



In the Matter of:

GUY F. COBB,

ARB CASE NO. 12-052

COMPLAINANT,

ALJ CASE NO. 2010-AIR-024

v.

DATE: December 13, 2013

FEDEX CORPORATE SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Guy Cobb; *pro se*, Cordova, Tennessee

For the Respondent:

Kimberly Hodges, Esq.; *FedEx Corporate Services, Inc.*, Memphis, Tennessee

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Corchado, concurring.

DECISION AND ORDER OF REMAND

The Complainant, Guy F. Cobb, filed a complaint alleging that FedEx Corporation (FedEx Corp.) retaliated against him in violation of 49 U.S.C.A. § 42121, the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ On January 20, 2012, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Granting Respondent's Motion for Summary Decision (D. & O.) dismissing Cobb's complaint based upon his finding that Respondent, FedEx Corporate

¹ 49 U.S.C.A. § 42121 (Thomson/West 2007).

Services (FedEx Services) was not an employer covered by Section 42121 because FedEx Services did not provide “safety sensitive functions” by contract to FedEx Express. For the following reasons, we reverse the ALJ’s D. & O. granting dismissal and remand for proceedings consistent with this decision.

BACKGROUND

FedEx Services employed Cobb from December 30, 2003, until it terminated his employment on November 13, 2009. Declaration of Jean Miller at 2. FedEx Services is a subsidiary of FedEx Corp. D. & O. at 3. The FedEx family includes the parent company (FedEx Corp.) and seven operating companies – FedEx Express, FedEx Ground, FedEx Freight, FedEx Office, FedEx Custom Critical, FedEx Trade Networks, and FedEx Services. Declaration of Jean M. Miller. FedEx Express operates a large fleet of cargo-carrying airplanes and is an “air carrier” within the meaning of Section 42121. *Id.*

Cobb was employed by FedEx Services as a Senior Project/Process Analyst in the Business Continuity and Disaster Recovery (BCDR) group.² In November 2006, Cobb and other BCDR members toured the Hurricane Creek Tunnel, a tunnel infrastructure located beneath the Memphis International Airport where FedEx Express maintains its SuperHub facilities. FedEx Corp.’s underground data networks are buried near the Hurricane Creek tunnels. The Memphis Airport, FedEx’s SuperHub and the Hurricane Creek Tunnel are located within 100 miles of the New Madrid Fault line and Cobb’s tour of the tunnels was part of a major FedEx effort to assess its vulnerability in the event of a major earthquake or terrorist attack.

In December of 2006, Cobb drafted a report, entitled Enterprise Vulnerability Study, in which he documented his concerns that both the runway and the Hurricane Creek Tunnel beneath it were structurally unsound and would “not be able to support the landing of a fully loaded (1.7 million pound) [Airbus] A380 on runway 9/27.” At the end of 2006 and in early 2007, Cobb shared his report and/or concerns with managers at FedEx Services, FedEx Corp., and FedEx Express as well as with the Memphis Shelby County Airport Authority (MSCAA). MSCAA provided Cobb with an engineering study which concluded that the tunnels and runway would be safe for the A380 aircraft. Around the same time, FedEx Corp. cancelled its order of A380 aircraft and announced it would be purchasing Boeing 777 airplanes. Thereafter Cobb expressed concerns to FedEx Services managers and MSCAA that the tunnel and runway would not be able to withstand landings of the Boeing 777 aircraft. In January 2007, MSCAA informed Cobb that it had an active contract to evaluate the ability of the airfield and all supporting infrastructure to safely handle the Boeing 777s. On January 24, 2007, Cobb presented the findings contained in his Enterprise Vulnerability Study to FedEx Express managers. On October 31, 2008, Cobb sent a copy of his Enterprise Vulnerability Study to FedEx Express Manager, Randy DiGirolamo. Several weeks later, MSCAA announced that the “antiquated” runway 9/27 would undergo a \$53 million reconstruction.

² These background facts are taken from the ALJ’s D. & O. and from Complainant’s Response to Respondent’s Motion for Summary Judgment. We view the facts in the light most favorable to Cobb, the party responding to a motion for summary decision.

FedEx Services terminated Cobb on November 13, 2009. His termination letter stated that he was fired for sharing his discounted shipping privileges with his mother in violation of the employee shipping policy of FedEx Services. Cobb claims that the policy did not exist when FedEx Services originally hired him and that his understanding of the policy was based upon the practice of his former brother-in-law, a FedEx Express pilot, who routinely shared his discount shipping privileges with his relatives.

Cobb filed a complaint with OSHA on November 30, 2009, against Federal Express Corp. alleging that Federal Express Corp. terminated his employment because he raised airline safety concerns about the stability of a tunnel under runway 9/27 at the Memphis International Airport. OSHA Case Activity Worksheet, Objection to Respondent's Access to Complainant's Unredacted OSHA case file, Exhibit 2.

On December 7, 2009, OSHA sent a letter to Lynn Diebold, FedEx Corp., to serve FedEx Corp. with notice that Cobb filed his complaint. On the same day, OSHA sent a letter to Cobb informing him that it had received his complaint of retaliation against FedEx Corp.

In response to the letter from OSHA, FedEx Corp. stated that Cobb never worked for FedEx Corp., but that he instead worked for FedEx Services. FedEx Corp. also denied that FedEx Services discriminated against Cobb. Although Cobb originally filed his complaint against FedEx Corp., at some point during the investigatory stage, it appears that OSHA substituted FedEx Services as the named party. The record on appeal does not reflect why this substitution was made.

OSHA issued the Secretary's Findings denying Cobb's complaint on June 10, 2010. OSHA stated that it was dismissing Cobb's complaint because the preponderance of the evidence indicated that his protected activity was not a contributing factor in his termination. Regarding coverage, OSHA wrote that FedEx Services was "an air carrier within the meaning of 49 U.S.C. § 40102(a)(2) because it performs safety-sensitive functions for Federal Express Corp., an air carrier." OSHA Findings at 1.

Cobb filed a timely request for hearing with the ALJ.

Before the ALJ, Cobb moved to amend his complaint to include FedEx Corp., FedEx Express, and FedEx Office as respondents. ALJ Order Ruling on Complainant's Motion to Amend the Complaint at 1 (June 3, 2011).³ He contended that each of them was involved in his termination. *Id.*

FedEx Services objected to Cobb's Motion to Amend the Complaint. It stated that the Secretary's Findings indicated that Cobb's complaint was against his employer, FedEx Services

³ While there are numerous references to Cobb's motion to amend in other pleadings, we note that we have been unable to find a copy of the motion in the record.

and that Cobb's "OSHA complaint was not against any other entities." FedEx Services Opposition to Cobb's Request to Amend His Complaint, at 1-2 (Apr. 18, 2011).

Cobb next filed a Motion to Compel and Response to Respondent's Objection to Complainant's Request to Amend the Complaint in which he explained that his original complaint was against FedEx Corp. and submitted evidence of such including OSHA's Case Activity Worksheet and correspondence to and from OSHA listing FedEx Corp. as the named party. He also explained that he chose to name FedEx Corp. "to include all subsidiary parties from Federal Express Corp.'s multiple operating companies responsible for the retaliation effort that led to [his] termination." Motion to Compel at 2. He argued that there was no authority for removing FedEx Corp. as the named party, that his Motion to Amend to add additional parties should be granted, and that at a minimum, FedEx Corp. should be returned as a party of record. On June 3, 2011, the ALJ denied Cobb's motion to amend the complaint to include FedEx Corp., FedEx Express, and FedEx Office. Order at 2.⁴

FedEx Services filed a Motion for Summary Decision arguing that the ALJ should dismiss Cobb's complaint because he failed to raise a genuine issue of material fact establishing that FedEx Services was a covered entity, that he engaged in protected activity, that FedEx Services knew about Cobb's protected activity, or that his protected activity contributed to the adverse action taken against him. FedEx Services also argued that it could establish by clear and convincing evidence that it would have terminated Cobb's employment absent any protected activity. Cobb filed a response in opposition to FedEx Services' Motion for Summary Decision in which he disputed that there were no genuine issues of material fact and counter moved for summary decision.

The ALJ granted FedEx Services' Motion for Summary Decision and dismissed the case. He based his decision upon his finding that Respondent FedEx Services was neither an air carrier nor a contractor of an air carrier and therefore was not covered under the AIR 21 whistleblower statute.⁵ Cobb filed a timely petition for review with the Board.

⁴ The record reflects that FedEx Corp. was named as respondent in Cobb's original complaint filed with OSHA on November 30, 2009. Sometime thereafter, it appears that OSHA dismissed FedEx Corp. as respondent and substituted FedEx Services.⁴ No reason for this substitution is apparent from the record. After Cobb requested a hearing, he attempted to amend his complaint before the ALJ to restore FedEx Corp. as a respondent and to add FedEx Express and FedEx Office as additional respondents. The ALJ denied Cobb's motion to amend by order dated June 3, 2011. Cobb did not appeal this ruling so we decline to formally address the issue. We note however that we have ruled that ALJs should liberally grant whistleblower complainants leave to amend their complaints. *Evans v. U.S. Env'tl. Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 11 (ARB July 31, 2012) (citations omitted). Especially given that Cobb initially named FedEx Corp. as the respondent, the ALJ may have erred in disallowing Cobb to amend his complaint to allege direct liability by FedEx Corp.

⁵ The ALJ denied Cobb's Motion for Summary Decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under Section 42121 and its implementing regulations.⁶

We review an ALJ's decision granting summary decision de novo.⁷ An ALJ may issue a summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law.⁸ The party opposing a summary decision motion may not rest upon mere allegations or denials of such pleading.⁹ Rather, the response must set forth specific facts showing that there is a genuine issue of fact for determination at a hearing.¹⁰ The ARB will affirm an ALJ's recommended granting of summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.¹¹

DISCUSSION

1. Legal Standard

Section 42121 provides that “[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any

⁶ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); see 29 C.F.R. Part 1979.110(a) (2013).

⁷ *Peters v. American Eagle Airlines, Inc.*, ARB No. 08-126, ALJ No. 2007-AIR-014, slip op. at 3 (ARB Sept. 28, 2010) (citation omitted).

⁸ *Id.*; see also 29 C.F.R. Part 18.40(d) (2013).

⁹ 29 C.F.R. § 18.40(c).

¹⁰ *Id.*

¹¹ *Peters*, ARB No. 08-126, slip op. at 3.

person acting pursuant to a request of the employee) (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States”

The term “contractor” under Section 42121 is defined at (e) as “a company that performs safety-sensitive functions by contract for an air carrier.”

2. Positions of the Parties

FedEx Services maintains that it is neither an “air carrier” under Section 42121, nor a covered contractor since it does not provide FedEx Express with “safety-sensitive functions.” According to FedEx Services, it began operations to provide information technology, sales, and marketing support for FedEx Corp., and its subsidiaries FedEx Express and FedEx Ground. Declaration of Jean M. Miller at 1. FedEx Services asserts that it “coordinates sales, marketing, information technology, customer service, and worldwide supply chain services support for the FedEx Brand. This includes the data management and networking expertise behind the package tracking capabilities for FedEx Express, FedEx Ground and FedEx Freight” D. & O. at 5 (citing Respondent’s Brief Exhibit C). FedEx Services denies that these responsibilities implicate the provision of “safety sensitive functions.”

Cobb maintains that FedEx Services affords many additional services to FedEx Corp. and FedEx Express including providing “critical data security protection for all of FedEx Corp.’s global systems including those of FedEx Express.” D. & O. at 5 (citing Complainant’s Brief at 6). Cobb explains that cargo tracking is an essential safety and security function that FedEx Services supplies to FedEx Express through its information management and networking capability: “this is especially true when you consider that FedEx Express cargo planes transport hazardous, radioactive, chemical and biological materials. The responsibility for tracking these hazardous materials and all FedEx Express packages resides within FedEx Corporate Services.” Cobb’s Motion for Recon. at 2.

Cobb argues that FedEx’s 2011 Annual Statement provides “proof of the contractual obligations in place between FedEx Services and FedEx Express and the explanation as to how these services are charged to FedEx Express.” Complainant’s Motion for Recon. at 4-5. The Annual Statement states that “[t]he FedEx Services segment operates combined sales, marketing, administrative and information technology functions in shared services operations that support our transportation businesses” Further, “[t]he FedEx Services segment provides direct and indirect support to our transportation businesses, and we allocate all of the net operating costs of the FedEx Services segment . . . to reflect the full cost of operating our transportation businesses in the results of those segments.” *Id.* at 4. “The operating expense line item ‘Intercompany charges’ on the accompanying unaudited financial summaries of our transportation segments in MD&A reflects the allocations from the FedEx Services segment to the respective transportation segments.” *Id.* at 5. Cobb asserts that at one time, all departments within FedEx Services were “located within the FedEx Express family prior to being migrated to” FedEx Services. *Id.* at 6.

Cobb submitted statements of fact to support his original evidence specific to his job functions within FedEx Services including that: 1) FedEx Services performs package tracking capabilities for FedEx Express, 2) the Disaster Recovery and Business Continuity Team was established in response to the events of 9/11, and 3) he had to be fingerprinted and go through an FBI background check before he could get a “Ramp Access” badge that allows him access to the SuperHub, terminal gates, and aircraft. Cobb argues these duties demonstrate that he provides safety sensitive functions to FedEx Express. Cobb’s Motion for Recon. at 5-6. He asserted that the “level of security further supports the fact that FedEx Services is providing safety sensitive functions for FedEx Express and for which FedEx Express is paying for these services by way of “Intercompany Charges.” *Id.* at 6.

3. The ALJ’s D. & O.

The ALJ held that FedEx Services was not a covered employer under the whistleblower provisions of AIR 21. The ALJ’s analysis focused on whether FedEx Services was a contractor of an air carrier within the meaning of Section 42121. D. & O. at 4. Section 42121 defines a “contractor” as a company that performs “safety-sensitive functions by contract for an air carrier,” but, as the ALJ acknowledged, neither the statute nor the implementing regulations define “safety-sensitive function.” So the ALJ turned to the definition of “safety-sensitive function” contained in FAA drug and alcohol testing regulations. *Id.* at 9. “Safety-sensitive functions” under those regulations include flight crewmember duties, flight attendant duties, flight instruction duties, aircraft dispatcher duties, aircraft maintenance and preventive maintenance duties, ground security coordinator duties, aviation screening duties, and air traffic control duties.¹² Noting that safety-sensitive functions under the FAA drug testing regulations are not directly applicable to the whistleblower protection program, the ALJ nevertheless determined that the terms should be similarly interpreted. The ALJ held that “safety-sensitive” functions referred “to activities directly and immediately related to the flight and maintenance of aircraft rather than to information security and the other corporate security functions that the Complainant has described.” *Id.* In this manner, the ALJ ultimately concluded that FedEx Services was not a contractor of FedEx Express because it never performed “safety-sensitive” functions within the meaning of Section 42121.¹³ *Id.* at 10.

As for coverage as an “air carrier,” the ALJ determined that while FedEx Express was “clearly an air carrier,” FedEx Services was *not* an air carrier because the company “does not own or operate any aircraft.” D. & O. at 4. This was error. Undisputed facts of record establish that that FedEx Services is an “air carrier” within the meaning of AIR 21.

¹² 14 C.F.R. Parts 120.105, 120.215 (2013).

¹³ We note however that in Department of Labor comments accompanying the final rule implementing § 42121, the Department stated that “OSHA agrees that ‘safety-sensitive functions’ include security-related activities” 68 Fed. Reg. 14100-01, 14101 (Mar. 21, 2003), 2003 WL 1386603(F.R).

4. Whether FedEx Services is an air carrier under AIR 21

Section 42121 provides that “[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee” for engaging in protected activity. An “‘air carrier’ means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”¹⁴ “Air transportation means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.”¹⁵ Foreign air transportation is “the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft.”¹⁶ And interstate air transportation is

the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft (A) between a place in (i) a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States; (ii) Hawaii and another place in Hawaii through the airspace over a place outside Hawaii; (iii) the District of Columbia and another place in the District of Columbia; or (iv) a territory or possession of the United States and another place in the same territory or possession; and (B) when any part of the transportation is by aircraft.^[17]

The initial question to be answered is whether FedEx Services may be considered an “air carrier” – that is, an entity “undertaking by any means, directly or indirectly, to provide air transportation” - for purposes of Section 42121, AIR 21’s whistleblower provision. FedEx Services does not *directly* provide air transportation; it does not own or operate aircraft or employ pilots. However, it is an entity directly charged with maintaining the security of “air carriers” and its services are integral to Fed Ex’s provision of air transportation. We find that it undertakes to *indirectly* provide air transportation as a matter of both law and fact and must therefore be considered an “air carrier” for purposes of Section 42121.

Fundamental principles of statutory construction dictate that, in determining whether FedEx Services is an air carrier under Section 42121, we look to “the language of the statute

¹⁴ 49 U.S.C.A. § 40102(a)(2)(Thomson/West 2007 & Supp. 2013); 29 C.F.R. § 1979.101.

¹⁵ 49 U.S.C.A. § 40102(a)(5).

¹⁶ 49 U.S.C.A. § 40102(a)(23).

¹⁷ 49 U.S.C.A. § 40102(a)(25).

itself”¹⁸ and to the implementing regulations,¹⁹ which we are bound to observe.²⁰ The statutory and regulatory definition of air carrier is “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”²¹ The statutory definition of “air carrier” is not contained within Section 42121 but is found at 49 U.S.C.A. §40102(a)(2). Section 40102(a)(2) is a general definition applicable to Part A – Air Commerce and Safety, which includes Section 42121, “Protection of employees providing air safety information at Subchapter III – Whistleblower Protection Program.” This pre-existing statutory definition was adopted without change into the program-specific regulations governing Section 42121.²²

The statutory definition of “air carrier” predates enactment of the AIR 21 whistleblower provisions and is similar in form to the definition contained in the Federal Aviation Act of 1958.²³ Federal aviation law has historically recognized two types of air carriers – direct and indirect.²⁴ Although there are no statutory criteria for determining an indirect air carrier, many courts have addressed the term in the context of the economic regulation of the aviation industry. Generally speaking, indirect air carriers are defined as those who “hold out a transportation service to the public under which they utilize the services of a direct carrier for the actual transportation by air.”²⁵ For example, travel agencies are considered to be “indirect air carriers” and subject to regulation under federal aviation law.²⁶ This precedent is not particularly helpful

¹⁸ *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). See, SINGER & SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION, § 46.1 (7th Ed.).

¹⁹ *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 277-78 (2009).

²⁰ Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012) (“The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.”).

²¹ 49 U.S.C.A. § 40102(a)(2); 29 .CF.R § 1979.101.

²² 68 Fed. Reg. 14100-01 (Mar. 21, 2003); 2003 WL 1386603.

²³ The Federal Aviation Act of 1958, 49 U.S.C. § 1303(3) provided: “‘Air carrier’ means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.”

²⁴ *DHL Corp. v. C.A.B.*, 584 F.2d 914, 915 (9th Cir. 1978).

²⁵ *Id.*; see also *McLaughlin v. TWA Getaway Vacations, Inc.*, 979 F. Supp. 174, 175-176 (S.D.N.Y. 1997); *Arkin v. Trans Int’l Airlines, Inc.*, 568 F. Supp. 11, 13 (E.D.N.Y. 1982).

²⁶ *Id.*

in interpreting “air carrier” in the context of whistleblower law, given its origin in economic regulation, but the case law is consistent with the interpretation we explain below.

For purposes of the present case, the key words are “undertaking *by any means*” to “*indirectly*” provide air transportation. The repeated use of broad language in the AIR 21 statute indicates Congress’s intent that the definition of “air carrier” be expansively construed.²⁷ Furthermore, by prohibiting “contractors and subcontractors,” as well as air carriers, from retaliating against employees for engaging in protected activity, Congress conveyed a clear aim to promote comprehensive aviation safety.²⁸ A final imperative to broadly define the scope of coverage derives from precedent under which whistleblower statutes “are intended as remedial measures to be broadly construed.”²⁹

Instead of applying the requisite expansive interpretation of “air carrier,” the ALJ improperly narrowed the meaning by concluding that FedEx Services does not qualify as an “air carrier” because it does not own or operate any aircraft. However, neither the statute nor the implementing regulations include such a requirement. Rather, AIR 21 covers entities that provide air transportation “directly or *indirectly*.”³⁰

Our holding in *Evans v. Miami Valley Hosp.* is instructive in this regard.³¹ In *Evans*, the evidence established that Miami Valley Hospital (MVH) owned three helicopters and contracted with another company to furnish pilots and mechanics for MVH’s air ambulance service called CareFlight. MVH neither directly employed pilots nor possessed an air certificate. Nevertheless, the ARB held that MVH *indirectly* provided air carrier services, which made it an air carrier within the meaning of Section 42121.³² Similarly, as explained below, FedEx

²⁷ See *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 383-84 (1992) (expansive scope of a statute is apparent from broadly worded statutory language); *Brumbelow v. Law Offices of Bennett & Deloney, P.C.*, 372 F. Supp.2d 615, 621 (D. Utah 2005) (“Where Congress has chosen to use broad language, that language should be given its full effect, no matter how sweeping.”).

²⁸ See, e.g., *Fleszar v. U.S. Dept. of Labor*, 598 F.3d 912, 915 (7th Cir. 2010) (“In context, ‘contractor, subcontractor, or agent’ sounds like a reference to entities that participate in the [parent’s] activities.”).

²⁹ *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 15 n.73 (ARB Dec. 29, 2010) (citing *Kansas Gas & Electric Co.*, 780 F.2d 1505 (10th Cir. 1985) (discussing the Energy Reorganization Act)).

³⁰ 49 U.S.C.A. § 40102(a)(2) (*italics added*).

³¹ *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-002, slip op. at 9 (ARB June 30, 2009).

³² *Id.*

Services *indirectly* provides air carrier services to FedEx Express - FedEx Services is therefore itself an “air carrier.”³³

Undisputed facts in the record before us demonstrate that FedEx Services “indirectly” provides for air transportation; in other words, FedEx Services operations are essential for the air transportation FedEx Express conducts. FedEx Services has asserted that it coordinates information technology as well as worldwide supply chain services support for the FedEx Brand. D. & O. at 5; Decl. Miller at 2. It has also stated that it coordinates data management and networking expertise behind the package tracking capabilities for FedEx Express, which is an air carrier because it engages in “express transportation” of “property by aircraft as a common carrier for compensation.”³⁴ *Id.*; see also D. & O. at 3 (FedEx Express “is clearly an air carrier within the meaning of AIR 21.”). Indeed, FedEx Services began operations “to provide information technology, sales, and marketing support for FedEx Corporation and two of its operating companies – FedEx Express and FedEx Ground.” FedEx Services Memo in Support of Motion for Summary Dec. at 2. Further, FedEx Services’ 2011 Annual Statement states that its “segment” “operates combined sales, marketing, administrative and information technology functions in shared services operations that support our transportation businesses” The Annual Statement goes on to say that the FedEx Services “segment provides direct and indirect support to our transportation businesses” and indicates that the net operating costs of FedEx Services are allocated “to reflect the full cost of operating our transportation businesses” Furthermore, there is no dispute that Cobb, as a Senior Analyst in the Business Continuity and Disaster Recovery group of FedEx Services had responsibilities related to disaster planning and corporate security.

Given this information about FedEx Services and its role vis-à-vis FedEx Express, it is clear that the operations of FedEx Services are integral to FedEx Express’s operation as an air carrier. Information technology services, cargo tracking operations and disaster and security planning are essential, albeit indirect, components of the integrated all-cargo air service provided by FedEx Express. AIR 21 covers companies that directly or indirectly provide foreign and interstate air transportation of property for compensation.³⁵ FedEx Corp. has fragmented its different departments and formed at least seven operating companies that are each potentially vital to its role as an air carrier. As a “segment” or piece of the whole that provides “direct and indirect support to” FedEx Brand transportation businesses including FedEx Express, FedEx

³³ See also, *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-032, slip op. at 34-35 (ALJ Dec. 11, 2007) (finding that BAA - which operates an airport terminal, maintains the airfield, and manages the airport information systems – is an indirect air carrier under § 42121 because its services “have a direct impact on the safety and well-being of the airlines and the passengers they carry. The maintenance of safe and secure runways on which airplanes take off and land is just as crucial to airline safety as the services provided by airline employees.”)

³⁴ Comp. Br., Ex. 2, Comp. Mot. For Recon., Ex. 2, titled “Note 13: Business Segment Information,” FedEx Corp.’s 2011 Annual Report (this document states that FedEx Express provides express transportation.); 49 U.S.C.A. §§ 40102(a)(23), (25).

³⁵ 49 U.S.C.A. §§ 40102(a)(23), (25).

Services is an air carrier as well. The technicalities of corporate structure may not act to shield operating “segments” of an air carrier from their air safety obligations as an air carrier under AIR 21. In conclusion, FedEx Services is an air carrier covered under Section 42121 because it indirectly provides air transportation support to the operations of FedEx Express, an “air carrier.”³⁶

We base this determination on the plain statutory language. However, the legislative history of both AIR 21 generally and Section 42121 specifically provide additional support for our conclusion.³⁷ The legislative history of the substantive statute leaves little doubt that in enacting AIR 21 Congress aimed to initiate “broad, fundamental improvements in aviation safety.”³⁸ AIR 21 contained wide ranging reforms to the U.S. aviation system intended “to ensure that we continue to have the safest, most efficient aviation system well into the 21st century.”³⁹ The whistleblower provisions contained in AIR 21 have the additional focus of protecting air industry employees who disclose violations of FAA laws and regulations.⁴⁰ This focus nevertheless “must be viewed primarily as a means for achieving AIR 21’s greater aviation safety goals.”⁴¹ The legislative history of the AIR 21 whistleblower provisions, while sparse,

³⁷ For a comprehensive analysis of the legislative history of both AIR 21 and § 42121 see *Dos Santos v. Delta Airlines, Inc.*, ALJ No. 2012-AIR-020, slip op. at 21-25 (Jan. 11, 2013) .

³⁸ Statement of the President of the United States Signing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 36 WEEKLY COMP. PRES. DOC. 745-47 (Apr. 6, 2000) (2000 WL 351911); *see also*, 146 CONG. REC. H1002-01, H1009 (daily ed. Mar. 15, 2000) (statement of Rep. Kelly) (“let there be no mistaking that our fundamental purpose here for undertaking this initiative is to ensure the safety of the traveling public.”). *See generally* *Dos Santos*, ALJ No. 2012-AIR-020, slip op. at 22-25 (for a comprehensive discussion of the legislative history of both AIR 21 and Section 42121).

³⁹ 146 CONG. REC. S1247-07, S1247 (daily ed. Mar. 8, 2000) (statement of Sen. Gorton). *See also* 146 CONG. REC. H1002-01, H1008 (daily ed. Mar. 15, 2000) (statement of Rep. Boehlert) (“That is our overarching objective, to maintain an aviation system that continues to be the finest and safest in the world.”).

⁴⁰ Mr. Shuster, from the Committee on Transportation and Infrastructure, submitted a report explaining that Title VI of the proposed Act, “would provide whistleblower protection for employees of air carriers who notify authorities that their employer is violating a federal law relating to air carrier safety” Aviation Investment and Reform Act for the 21st Century, House Rept. 106-167, May 28, 1999, Supplemental Report at 3.

⁴¹ *Dos Santos*, ALJ No. 2012-AIR-020, slip op. at 24; *see also*, 146 CONG. REC. S1247-07, S1252 (daily ed. Mar. 8, 2000) (statement of Sen. Grassley) (“Whistle-blower protection adds another, much needed, layer of protection for the traveling public using our Nation’s air transportation system.”); 146 Cong. CONG. REC. S1255-01, S1257 (daily ed. Mar. 8, 2000) (statement of Sen. Hollings) (AIR 21 includes “whistleblower protection to aid in our safety efforts and protect workers willing to expose safety problems.”).

reflects the priority Congress placed on airline safety.⁴² In enacting the whistleblower provisions, Congress recognized that “[f]light attendants and other airline employees are in the best position to recognize breaches in safety regulations and can be the critical link in ensuring safer air travel. Currently, those employees . . . face the possibility of harassment, negative disciplinary action, and even termination if they report violations For that reason, we need a strong whistleblower law to protect aviation employees from retaliation by their employers when reporting incidents to federal authorities. Americans who travel on commercial airlines deserve the safeguards that exist when flight attendants and other airline employees can step forward to help federal authorities enforce safety laws.”⁴³

This statement is no less true when it comes to workers like Cobb whose jobs directly involve airline safety – whether it is disaster planning, detecting package bombs, cargo tracking, or drafting runway vulnerability studies.⁴⁴ Cobb, and other employees of FedEx’s companies, may be “in the best position to recognize breaches in safety regulations and can be the critical link in ensuring safer air travel.”⁴⁵ Congress cannot have intended that a FedEx Express employee working side by side with a FedEx Services employee in the SuperHub at Memphis International Airport, each seeing an air safety violation and reporting it, would result in the former employee being protected by Section 42121 and the latter not.⁴⁶ A broad definition of “air carrier” is necessary to give full effect to the purpose underlying Section 42121 of encouraging reporting of air safety concerns. For all these reasons, we find that FedEx Services is a covered air carrier under AIR 21.

⁴² See, e.g., 146 Cong. CONG. REC. H1002-01, H1008 (daily ed. Mar. 15, 2000) (statement of Rep. Boehlert) (the whistleblower provisions will “ensure that aviation workers can blow the whistle on safety problems without looking over their shoulders and fearing retaliation.”).

⁴³ 145 Cong. CONG. REC. S2841-02, S2855 (Introductory Statement of Sen. John Kerry pertaining to the AIR 21 legislation) (Mar. 17, 1999).

⁴⁴ The ALJ made findings of fact that Cobb performed each of these duties for FedEx Services. D. & O. at 7, 10.

⁴⁵ 145 Cong. CONG. REC. S2841-02, S2855 (Introductory Statement of Sen. John Kerry pertaining to the AIR 21 legislation) (Mar. 17, 1999).

⁴⁶ Compare *Fullington v. AVSEC Servs., LLC*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 7 (ARB Oct. 26, 2005) (Respondent AVSEC, a janitorial company with contracts for cleaning services with Southwest Airlines, is a covered employer under Section 42121).

CONCLUSION

Because we find that FedEx Services is an air carrier under Section 42121, we **REVERSE** the ALJ's decision dismissing Cobb's complaint. Therefore, we **REMAND** this case to the ALJ for proceedings consistent with this decision.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

Luis A. Corchado, *Administrative Appeals Judge*, concurring:

I concur with the majority that the definition of "air carrier" under AIR 21 raises a question of coverage insufficiently addressed by the ALJ. As stated by the majority, the term "air carrier" expressly includes FCS if it "undertak[es] by any means, directly or indirectly, to provide air transportation." 49 U.S.C.A. § 40102(a)(2). The ALJ simply stated that FCS "does not own or operate any aircraft and is not itself an air carrier." D. & O. at 4. FCS briefly addressed the definition of "air carrier" in one paragraph of its brief before us. Resp. Br. at 10. Yet, Cobb's arguments focused heavily on the interconnection between FCS, FedEx Corporation, and FedEx Express. Cobb asserted that: (1) FedEx Express is an air carrier that "cannot function without FCS"; (2) FCS, FedEx Express and FedEx Corporation share "information technology" services; (3) Cobb worked as a "Business Continuity and Disaster Recovery planner"; (4) he had "full FBI approved access to the Express SuperHub and Air Ramps" at the Memphis International Airport from where FedEx Express flew in and out; and that (5) "FCS misrepresented their [sic] interaction with FedEx Express." Compl. Br. at 4-5.

In its brief, FCS added to Cobb's list of duties: "automation of FXI process, methodologies, knowledge management, social networks, websites, and research databases" and "development of intellectual capital/property," among other duties. Resp. Br. at 3. FCS admitted that Cobb "toured the Hurricane Creek Tunnel, which is a culvert tunnel under a runway at the Memphis International Airport" and the "purpose of the tour was to assess Federal Express Corporation's [the parent company's] 'underground data networks'" at the airport.

In the end, this long list of duties connected to the airport where FedEx Express operates raises a genuine issue of fact as to the whether FCS undertakes “indirectly” to provide air transportation. I need more stipulations of fact or findings of fact supported by evidence in the record. Consequently, I would remand the coverage issue for further consideration. In this particular case, I limit my review to the only issue addressed by the ALJ, that being whether FCS was a covered company under AIR 21.

LUIS A. CORCHADO
Administrative Appeals Judge