



Issue Date: 21 December 2016

CASE NO.: 2014-FRS-00109

In the Matter of

CORY HODGE,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

ORDER OF DISMISSAL

This whistleblower retaliation case arises under the Federal Railroad Safety Act, 49 U.S.C. § 20109. Though the parties have reached an agreement to settle, any settlement requires the approval of the administrative law judge. *See* 29 C.F.R. § 1982.111(d)(2). I have twice disapproved the parties' proposed settlement documents because, in my view, the documents contain release provisions that are overbroad. Were Complainant to agree to these provisions, he would be waiving potential claims in a manner that is neither knowing nor voluntary.

Congress created a "kick-out" provision in the Act. In cases in which the Department of Labor has not reached a final decision within 210 days after a complainant files an administrative complaint, the Complainant may refile the case *de novo* in the appropriate U.S. District Court. *See* 49 U.S.C. § 20109(d)(3). On December 20, 2016, Complainant notified this Office of his election to pursue his complaint *de novo* in the district court. He states that Respondent BNSF Railway does not object.

An exercise of the kick-out provision is in the sole discretion of the Complainant so long as it is not interposed in bad faith for delay. I find that Complainant here is acting in good faith and that more than 210 days have passed since Complainant filed his administrative complaint. Accordingly, this matter is **DISMISSED** without prejudice to Complainant's pursuing it *de novo* with the filing of a complaint in the district court.¹ The hearing set for March 13, 2017, in Billings, Montana is **VACATED**.

¹ Either party may request a jury trial in the district court. *See* 29 C.F.R. § 1982.114(a).

This Order is contingent on Complainant's compliance with the applicable regulation, 29 C.F.R. § 1982.114(c). In particular, within 7 days after filing a complaint in the district court, Complainant must file with the administrative law judge a copy of the file-stamped complaint, with service on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *Id.*

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge