no findings of fact to show that the subject information was specific, and Mr. Colsky, who authored the Order, admits that his only training on how to interpret the word “specific” was “high school.” App. at 111.

Contrary to the Order, the cancellation of RON missions was not specific information as contemplated under 49 C.F.R. § 1520.7(j) because it is not at all clear which flights involve RON missions. While Petitioner disclosed the fact that RON missions would be canceled, he disclosed no information that would assist anyone with the intent to harm aviation security in determining which flights involve RON missions. Neither did Petitioner disclose any information about whether, where, when, why or how Respondent would reassign FAMs previously scheduled to perform RON missions, if any. For a member of the general public, therefore, the information that Petitioner disclosed would be entirely insufficient to determine whether any particular flight would or would not enjoy FAM protection.

Former Director Quinn admitted that the information Petitioner disclosed did not concern “an individual Federal Air Marshal team or an individual situation.” App. at 102. Rather, the information was so broad and general that it concerned “the entire responsibilities of TSA and the Federal Air Marshal Service” – indeed, “the entire aviation domain.” Id. Accordingly, Petitioner did not disclose *specific* information concerning FAM deployments or missions as contemplated by 49 C.F.R. § 1520.7(j).

Fifth, the Order ignores Respondent's own interpretation of SSI. When the undersigned counsel asked Mr. Colsky whether a disclosure that Respondent "deploys hundreds of thousands of Air Marshals" would constitute SSI under 49 C.F.R. § 1520.7(j), Mr. Colsky replied that "[a] statement that broad and general couldn't possibly be used to the detriment of the security of transportation" and therefore would not constitute SSI. App. at 131.

But Petitioner's disclosure that RON missions would be canceled was also broad and general. From the mere fact that RON missions would be canceled, someone with the intent to impair aviation security could find no assistance. After all, only FAMs and TSA supervisors know which flights require RON missions. Petitioner's disclosure could not possibly have been used to the detriment of the security of transportation because it gave potential terrorists no information regarding specific FAM deployments or missions. Petitioner disclosed that RON missions would be canceled, but he did not indicate which flights involve RON missions. Without that knowledge, a potential terrorist could not make no use of Petitioner's disclosure.

Sixth, the decision to cancel RON missions was not an official FAMS action; it was a premature, unauthorized, and mistaken decision that

Respondent immediately corrected. App. at 6, 100-101 and 103.

Petitioner's disclosure could not possibly be used to the detriment of the security of transportation, therefore, because Respondent did not actually cancel the RON missions. See App. at 6; see also App. at 65-66. With FAMs continuing to perform RON missions, Petitioner's disclosure could not possibly have helped any terrorist activity to succeed. Instead, Petitioner's disclosure helped Respondent to correct a very serious mistake that threatened to undermine its core mission of ensuring aviation security.

G. The Order is Invalid Because it Applies an Ambiguous Regulation that must be Construed Against the Drafting Party

The information Petitioner disclosed is not SSI because the regulation upon which the Order relies is ambiguous as to whether non-specific information can qualify as SSI. From its plain language, 49 C.F.R. § 1520.7(j) covers only "specific" information concerning FAM deployments or missions, whereas Petitioner disclosed only broad and general information. Although Respondent's SSI expert puts forth the unreasonable suggestion that 49 C.F.R. § 1520.7(j) does not require that information concerning FAM deployments or missions be "specific" in order to qualify as SSI, Respondent concedes that the regulatory language is ambiguous on this point. See App. at 113-114 (wherein TSA counsel admits that the regulation "may be ambiguous" and Respondent's designated expert on SSI,

Andrew Colsky, admits that he is “not sure” that specific modifies the terms that follow it); see also id. at 115 (wherein Mr. Colsky testifies that a reasonable person could interpret the regulation as requiring that all information, not just FAM numbers, be specific). Petitioner’s position is that this is, in fact, the most reasonable interpretation of the regulation. If Petitioner’s interpretation is not correct, however, then the regulation is ambiguous and must be construed against the drafting party.

In support of Petitioner’s interpretation, subsequent iterations of Respondent’s SSI regulation omit the word “specific,” suggesting that the word had a limiting effect in prior iterations, including the version in effect on July 29, 2003. Compare 49 C.F.R. § 1520.7(j) and 49 C.F.R. §1520.5(b)(8)(ii). This conclusion takes additional support from the fact that 49 C.F.R. § 1520.7(j) required a policy document “interpreting what is protected” (App. at 123), together with the fact that a subsequent version of the regulation made “a lot of clarifications” (App. at 110), including an alteration to the very language Petitioner’s disclosure supposedly violated. This subsequent shift in the regulatory language demonstrates that 49 C.F.R. § 1520.7(j), the SSI regulation in effect in July 2003, did not put Petitioner on clear notice of what information was SSI.

Respondent cannot evade this argument even by offering an alternative interpretation of the regulation, which would only confirm that the regulation is ambiguous. Moreover, the Order supports Petitioners' interpretation by alleging that the information Petitioner disclosed was "specific." E.R. at 1. This allegation is incorrect, but it reveals the fatal ambiguity in Respondent's treatment of SSI.

On the one hand, the Order clearly suggests that SSI must be specific information (E.R. at 1); 49 C.F.R. § 1520.7(j) defines SSI to include only specific information; and Respondent's SSI expert maintains that broad and general information cannot be SSI (App. at 131). On the other hand, Respondent maintains that information concerning FAM deployments or missions can be non-specific and still qualify as SSI. App. at 114. This implausible interpretation must be rejected, however, in favor of the conclusion that Respondent's interpretation of SSI is as ambiguous as 49 C.F.R. § 1520.7(j) itself.

Not only is 49 C.F.R. § 1520.7(j) ambiguous, but in July 2003 Respondent had no effective policies or procedures for applying the regulation correctly. Indeed, the Government Accountability Office determined that as late as June 2005 Respondent had no "written policies or procedures... providing criteria for determining what constitutes SSI." App.

at 80. Almost two years after Petitioner's disclosure, Respondent still "[had] not developed policies and procedures for providing specialized training for all of its employees making SSI designations on how information is to be identified and evaluated for protected status." App. at 76.

As a result of the ambiguity in 49 C.F.R. § 1520.7(j), and Respondent's failure to provide any clarification or guidance, the regulation must be construed against Respondent. The Order cannot be valid, therefore, because it relies on an ambiguous regulation that failed to give Petitioner clear notice of what information constitutes SSI.

H. The Order is Invalid Because its Purpose is Forum Shopping

Although the Order claims "to facilitate judicial review" of Respondent's SSI determination (E.R. at 1), the Order deprives Petitioner of his right to appeal his removal to the MSPB. Pursuant to 5 U.S.C. § 7701, Petitioner may challenge Respondent's April 10, 2006 Notice of Removal by demonstrating to the MSPB that Respondent cannot prove that Petitioner made an unauthorized disclosure of SSI, the charged misconduct. The Order attempts to curtail Petitioner's appeal rights by eliminating the MSPB's jurisdiction over the issue of whether the information Petitioner disclosed was SSI, an essential element of the charge. Accordingly, TSA pleadings shift from the premise that 49 U.S.C. § 46110 does not allow the MSPB to

review the Order to the conclusion that the MSPB “does not have jurisdiction to review the Agency’s SSI determination *underlying the charge.*” App. at 31 (emphasis added).

This is, of course, a non sequitur. The Order is not at all the SSI determination underlying Respondent’s removal action. Indeed, Respondent did not issue the Order until well after Petitioner appealed his removal to the MSPB. Although the Order purports to facilitate judicial review, its clear purpose is to avoid judicial review of the ad hoc SSI determination that preceded the Order and formed the basis for Petitioner’s removal. In other words, the Order’s clear purpose is to deny Petitioner his right to appeal Respondent’s charge to the MSPB.

Moreover, the Order facilitates a reduction in the evidentiary standard upon which judicial review will proceed. The MSPB reviews Respondent’s removal action, including its underlying SSI determination, by a fair preponderance of the evidence. By issuing the Order, Respondent reduces the standard of review to the more favorable substantial evidence standard. See 49 U.S.C. § 46110(c). Respondent’s exercise in forum shopping demonstrates that its SSI determination contradicts the preponderance of the evidence. The Order should be set aside, therefore, because it makes no

attempt to protect SSI but is rather a cynical attempt to protect Respondent's unlawful and retaliatory removal action.

VII. CONCLUSION

For the reasons stated above, the Order is unsupported by substantial evidence and must be set aside.

STATEMENT OF RELATED CASES

Petitioner is unaware of any cases related to this matter.

CERTIFICATE OF SERVICE

I, Peter H. Noone, Esquire, certify that I have this 29th day of January, 2007, served the within document, by Overnight Mail to:

Eric Fleisig-Greene
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave, NW, Room 7214
Washington, DC 20530

Douglas N. Letter
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave, NW, Room 7214
Washington, DC 20530

Peter H. Noone