**In the Matter of:**

**GEORGE T. DAVIS, JR., and DIANE DAVIS,**

**COMPLAINANTS,**

**v.**

**UNITED AIRLINES, INC.,**

**RESPONDENT.**

**ARB CASE NO. 02-105**

**ALJ CASE NO. 01-AIR-5**

**In the Matter of:**

**TIM HAFER,**

**COMPLAINANT,**

**v.**

**UNITED AIRLINES,**

**RESPONDENT.**

**ARB CASE NO. 02-088**

**ALJ CASE NO. 02-AIR-5**

**In the Matter of:**

**DAVID LAWSON,**

**COMPLAINANT,**

**v.**

**UNITED AIRLINES, INC.,**

**RESPONDENT.**

**ARB CASE NO. 03-037**

**ALJ CASE NO. 02-AIR-6**

**In the Matter of:**

**GLYN TAYLOR, JR.,** **ARB CASE NO. 02-054**

**COMPLAINANT,** **ALJ CASE NO. 2001-AIR-002**

**v.**

**DATE: May 30, 2003**

**EXPRESS ONE INTERNATIONAL, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For Davis*:**
**Steven Silvern, Esq., Sunshine S. Benoit, Esq., Thoms A. Bulger, Esq.,** ***Silvern Law Offices, Denver, Colorado***

***For Hafer*:**
**Linda Fessler, Esq.,** ***Los Angeles, California***

***For Lawson*:**
**Steven Silvern, Esq., Sunshine S. Benoit, Esq.,** ***Silvern Law Offices, Denver, Colorado***

***For Taylor*:**
**John Chelsea Allman, Esq.,** ***Slack & Davis, Austin, Texas***

***For United Airlines*:**
**Nancy E. Pritikin, Esq., John C. Fish, Jr., Esq., Matthew R. Young, Esq.,** ***Littler Mendelson, San Francisco, California***

**Lisa Hogan, Esq., Mark T. Barnes, Esq., Jeanine M. Anderson, Esq.,** ***Brownstein Hyatt & Farber, Denver, Colorado***

**Jennifer C. Robinson, Esq.,** ***Robinson Employment Law, Denver, Colorado***

***For Express One International*:**
**J. Michael Sutherland, Esq.,** ***Winstead Sechrest & Minick, Ft. Worth, Texas***
**J. Derek Braziel, Esq.,** ***Littler Mendelson, Dallas, Texas***

***For the Occupational Safety and Health Administration*:**

**Howard M. Radzely, Acting Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, Lois R. Zuckerman, Attorney, *United States Department of Labor, Washington, D.C.***

## ORDER STAYING PROCEEDINGS

These four cases arise under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C.A. § 42121 (West Supp. 2003). We hereby consolidate the four cases for disposition of the question whether they are subject to the automatic stay of the Bankruptcy Code, 11 U.S.C.A. § 362(a)(1) (West 1993) or are exempt from the stay pursuant to § 362(b)(4) which applies to actions and proceedings by a governmental unit to enforce its police and regulatory authority.

In each of the cases before us, the employee complainant is the sole prosecuting party. This decision addresses only the issues and facts of these cases. We take no position at this time as to whether the § 362(b)(4) exception to the automatic stay would apply if the Secretary or her delegatee took a role in § 42121 proceedings other than as investigator of the employee's initial complaint.

## BACKGROUND

### I. Procedural Posture of the Case

The AIR 21 whistleblower protection provision at § 42121 prohibits employer retaliation against employees in the airline industry who complain about violations of aviation safety laws or about safety or health hazards in the aviation industry. 11 U.S.C.A. § 42121(a).[1]

[1] § 42121 (a) Discrimination against airline employees–

> No 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 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;
>
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating

Complainants Davis, Hafer, Lawson and Taylor each filed a § 42121 complaint with the Occupational Safety and Health Administration (OSHA), the agency to which the Secretary of Labor delegated authority to administer § 42121. Secretary Order 5-2002, 67 Fed. Reg. 65,008 (Oct. 22, 2002).

After investigating the complaints, OSHA issued its investigative findings and conclusions. In each case one of the parties objected to OSHA's determination and invoked the right to a hearing on the record as provided in § 42121(b)(2) and 29 C.F.R. § 1979.106 (2002). Each case was assigned for a hearing on the record before a Labor Department Administrative Law Judge (ALJ) and resulted in an ALJ Recommended Decision and Order. *Davis v. United Airlines, Inc.* ALJ No. 2001-AIR-5 (ALJ Jul. 25, 2002); *Hafer v. United Airlines*, ALJ No. 2002-AIR-00005 (ALJ June 11, 2002); *Taylor v. Express One International, Inc.*, ALJ No. 2001-AIR-2 (Feb. 15, 2002); *Lawson v. United Airlines, Inc.*, ALJ No. 2002-AIR-00006 (ALJ Dec. 20, 2002). The party aggrieved by the Recommended Decision and Order in each case petitioned for review by this Board pursuant to 29 C.F.R. § 1979.110.

While the petitions for review were awaiting disposition by the Board in *Davis*, *Hafer*, and *Taylor*, the two employers, United Airlines (United) and Express One International (EOI or Express) filed for bankruptcy protection and duly notified this Board.[2] United and Express indicated that they considered further action by the Board stayed until conclusion of the bankruptcy proceedings, pursuant to § 362(a)(1) of the Bankruptcy Code, the "automatic stay" provision. The Bankruptcy Code's automatic stay provision applies to the "continuation of any judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement" of the bankruptcy case. 11 U.S.C.A. § 362(a)(1). However, § 362(b)(4) excepts from the stay "continuation of an action or proceeding by a governmental unit" to "enforce such governmental unit's or organization's police and regulatory power." 11 U.S.C.A. § 362(b)(4).

It is undisputed that these whistleblower cases are administrative actions or proceedings against United and Express that were commenced before United and Express filed their bankruptcy petitions. Accordingly, the Administrative Review Board (ARB) invited United,

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> to any violation or alleged a 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;
>
> (3) testified or is about to testify in such a proceeding; or
>
> (4) assisted or participated or is about to assist or participate in such a proceeding.

[2] United filed its petition for bankruptcy on December 9, 2002. The ALJ issued the Recommended Decision and Order in *Lawson* on December 20, 2002.

Express, and the employee complainants to brief the question whether the automatic stay bars further action by the Board until conclusion of the bankruptcy proceedings or, whether the governmental unit exemption applies. ARB also invited OSHA to brief the question. For the reasons discussed below, we conclude that the automatic stay does apply to all four cases.

## II. The Automatic Stay and the Governmental Unit Exception

> The automatic stay provision at 11 U.S.C.A. § 362(a) provides in relevant part:
>
> (a) Except as provided in subsection (b) of this section, a petition [for bankruptcy] . . . operates as a stay, applicable to all entities, of–
>
> (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . .

11 U.S.C.A. § 362(a)(1).

Subsection 362(b)(4) excepts from the stay certain actions and proceedings by governmental units:

> (b) The filing of a petition [for bankruptcy protection] does not operate as a stay—
>
> (4) [O]f the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power . . . .

11 U.S.C.A. § 362(b)(4).

Terms "police or regulatory power" refer to laws affecting fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws. *Midlantic National Bank v. New Jersey Dep't Envtl. Prot.*, 474 U.S. 494, 504, 106 S. Ct. 755, 761 (1986); *accord Nelson v. Walker Freight Lines, Inc*., 87-STA-24, slip op. at 2 (Sec'y July 26, 1988).

Whistleblower protection provisions that are part of public health and safety laws are police and regulatory powers within the meaning of § 362(b)(4). *Nelson v. Walker Freight,*

*supra; Torres v. Transcon Freight Lines*, No. 90-STA-29 (Sec'y Jan. 30, 1991); *cf. Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 388 (3d Cir. 1987) (§ 362(b)(4) "exempts from the automatic stay equitable actions brought by state and federal agencies to correct violations of regulatory statutes enacted to promote health and safety").

The governmental unit exemption was incorporated into the Bankruptcy Code to curb what Congress considered overuse of the stay.

> For example, in one Texas bankruptcy court, the stay was applied to prevent the state of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws. . . . In a Montana case, the stay was applied to prevent Nevada from obtaining an injunction against a principal in a corporation who was acting in violation of Nevada's anti-fraud consumer protection laws. The bill excepts these kinds of actions from the automatic stay. . . . The states will be able to enforce their police and regulatory powers free from the automatic stay. The bankruptcy court has ample additional power to prevent damage to the bankrupt estate by such actions on a case-by-case basis. . . . By exempting these state actions from the scope of the automatic stay, the court will be required to examine the state actions more carefully, and with a view to protecting the legitimate interests of the state as well as of the estate, before it may enjoin actions against the debtor or the estate.

H. Rep. No. 95-595, Chapter 4 § 1 (Sept. 8, 1977).

> Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5)[[3]] makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

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[3] Paragraph 362(b)(5) was later merged with paragraph 362(b)(4). The merger is irrelevant to these cases.

S. Rep. No. 95-989, § 361 (July 14, 1978).

The term "governmental unit" has the same meaning throughout the Code:

In this title–

> (27) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government . . . .

11 U.S.C.A. § 101(27). Correspondingly, the term "person" generally excludes the government. *Id.* at § 101(41).

## III. OSHA Participation

The Secretary of Labor is responsible for enforcement of whistleblower protection provisions besides AIR21 § 42121.[4] Like § 42121, the other whistleblower protection provisions establish a statutory private right of action and impose no requirement on the Secretary to participate in litigation of a whistleblower complaint. The Secretary's practice has long been not to participate as a litigant in such cases. Only under very unusual circumstances has the Secretary or her delegatee done so.

In its Preamble to the final rules of procedure for AIR21 administrative adjudication, OSHA specifically notes this practice as well as the agency's anticipation that it will follow that approach for the future:

> OSHA does not ordinarily appear as a party in the proceeding. The Department has found that in most environmental whistleblower cases, parties have been ably represented and the public interest has not required the Department's participation . . . . The Assistant Secretary at his or her discretion, may participate as a party or *amicus curiae* at any time in the administrative

[4] Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at 42 U.S.C.A. § 9610 (West 1995); Federal Water Pollution Prevention Control Act (Clean Water Act) at 33 U.S.C.A. § 1367 (West 2001); Energy Reorganization Act (ERA) at 42 U.S.C.A. § 5851 (West 1995); Solid Waste Disposal Act at 42 U.S.C.A. § 6971 (West 1995); Safe Drinking Water Act at 42 U.S.C.A. § 300j-9(i) (West 1991); Toxic Substance Control Act at 15 U.S.C.A. § 2622 (West 1998); Clean Air Act at 42 U.S.C.A. § 7622 (West 1995); Surface Transportation Assistance Act at 49 U.S.C.A. § 31105 (West 1998); Sarbanes-Oxley Act of 2002 at 18 U.S.C. § 1514A (West P.P. 2003).

> proceedings. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an administrative law judge; petition for review of a decision of an administrative law judge, including a decision based on a settlement agreement between complainant and the named person, regardless of whether the Assistant Secretary participated before the ALJ; or participate[s] as *amicus curiae* before the ALJ or in the Administrative Review Board proceeding. Although we anticipate that ordinarily the Assistant Secretary will not participate in AIR21 proceedings, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations which appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The FAA, at that agency's discretion, also may participate as amicus curiae at any time in the proceeding.

68 Fed. Reg. 14,100, 14,105 (March 21, 2003).

## IV. Department Precedent

In *Torres v. Transcon Freight Lines*, No. 90-STA-29 (Sec'y Jan. 30, 1991), the Secretary held that the governmental unit exemption to the automatic stay did not apply to a Surface Transportation Assistant Act (STAA) whistleblower case in which the employee was the sole prosecuting party. Looking to the plain meaning of the § 362(b)(4) text, the Secretary concluded that the litigation could not be denominated an action or proceeding "**by** a governmental unit" absent participation by the government. *Torres*, slip op. at 4; *accord Nelson v. Walker, supra; Hasan v. Stone & Webster Eng'rs & Constructors, Inc.*, ARB No. 01-007, ALJ No. 2000-ERA-10 (ARB May 30, 2001); *Haubold v. KTL Trucking Co.*, ARB No. 00-065, ALJ No. 2000-STA-35 (ARB Aug. 10, 2000). We will examine the employees' and OSHA's arguments for reason to conclude that the cited decisions are not controlling or were decided in error.

## THE ISSUES

**I. Whether this Board has jurisdiction to decide that the exemption under 11 U.S.C.A. § 362(b)(4) applies**

**II. Whether the exemption under 11 U.S.C.A. § 362(b)(4) applies to these cases**

## JURISDICTION

### I. Jurisdiction Over the Cases

We have jurisdiction over these cases pursuant to 29 C.F.R. § 1979.110(a) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

## II. Jurisdiction to Decide Applicability of the Automatic Stay

Express suggests (Br. at 2) that only the Bankruptcy Court has authority to decide whether the automatic stay applies. This argument goes against the overwhelming weight of authority.

"Courts have uniformly held that when a party seeks to commence or continue proceedings in one court against a debtor or property that is protected by the stay automatically imposed upon the filing of a bankruptcy petition, the non-bankruptcy court properly responds to the filing by determining whether the automatic stay applies to (i.e., stays) the proceedings." *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 384 (6th Cir. 2001). *See also, In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 140 B.R. 969, 973 (N.E. Ill. 1992) (Easterbrook, C. J., sitting by designation in non-bankruptcy case) ("most of the cases holding that bankruptcy judges lack exclusive jurisdiction to interpret § 362 involve suits by public agencies, seeking relief excluded by § 362(b)(4). . . . All the cases I have found hold that each court may decide for itself. So far as I am aware, there is no contrary authority."); *cf. McGuire v. Little Bill Coal Co.*, 01-BLA-A (BRB Jan. 24, 2003) (applying same principle in administrative adjudication). Therefore, we hold that the ARB has jurisdiction to decide whether the automatic stay applies to these cases.

## DISCUSSION

## I. OSHA's Arguments

OSHA does not claim that AIR21 is materially different, for purposes of stay analysis, from STAA or the other whistleblower provisions the Secretary administers. Rather, OSHA argues that *Torres* was wrongly decided. *See e.g.*, OSHA *Davis* Br. at 19.[5]

### A. All stages of the § 42121 process constitute an "enforcement action or proceeding by a governmental unit"

OSHA contends that *Torres* improperly focused exclusively on the litigation phase of the whistleblower protection process. OSHA contends that a correct analysis would treat the entire administrative process created by § 42121 as the action or proceeding by a governmental unit enforcing its police and regulatory power. To OSHA, the Secretary's involvement (through her agency delegatees) in every step of the § 42121 process establishes its character as a "governmental action or proceeding" within the meaning of § 362(b)(4).

OSHA demonstrates how the Secretary is involved in every phase of the § 42121 process:

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[5] OSHA makes identical arguments in these cases. For convenience sake we refer to only one brief for each argument.

The employee must file his or her complaint with OSHA. 29 C.F.R. § 1979.103; 49 U.S.C.A. § 42121(b)(1). OSHA must investigate the complaint. 29 C.F.R. § 1979.104, 49 U.S.C.A. § 42121(b)(2). If OSHA concludes there is reasonable cause to believe a violation occurred, it must issue findings and a preliminary order of relief. 29 C.F.R. § 1979.105; 49 U.S.C.A. § 42121(b)(2)(A). If either party objects to OSHA's determination, the Labor Department's Office of Administrative Law Judges (OALJ) affords the parties a hearing on the record and issues a recommended decision and order. 29 C.F.R. § 1979.109; 49 U.S.C.A. §42121(b)(2)(A). If either party objects to the recommended decision and order, that party may petition the Board for review of the Recommended Decision and Order. 29 C.F.R. § 1979.110; 49 U.S.C.A. § 42121(b)(2)(A). If a case reaches the Board by petition for review, the Board's decision is the final agency action in the case. 29 C.F.R. § 1979.110(c); 49 U.S.C.A. § 42121(b)(3)(A). If the employer and employee wish to settle a case, the ALJ or ARB exercise the Secretary's statutory duty to "enter into the agreement." 49 U.S.C.A. § 42121(b)(3)(A); 29 C.F.R. § 1979111(d)(2). OSHA, as well as a named party, may file a civil action for enforcement of the final agency order in federal district court. 29 C.F.R. §§ 1979.113, 49 U.S.C.A. §§ 42121(b)(5) and (6).

At this juncture, OSHA argues, OSHA is in the midst of the statutory process for determining whether violations of § 42121 occurred, a process that began with receipt of the employee complaints and will not end until issuance of the Department's final orders by the ARB. OSHA *Hafer* Br. at 13:

> The Assistant Secretary has completed the congressionally-mandated investigation of Hafer's complaint, but the administrative process that Congress intended to culminate in the issuance of a final (and potentially enforceable) order by the Secretary is still underway [sic]. The Secretary is exercising her police and regulatory power under AIR 21 to decide whether United retaliated against Hafer. The statutory complaint process requires that there be a final order by the Secretary before enforcement is possible. The administrative proceedings involving the Secretary's exercise of her police and regulatory power simply are not complete until that final order is issued.

OSHA is emphatic that it is the Secretary's involvement overall, rather than OSHA's specific findings at the investigative phase or the actual participation of the Assistant Secretary of OSHA in adjudicative proceedings, that caused the exemption to apply:

> In all these cases, OSHA conducted an investigation and issued a determination [whether] the complaint [had] merit. The Assistant Secretary has not participated in these cases . . . .
>
> As we stated in our responses to the Suggestions of Bankruptcy filed in Taylor, Davis, and Lawson . . . the initial determination following the OSHA investigation often is only the first step in the agency's process of determining whether a

> whistleblower claim has merit, and the agency continues its role of determining whether an employer has violate [sic] the Act through the ALJ and ARB proceedings. Therefore, to the extent that the whistleblower decisions of the Board and an ALJ . . . are based on whether the complainant has prevailed and whether the Assistant Secretary has been directly involved in the proceedings, either as a prosecuting party or intervenor or just an interested party of record, they are, we believe, incorrectly decided and should not control the present case as to the applicability of the exception to the automatic bankruptcy stay.

OSHA *Hafer* Br. at 21-22.

> The Secretary is exercising her police and regulatory power to decide through a congressionally-mandated administrative adjudicative process whether EOI retaliated against Taylor for being a whistleblower . . . and section 362(b)(4) permits this process to continue through the issuance of a final order.

OSHA *Taylor* Br. 14-15.

> [T]he Board proceeding is part of the statutory process for issuance of a final order determining whether AIR 21 protections should extend to the complainant, and prosecution of the complaint by the Assistant Secretary should not be determinative of the applicability of the exception to the automatic stay to AIR 21 – or STAA or ERA – administrative whistleblower proceedings.

*Id.* at 20 n.13.

We agree with OSHA that the Secretary is involved in some manner in every step of the § 42121 process and that the process OSHA describes is not complete in these four cases. But that leaves unresolved the question for decision, whether the cases before us, in their present posture, are enforcement actions by a government unit under § 362(b)(4).

### B. *MCorp*

Building on the premise that the relevant governmental proceeding is the entire § 42121 process, and the fact that these four cases have not reached the end of that process, OSHA invokes the authority of *Board of Governors of the Fed. Reserve Syst. v. MCorp Fin., Inc.*, 502 U.S. 32, 112 S.Ct. 459 (1991). OSHA asserts that *MCorp* "held that administrative proceedings to carry out the government's police and regulatory power are excepted from the automatic stay under § 362(b)(4) up to and including the entry of a money judgment." OSHA *Hafer* Br. at 12.

> Accordingly, the exception to the automatic stay should apply to

> the Board's review of the ALJ's decision dismissing Hafer's complaint because it is part of the Secretary's exercise of her police and regulatory power under AIR 21 that began with the OSHA investigation, notwithstanding the possibility that a final order of the Secretary, after hearing before an ALJ, could award monetary relief to Hafer which could not be enforced outside of the bankruptcy proceeding.

*Id*. at 12-13.

This argument reflects a misunderstanding of *MCorp*. The Reserve Board actions in question were administrative enforcement proceedings for alleged violations by MCorp of Federal Reserve regulations. MCorp argued that the prosecutions were subject to the automatic stays at 11 U.S.C.A. §§ 362(a)(3) and (b). Section 362(a)(3) stays any act to obtain possession of property of the bankruptcy estate. Section 362(a)(6) stays any act to collect on a claim.

The Court stated that the § 362(b)(4) exemption for actions by a governmental unit enforcing its police power applied to the Board's proceedings. The Board (a governmental unit) was prosecuting (an action or proceeding by a governmental unit) MCorp for alleged fraud on the banking public (action or proceeding by a governmental unit to enforce its police and regulatory authority). The Court also held that the two automatic stay provisions at §§ 362(a)(3) and (6) did not apply the Board's enforcement actions because the connection between those actions and acts to take possession of property or collect on a claim was too attenuated.

> It is possible, of course, that the Board proceedings, like many other enforcement actions, may conclude with the entry of an order that will affect the Bankruptcy Court's control over the property of the estate, **but that possibility cannot be sufficient to justify the operation of the stay against an enforcement proceeding that is expressly exempted by § 362(b)(4).** To adopt such a characterization of enforcement proceedings would be to render subsection (b)(4)'s exception almost meaningless. If and when the Board's proceedings culminate in a final order, and if and when judicial proceedings are commenced to enforce such an order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction . . .. We are not persuaded, however, that the automatic stay provisions of the Bankruptcy Code have any application to ongoing, nonfinal administrative proceedings.

*Mcorp*, 502 U.S. at 41, 112 S. Ct. at 464 (emphasis supplied). Thus, *MCorp* not only fails to support OSHA's theory, it presents a textbook example of a § 362(b)(4) proceeding. "[T]he Board's actions also fall squarely within § 362(b)(4), which expressly provides that the automatic stay will not reach proceedings to enforce a 'governmental unit's police or regulatory power.'" *MCorp*, 502 U.S. at 39-40, 112 S. Ct. at 39-40). Therefore, *MCorp* is not authority for the proposition that *Torres*' conclusion was incorrect.

### C. NLRB, FLSA and EEOC Cases

OSHA suggests that the Board should follow a large body of "well settled [law] that government proceedings to enforce the labor and employment laws, including the entry of both a preliminary and a final order directing reinstatement and back pay, constitute an exercise of the government's police and regulatory power excepted from the automatic bankruptcy stay under section 362 (b)(4)" and citing NLRB, FLSA, or EEOC decisions. *See, e.g.*, OSHA *Hafer* Br. at 14 – 15.

This argument fails because each of the cases cited by OSHA was prosecuted by a governmental unit – the NLRB General Counsel, the Fair Labor Standards Administration, and the Equal Employment Opportunity Commission. The NLRB decisions OSHA cites, for example, *NLRB v. Continental Hagen Corp.*, 932 F.2d 828 (9th Cir. 1991), do refer to the Board as the enforcing party. But that is not because the Board, which *adjudicated* the case, was considered to have *prosecuted* it. Under the National Labor Relations Act, only the NLRB General Counsel has prosecutorial authority. *See* 29 U.S.C.A. § 153(d) ("The General Counsel **of the Board** shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board") (emphasis added). Thus, these cases fall within the § 362(b)(4) exemption not because of the NLRB's adjudicatory role, but because of the General Counsel's prosecutorial role.

*Brock v. Rusco Indus., Inc.*, 842 F.2d 270 (11th Cir. 1988), which OSHA cites as an example of a § 362(b)(4) enforcement action under the Fair Labor Standards Act, was prosecuted by the Fair Labor Standards Administration. Equal Employment Opportunity Commission cases OSHA cites as examples of § 362(b)(4) proceedings were prosecuted by the EEOC. *EEOC v. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1987); *EEOC v. McLean Trucking Co.*, 834 F.2d 398 (4th Cir. 1987). Thus, the parallelism OSHA sees does not in fact exist.

### D. Other Decisional Law

OSHA cites *Volkswagen of America, Inc. v. Dan Hixson Chevrolet Co.*, 12 B.R. 917 (Bankr. N.D. Tex. 1981), for the proposition that "where an administrative agency, acting in a quasi-judicial capacity, is necessarily affecting public policy as opposed to taking action that concerns only the private parties immediately affected, the police and regulatory power exception . . . would apply." OSHA *Hafer* Br. at 15-16. That is not an accurate characterization of *Dan Hixson.* The administrative proceeding at issue in *Dan Hixson* was not a hearing to determine whether Hixson had violated any law, but whether Hixson had violated his franchise agreement with Volkswagen. Therefore, the court held, the § 362(b)(4) exemption did not apply:

> This hearing [before the Texas Motor Vehicle Commission] is to determine whether there is good cause for the termination of the

> franchise by the manufacturer [Volkswagen]. The hearing is in essence an adjudication of private rights. The matters raised in the hearing need relate only to violations of the private franchise agreement, no violations of the Motor Vehicle Code need be raised although they may be considered. Thus the good cause proceeding before the Commission is distinguished from the proceedings before the N.L.R.B. which necessarily involve alleged violations of the National Labor Relations Act and serve to effectuate public policy. In the instant case Volkswagen cites the filing of a Chapter 11 petition as grounds for termination, yet such action is not a violation of the Motor Vehicle Code.
>
> In view of the above, I hold that the proceeding between the plaintiff and defendant now pending before the Commission was commenced in violation of the automatic stay, § 362(a)(1).

*Dan Hixson*, *supra*, 12 B.R. at 922 (internal citations omitted).

OSHA relies on a bankruptcy court statement that "it is not fatal to a complaint brought under Section 362(b)(4) that it was not actually filed by a governmental unit." *In re Dervos*, 37 B.R. 731, 734 (Bankr. N.D. Ill. 1984). OSHA *Hafer* Br. at 16. *Dervos* is not helpful to OSHA's argument for two reasons. We have never suggested that the governmental unit exception at § 362(b)(4) applies only if the governmental unit files the complaint. Further, the non-bankruptcy proceeding in question in *Dervos* was a criminal case. The issue before the Bankruptcy Court was whether restitution ordered in the criminal case could be enforced pursuant to § 362(b)(4) during the defendant's bankruptcy. The criminal case indubitably qualified as a § 362(b)(4) governmental unit proceeding, because it was prosecuted by the State. In any event, § 362(b)(1) exempts criminal proceedings from the automatic stay.

The only case cited by OSHA that directly supports the proposition that an adjudicative body may be a "governmental unit" within the meaning of § 362(b)(4) is *In re Briarcliff*, 16 B.R. 544 (Bankr. D.N.J. 1981). OSHA *Hafer* Br. at 16. There, the Bankruptcy Court held that proceedings before a municipal rent control board initiated by tenants of the debtor's apartment building were exempt from the automatic stay based on the exemption for governmental units exercising their police powers. However, we note that this 22-year old decision appears not to have been relied upon by any other court for this proposition. And we find telling the court's statement that, "[a]ssuming arguendo a violation does exist, a stay would render unavailable a practical remedy or effective means of enforcement or redress, other than for this Court to adjudicate the underlying dispute." *Id.* 16 B.R. at 546. In any event, *Briarcliff* is hardly sufficient ground for rejecting the large body of decisional law to the contrary.

On balance, OSHA's arguments based on decisional law do not support its view that *Torres* was wrongly decided.

### E. Analogous Sovereign Immunity Decisions

OSHA asserts that the "initial determination following the OSHA investigation often is only the first step in the agency's process of determining whether a whistleblower claim has merit, and the agency continues its role of determining whether an employer has violated the Act through the ALJ and ARB proceedings." OSHA *Hafer* Br. at 22.

OSHA made a similar argument in defense of employee whistleblower actions against a State government. *Florida v. United States*, 133 F. Supp.2d 1280, 1289 (N.D. Fla. 2001). There OSHA argued that even though the prosecuting party was a private individual, the litigation did not violate the State's sovereign immunity from suit, because the litigation was but a step in OSHA's investigation of the employee complaint. That argument was rejected.

> The Department and [whistleblower complainant] assert that the administrative proceeding at issue is merely a step in the Department's investigation of the state's possible violation of the unquestionably valid whistleblower provisions. They assert that, if deemed a proceeding against the state, the administrative proceeding at issue is a proceeding brought by the Department of Labor (that is, by the federal government).
>
> In fact, however, the Department of Labor completed its investigation of [the employee]'s complaint and determined there had been no violation. The matter would have ended there, but for [the employee's] request for an administrative hearing. It was [the employee], not the Department of Labor, that made the determination to proceed further, and it was [the employee], not the Department, that would have presented evidence and argument at the administrative hearing, had it gone forward. In short, it was [the employee], not the Department of Labor who commenced and was prosecuting the administrative proceeding at issue.
>
> Moreover, the administrative proceeding was no mere investigation. It would have included, instead, a formal evidentiary hearing, resulting in formal findings of fact, with defined legal consequences. . . . The proposed administrative proceeding thus was not a step in a Department of Labor investigation; it was, instead, a formal adjudicatory proceeding . . . .

*Id.*, 133 F. Supp.2d at 1289.

The First Circuit has also rejected the notion that administrative adjudication of an employee whistleblower complaint is really an "investigation":

> It is obvious from the regulatory scheme and governing APA provisions that the administrative adjudication is not directed or prosecuted by the Secretary. Instead, the individual complainant tries a case against the employer, and the Secretary (through the ALJ) acts as the neutral arbiter of law and fact. *See Butz v. Economou*, 438 U.S. 478, 513, 98 S. Ct. 2894 (1978). . . . There is simply no basis for construing the privately-prosecuted whistleblower claims at issue here as implicating the exercise of political responsibility by the federal government.

*Rhode Island Dep't Envtl. Mgmt. v. United States*, 304 F.3d 31, 53 (1st Cir. 2002). We think these decisions weigh against OSHA's view that administrative adjudication of § 42121 cases can fairly be characterized as part of a federal investigation.

## II. The Complainants' Arguments

The four employees concur in OSHA's arguments. Lawson makes the alternative argument, however, that if, as happened in his case, OSHA makes an investigative finding that a violation occurred, a governmental unit has exercised its police power. "Assuming *arguendo* that the criteria [sic] under §362(b)(4) is the 'active participation' of the Agency, this case is not stayed." *Lawson* Br. at 4. "The government's decision to issue the Preliminary [Investigative] Order herein is, therefore, a considerably stronger and more effective statement of DOL's belief that a safety violation occurred and needs to be remedied, than a decision to merely assign one of its lawyers to help prosecute an (as yet unproven) violation." Additionally, Lawson argues, OSHA has participated in these cases by filing briefs on the issue of the stay and thereby satisfied the requirements of § 362(b)(4). Lawson Br. at 7.[6]

Like OSHA's arguments, Lawson's do not join issue with the fact that our precedent holds that a § 362(b)(4) enforcement action by a governmental unit is one actually litigated by a governmental unit. Lawson points to nothing new on the legislative front or in § 362(b)(4)

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[6] Hafer argues that his case is exempt from the automatic stay because by pursuing an AIR21 whistleblower case, he is not seeking pecuniary advantage for the government, and continuation of his case would effectuate public policy by protecting the public. *Hafer* Br. at 2.

Davis argues that the reasoning of *Torres* does not apply, because the public interest in preventing airline crashes and hundreds of deaths is more significant than the public interests protected by the STAA. *Davis* Br. at 2.

Since neither argument relates to the issues before us, we will not pause to discuss them.

decisional law that would warrant a retreat from *Torres*' fundamental holding.

## III. United's Arguments

United argues that these proceedings are not "by a governmental unit" because the sole plaintiff in each case is the complaining employee. Moreover, each complainant seeks remedies personal to himself, such as reinstatement and backpay.

> [H]ere the Department has . . . not sought to intervene in this action [*Davis*] which is limited to Complainant's request for a modest money judgment. Further, . . . in this case Complainants are proceeding of their own accord to vindicate a private right created by AIR 21, just as if they were proceeding in a retaliation case under Title VII of the Civil Rights Act of 1964 (a proceeding which would be stayed). Thus, there is no question that Section 362(b)(4)'s automatic stay exception does not apply here.

United *Davis* Br. at 3-4.

United relies on *Nelson v. Walker Freight Lines*, and *Torres.* United also relies on *In re Revere Copper & Brass, Inc.*, 32 B.R. 725 (S.D.N.Y. 1983) (*qui tam* action under Clean Water Act is not an exempt action by a governmental unit), and *In re Colin, Hochstin Co*., 41 B.R. 322 (Bankr. S.D.N.Y. 1984) (New York Stock Exchange and its enforcement division are not governmental units exempt from the automatic stay provision even though they act in the national public interest to protect investors and the general public and the securities market).

United also contends that if after investigation OSHA finds the complaint lacks merit, no basis remains for characterizing the subsequent litigation as a police or regulatory enforcement action. United *Hafer* Br. at 7.

## IV. Express' Arguments

Like United, Express contends that DOL's absence as prosecutor means that this is not a police or regulatory action by a governmental unit. "[F]urther pursuit of this matter at an agency level will, entirely or predominantly result only in adjudication of Complainant's private rights." *Express* Br. 8.

## V. The Weight of Authority

Bankruptcy and non-bankruptcy court decisions reflect a near unanimous agreement that § 362(b)(4) refers to prosecutorial activity by a governmental unit. "The inclusion of damage actions for reimbursement together with injunctive relief in this section [362(b)(4)] furthers the purpose of the automatic stay's regulatory exception. The availability of a reimbursement action encourages a quick response to environment crises by a government, secure in the knowledge that reimbursement will follow." *New York v. Exxon Corp*., 932 F.2d 1020, 1024 (2d Cir. 1991).

"The Second Circuit has set forth two factors for courts to consider in determining whether an action falls within the terms of §§ 362(4) and (5)." The court must first determine whether the action is being brought by a governmental unit and, second, whether the governmental unit is bringing the action to enforce its police or regulatory power. *Herman v. Fashion Headquarters, Inc*., 6 Wage & Hour Cas.2d (BNA) 286 (S.D.N.Y. 1998) (FLSA enforcement action, citing *New York v. Exxon*). "The legislative history of this section indicates that when a debtor is sued by a governmental unit in order 'to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.'" *In re First Alliance Mortgage Co*., 263 B.R. 99, 107 (B.A.P. 9th Cir. 2001) (internal emphasis and citations omitted). "When EEOC sues to enforce Title VII it seeks to stop a harm to the public – invidious employment discrimination which is as detrimental to the welfare of the country as violations of environmental protection and consumer safety laws, which are expressly exempt from the automatic stay." *EEOC v. Rath Packing Co*., 787 F.2d 318, 325 (8th Cir. 1986). "The question in this case is whether an IRS letter revoking the tax exempt status of a religious corporation meets either test [for determining whether agency action is a "police or regulatory power" action or is merely for determining private rights]. We hold it meets both." *Universal Life Church v. United States*, 128 F.3d 1294, 1297 (9th Cir. 1997). "[C]ourts interpret '§ 362(b)(4) to allow an action to proceed where a "governmental unit is suing a debtor to prevent or stop violation of fraud . . . laws or attempting to fix damages for violation of such a law.' *In re Commonwealth Companies, Inc*., 913 F.2d 518, 522 ([8th Cir.] 1990)." *In re Psychotherapy and Counseling Center, Inc*., 195 B.R. 522, 527 (Bankr. D.D.C. 1996).

The rare § 362(b)(4) cases that actually focus on adjudication by a governmental unit reject the notion that an agency adjudicator could be a § 364(b)(4) governmental unit. "A single agency may as to one function exercise judicial powers, and as to the other and different functions exercise executive or legislative powers. . . . The leading decisions under the Bankruptcy Code which discuss the interplay between § 362(a)(1) and § 362(b)(4) involve governmental entities seeking to exercise executive type powers against the debtor." *Dan Hixson*, 12 B.R. at 920. "[G]overnmental activities have been found to be within the exception so long as the action relates to the enforcement of police or regulatory laws. However where the administrative agency is acting in a quasi-judicial capacity seeking to adjudicate private rights rather than effectuate public policy as defined by regulatory law the (b)(4) exception is inapplicable." *Id*. at 921; *In re Christensen*, 167 B.R. (Bankr. D. Or. 1994) ("The § 362(b)(4) exemption to the automatic stay has also been held inapplicable when the governmental unit is merely adjudicating private rights" citing *Dan Hixson*).

True, courts occasionally rely on § 362(b)(4) when sanctioning debtor counsel for litigation misconduct. But in these cases, the court is not acting as arbiter, it is functioning as a government unit applying its police power over conduct in the courtroom. *See, e.g., In re Berg*, 230 F.3d 1165, 1168 (9th Cir. 2000) ("We . . . hold that § 362(b)(4)'s government regulatory exemption exempts from the automatic stay an award of attorneys' fees imposed under Rule 38 as a sanction for unprofessional conduct in litigation"); *Alpern v. Lieb*, 11 F.3d 689 (7th Cir. 1993) (a federal court is a governmental unit enforcing its police power when it imposes sanctions on debtor counsel for unprofessional conduct in litigation).

## VI. Status of *Lawson* Recommended Decision and Order

In *Lawson*, the ALJ issued the Recommended Decision and Order on December 20, 2002 –**after** United's December 9, 2002 petition for bankruptcy. United asserts that the Recommended Decision and Order should be declared void ab initio because the automatic stay became effective immediately upon United's filing of its petition for bankruptcy. United Br. at 9-10. "[T]he ALJ's Recommended Decision and Order entered on December 20, 2002 constitutes a judicial act toward the disposition of the case and hence, is a 'continuation of a judicial proceeding.'" *Id.* at 10. We agree. *See Haubold v. KTL, supra*, in which we held that the automatic stay bars entry of an order of dismissal, citing *Pope v. Manville Forest Prods.*, 778 F.2d 238, 239 (5th Cir. 1985); *Dean v. Trans World Airlines*, 72 F.3d 754, 756 (9th Cir. 1995)(same); *Chao*, 270 F.3d at 385 (if the non-bankruptcy forum acts on the assumption that the automatic stay does not apply and a court later determines that it does apply, the post-bankruptcy act is void ab initio). We therefore declare the ALJ Recommended Decision and Order in *Lawson* void ab initio.

## CONCLUSION

Neither the Complainants nor OSHA has demonstrated that under the facts presented these cases are actions or proceedings of a governmental unit to enforce such unit's police and regulatory power. Accordingly, we conclude that further proceedings in these cases are stayed until conclusion of the bankruptcy proceedings.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**
**Administrative Appeals Judge**

**JUDITH S. BOGGS**
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**
**Administrative Appeals Judge**