

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 August 2014

Case Number: 2014-FRS-00129

In the Matter of:

Robert Musto,
Complainant,

v.

Norfolk Southern Railroad,
Respondent.

ORDER OF DISMISSAL

This proceeding arises from a claim under the Federal Railroad Safety Act (“FRSA”), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. No. 110-53.

On July 3, 2014, Robert Musto (“Complainant”) filed a letter with the U.S. Department of Labor (“DOL”), Office of Administrative Law Judges (“Office”) seeking a hearing before an Administrative Law Judge under the FRSA with regard to an injury incurred in August 2003 and his subsequent termination of employment from Norfolk Southern Railroad (“Respondent”).

This Office duly sent a Notice of Docketing and Order to Show Cause to the parties on July 15, 2014. Therein, the parties were ordered to file briefs no later than August 12, 2014 addressing the question of whether Complainant’s whistleblower complaint under the FRSA should be dismissed based on Complainant’s apparent failure to file his complaint within 180 days of the alleged termination.

On August 12, 2014, I received Complainant’s brief in which Complainant admits, “I have no claim when I was unjustly reprimanded when I was injured in 1999 as the law was not in effect yet.” Complainant further states, “It would be encouraging if the bill could be amended to allow claims to be submitted prior to its inception.” To date, I have not received a brief from Respondent.

Congress amended the FRSA through Section 1521 of the 9/11 Act by modifying the railroad carrier employee whistleblower provision – both expanding what constitutes protected activity and enhancing administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), 49 U.S.C. §42121. *See Gonder v. Norfolk Southern Corporation*, 2012-FRS-00075 at (ALJ Sept. 27,

2012). In *Gondor*, the presiding Administrative Law Judge (“ALJ”) addressed the question: “Does the Department of Labor have retroactive jurisdiction over a complaint filed under the amended FRSA where the alleged protected activity and adverse employment action occurred prior to the effective date of the amendment?” *Id.* at 2. And if so, must the DOL adhere to the 180 day filing requirement? *Id.* The ALJ applied the principals established by *Landgraf v. USA Film Prods.*, 511 U.S. 244 (1994). The two-step analysis starts with a review of the statute’s express directive or implied intent and concludes by analyzing if the statute would have a retroactive effect on the parties. *Id.* at 280.

The applicable 9/11 Act amendment to the FRSA is devoid of any express directive while other amendments made by the 9/11 Act to the FRSA did include express retroactivity language. *Gonder*, at 3. The ALJ therefore reasoned: “The fact that Congress included an express directive allowing retroactive application of Section 20106 and did not do the same for Section 20109 indicates that Congress did not intend to allow retroactive application of Section 20109.” *Ibid.* The ALJ thus concluded that since the amendments are designed to expand the remedies for employees, it would be unfair to subject employers to its provisions without prior notice. “Consequently, application of the amended FRSA to conduct occurring prior to enactment would be improper.” *Id.* at 4.

I agree with the ALJ’s rationale in *Gonder* and find for the same reasons here that it would be improper for me to retroactively apply Section 20109 of FRSA in this case. In addition, I note that Complainant’s claim was filed on September 5, 2012 with OSHA which is over six since years *after* his termination in or about 2005 and is clearly well beyond the 180 days allowed by 49 U.S.C. § 20109(d)(2)(A)(ii) for filing a whistleblower complaint. *Id.* (stating that the applicable action must commence no later than 180 days after the alleged violation of the statute).

Based on the foregoing, Complainant’s whistleblower complaint under the FRSA, 49 U.S.C. §20109, is **HEREBY DISMISSED**.

SO ORDERED.

STEPHEN L. PURCELL
Chief Administrative Law Judge