



**Issue Date: 29 January 2015**

**CASE NO.: 2014-FRS-145**

**IN THE MATTER OF**

**KENNETH M. PACETTI,  
Complainant**

**v.**

**BNSF RAILWAY COMPANY  
Respondent**

**ORDER OF DISMISSAL**

This case comes under the Federal Rail Safety Act (FRSA),<sup>1</sup> as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.<sup>2</sup> The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against by Employers for taking any action relating to the fulfillment of safety or other requirements established by the above Act. On 27 Oct 11, Complainant filed his initial complaint with OSHA, which issued a decision dismissing the complaint on 10 Jul 14. Complainant filed his objections on 11 Aug 14, the case was referred to OALJ, and on 8 Sep 14, I held a conference call with the parties. Both Complainants and Respondent agreed to a litigation timeline that would culminate in a hearing on 23 Apr 15. When asked, Complainant said he understood that the timeline agreed to would fail to result in a final agency decision within 210 days of his complaint, but denied having any present intent to remove his case to district court.<sup>3</sup>

After the parties filed a complaint, answer, and motion to compel, on 16 Dec 14, Respondent filed notice he intended to pursue his complaints in federal district court. In a subsequent conference call, Respondent indicated it did not believe it had grounds to object. On 27 Jan 15, Complainant filed a copy of the complaint he had filed in Federal District Court.

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<sup>1</sup> 49 U.S.C. § 20109.

<sup>2</sup> Pub. L. No. 110-53 (Aug. 3, 2007).

<sup>3</sup> During the call everyone also agreed that the deadline had already expired for a timely agency decision.

The statute provides for de novo review in federal district court. "With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States ...."<sup>4</sup>

Based on Complainants' clearly stated intention of pursuing remedies in district court and absence of objection from Respondent, this litigation is terminated and the administrative complaint is dismissed.<sup>5</sup>

In view of the foregoing, the hearing scheduled on **23 Apr 15** in **Houston, Texas** is hereby **CANCELLED**.

**So ORDERED.**

**PATRICK M. ROSENOW**  
**Administrative Law Judge**

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<sup>4</sup> 49 U.S.C. § 20109(c)(3).

<sup>5</sup> The statute provides 270 days from the filing of the initial OSHA complaint to (1) conduct an initial investigation and issue a decision, (2) file objections, conduct discovery and file dispositive motions, (3) conduct a formal administrative hearing, (4) prepare a transcript and submit legal briefs, (5) write and issue a full APA compliant decision, (6) file a notice of appeal from that decision and submit appellate briefs, and (7) make a decision on the appeal and issue a final agency decision. Even assuming a complainant is willing to forgo many of these steps and makes clear his desire to reach a rapid resolution, it is very difficult to comply with that time limit and also protect in any meaningful way the due process rights of the respondent. In this case, Complainants did not try to obtain a rapid administrative decision, but instead took an active role in setting a schedule that would by definition prevent compliance with the 270 limit. Whether or not that would constitute bad faith or otherwise equitably stop them from invoking the 270 day provision and filing de novo in district court was discussed in the telephone conference but not asserted as a grounds in opposition by Respondent.