



Issue Date: 22 October 2014

*In the Matter of:*

**JAMES A. PAULY,**  
*Complainant,*

Case No.: 2014- FRS-00032

v.

**BNSF RAILWAY COMPANY,**  
*Respondent.*

**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

This matter arises under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109, as amended by the 9/11 Commission Act of 2007. Section 20109 protects employees of railroad carriers from discrimination based on their prior protected activity pertaining to railroad safety or security.

Respondent's *Motion for Summary Decision* is now before me, and for the reasons stated below, that motion is **granted**.

**Procedural History**

On September 21, 2013, Mr. James Pauly ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that his employer, BNSF Railway Company ("Respondent") terminated him in violation of the anti-retaliation provision of the FRSA. On November 6, 2013, OSHA issued a decision dismissing the complaint on the grounds that Mr. Pauly had not adequately participated in the investigation because he had declined to respond to the agency's numerous attempts to contact him to clarify details of the complaint.

On March 11, 2014, Complainant requested a hearing before an Administrative Law Judge ("ALJ"). The case was assigned to me and set for hearing on July 8, 2014, as indicated in my *Notice of Hearing and Prehearing Order*, dated April 9, 2014.

On May 20, 2014, I received *Respondent BNSF Railway Company's Motion for Summary Decision and Incorporated Memorandum in Support* ("Motion"). On June 5, 2014, I granted Complainant's request for a continuance of the hearing in order to provide him with additional

time to obtain counsel. When Mr. Pauly continued to experience difficulties securing representation, I issued my *Order Clarifying Response Deadline* on July 9, 2014, informing him that he had until August 1, 2014, to either retain counsel or respond to the motion. On August 26, 2014, I granted Complainant a final two-month extension in my *Order Requiring Complainant's Response to Motion*. On October 6, 2014, I received *Complainant's Opposition to Summary Decision* ("CP Opp. to RP Motion").

### **Background**

Complainant was an employee of BNSF Railway Company ("BNSF") or ("Respondent") until January 29, 2013, when he was terminated from his position after failing to return to work following a leave of absence.

### ***Health & Safety Complaint***

Prior to 2003, Complainant worked as a Material Department Section Stockman. Compl., 1. This position required him to operate a forklift and perform other tasks. RP Motion, 1. On May 19, 1994, Complainant reported to the Minnesota Department of Labor and Industry ("the Department") what he viewed to be a violation of health and safety laws by BNSF. Compl., 1. A citation was subsequently issued to the company. *Id.* On June 6, 1994, while Complainant was working at BNSF's Brainerd, Minnesota location, he reported to his supervisor, Tom Schloesser, an incident that had occurred involving Complainant's use of a propane-powered fork truck and relating to Complainant's hearing loss. *Id.* Steve Busch, Mr. Schloesser's supervisor, determined that Complainant could not safely operate a fork truck because his hearing loss made it difficult for him to understand his co-workers while using this equipment. *Id.* Complainant received notice of a letter written by Mr. Busch stating that because Complainant was unable to perform the duties of his position—which included taking the fork truck operator's test and operating the fork truck—he would be transferred to another position within BNSF. *Id.* Complainant was then transferred to the company's location in Staples, MN, where he worked as a yard clerk, crew hauler, and janitor. CP Opp. to RP Motion, 1.

In 2000, BNSF's Staples location was closed, and Complainant was moved back to the Brainerd, MN location. Compl., 1. H attempted to take an office job at this location, but was disqualified from doing so. *Id.* Despite Complainant's protests, he was forced to return to the work area where the propane-powered fork trucks were in use. *Id.* As he had been instructed following the incident in 1994, he avoided contact with the fork trucks while working in this environment. *Id.*

In 2003, BNSF cut a number of job positions, and Complainant was forced to return to a fork truck operation position. *Id.* However, he used only an electric fork truck rather than a propane-powered fork truck. *Id.* On January 21, 2003, he contacted his supervisor at the company's headquarters in Fort Worth, TX to ask whom he should contact for a determination of his fitness and ability to perform a fork truck operator job. *Id.* He was told to contact local management. *Id.* On January 21, 2013, Complainant was contacted by his immediate supervisor, Jeff Schurman, to discuss work options. *Id.* At the meeting, Mr. Schurman told

Complainant that he would be required to drive a propane-powered fork truck starting on February 13, 2013. This order contradicted Mr. Busch's written instructions that Complainant not operate the fork truck due to safety concerns. *Id.* Complainant told his supervisor that he was not allowed to operate the fork truck because of his hearing loss. *Id.*

On February 14, 2003, Complainant contacted the Department to inform officials that BNSF was attempting to place Complainant in a position that it had previously deemed to pose a safety risk. Compl., 1; CP Opp. to RP Motion, 7-8. According to Complainant, the Department issued a letter on February 18, 2003, to both Complainant and BNSF providing information on safety standards and recommending that BNSF encourage employee participation in investigating and responding to alleged hazards. *Id.* at 2. However, Complainant was never contacted by BNSF regarding his complaint or the letter from the Department. *Id.*

### ***Leave of Absence and Termination***

After Complainant notified management that he was not allowed to operate the fork truck, BNSF determined that his hearing deficit constituted a potential workplace health and safety hazard. RP Ex. B. BNSF placed him on an unpaid medical leave of absence and requested that he submit physician information to support his medical leave. *See* RP Ex. B. Complainant requested and was granted several extensions over the next ten years because he was unable to provide this information. Compl. 2. His final extension was scheduled to end on November 17, 2012, as per the Employee Medical Leave Form dated November 18, 2011. RP Motion, 2; RP Ex. B. In accordance with the requirements included on the form, an employee is required to return to work prior to or on the date his leave of absence from work expires. RP Ex. B. Therefore, Complainant was required to return to work on or about November 17, 2012. *Id.* However, Complainant failed to return to work on this date, and there is no evidence that he made any attempt to communicate with Respondent regarding the reason for his continued absence. RP Motion, 2.

On January 29, 2013, Respondent sent Complainant a letter via certified mail notifying him that, under the terms of the governing collective bargaining agreement, his employment record had been officially closed. RP Ex. C. The letter stated as grounds for dismissal that Respondent had not received a request for Complainant's extension of his leave of absence nor an authorization of his return to work from the BNSF Medical Department. *Id.* The United States Postal Service ("USPS") delivered the letter to Complainant's postal address on February 1, 2013, and left a notice of delivery at Complainant's residence. RP Ex. A. The letter remained unclaimed on February 19, 2013, when it was returned to Respondent by USPS after several attempts at delivery to Complainant. *Id.*

Complainant filed his FRSA complaint on September 21, 2013, alleging that Respondent terminated him in response to his 2003 communication with the Department, which he asserts is protected activity.

## Respondent's Motion for Summary Decision

Respondent argues in *Respondent's Motion for Summary Decision* that, regardless of the merits of Complainant's FRSA claim, this claim should be dismissed because it was not timely filed.

### *Timeliness*

Respondent principally argues that no issue of material fact exists as to whether Complainant's FRSA claim is time-barred, and that Respondent is thereby entitled to judgment as a matter of law. Respondent asserts that Complainant's FRSA complaint was not filed within the applicable statute of limitations period of 180 days. RP Motion, 4-8. BNSF argues that, under applicable case law, the statute of limitations period commences on the date the employer communicates to the employee its intent to implement an adverse employment action rather than the "point at which the consequences of the act become painful." *Id.* at 4-5. In addition, Respondent argues that the limitations period begins "on the date that the employee is given final and unequivocal notice of the Respondent's employment decision." *Id.* at 5 (citing *Johnson v. BNSF Railway Co.*, 2011-FRS -00021, slip op. at 5 (citations omitted)). Final notice, asserts Respondent, must leave no opportunity for further action by either party and must be clear and unambiguous. RP Motion, 5. Citing USPS records, Respondent argues that Complainant received the termination letter from BNSF on January 29, 2013. RP Motion, 5; RP Ex. A. Respondent asserts that this gave Complainant until July 29, 2013, to file his FRSA claim. *Id.* Because Complainant's claim was not filed until September 21, 2013, Respondent argues that the claim was not timely filed.

Respondent states that Complainant cannot credibly argue that he never received the letter for two reasons. First, Respondent argues that the "mailbox rule" establishes that a correctly-addressed letter is presumed to have been received by the addressee. *Id.* at 6. Therefore, because Complainant does not contest the accuracy of the address to which the letter was mailed, the presumption of receipt should be applied. *Id.* Second, Respondent contends that the statute of limitations period begins when an employee *should* have known of the adverse action and not when he actually became aware of the action. *Id.* Respondent states that, because no dispute exists as to proper delivery of the letter, "the fact of delivery by the Postal Service is sufficient to impute delivery." *Id.* To illustrate this point, Respondent discusses *Bond v. The Boeing Company*, in which an employee's complaint under the Sarbanes-Oxley Act was dismissed as untimely because it was not filed within 90 days, the applicable limitations period. RP Motion, 6-7; 2010-SOX-00040 (ALJ Sept. 13, 2010). In this case, the court used an objective analysis to determine that the statute of limitations began to run on the date of the event that should have alerted a "typical lay person". RP Motion, 7. This date, the court determined, was the date the letter was delivered to the employee's address. *Id.* Respondent argues that in light of this and other analogous case law, Complainant's anticipated argument that he did not receive the letter on the date it was delivered by USPS, should be rejected by this tribunal.

## Complainant's Opposition to Motion for Summary Decision

Complainant maintains in *Complainant's Opposition to Summary Decision* ("Opposition") that he engaged in protected activity under the FRSA when, on February 14, 2003, he filed his complaint with the Department. In addition to reiterating his initial claim that Respondent terminated him in response to his protected activity, Complainant rejects Respondent's argument that he did not file his claim within the applicable limitations period. He asserts that he never received the termination letter and that the limitations period began running when he learned of the termination in August of 2013.

### *Contributing Factor in Termination*

Complainant argues that the protected activity, his complaint to the Department in February 2003, was a contributing factor, if not the only factor, in BNSF's decision to terminate his employment. He asserts that Respondent is required to prove by clear and convincing evidence "that it would have taken the same adverse action in the absence of protected activity."<sup>1</sup> CP Opp. to RP Motion, 7. He calls BNSF's stated reasons for terminating him "bogus" and claims that BNSF could easily have verified the medical documentation requested of him. *Id.* at 8. Thus, Complainant asserts, his protected activity occurring on February 14, 2003, led to his eventual termination when he could not provide Respondent the requested medical documentation. *Id.* Thus, according to Complainant, his protected activity resulted in the adverse employment action taken against him.

### *Timeliness*

Complainant also addresses Respondent's statute of limitations argument in his Opposition. He states that, pursuant to FRSA Section 1982.103, "the limitations period commences once the employee is aware or should have be[en] aware of the employer's decision." CP Opp. to RP Motion, 7. Complainant asserts that he was not made aware of the letter until August 2013, when he received an inquiry regarding a seniority roster that contained the termination letter. *Id.* He argues that there was "no reason for [him] to suspect BNSF was sending a letter to fire him." To illustrate this point, Complainant argues that BNSF should have fired him on a number of occasions beginning in 2003, when he failed to submit to BNSF physician information to support his medical leave. *Id.* Thus, because Complainant had not been fired at any point during this time period, he had no reason to suspect that he would be fired in 2013.

Further, Complainant argues that if BNSF were going to fire him, it should have done so immediately upon his failure to report to work on November 18, 2014. The company's employee medical leave form requires that employees return to work following the expiration of their leave time, stating that "[f]ailure to report for duty on or before the date of the expiration of the leave of absence, unless application for extension has been approved, will be considered

---

<sup>1</sup> Complainant makes this argument independently rather than in response to any argument of Respondent, as the issue of whether the adverse action was a contributing factor in Complainant's termination was not addressed by Respondent in its Motion to Dismiss.

absent without authority and can be grounds for termination.” RP ex. B. According to Complainant, because BNSF failed to follow its own stated procedures requiring the company to terminate him immediately upon expiration of his leave, he had no reason to expect a letter informing him of his termination, and thus, no reason to know of his termination. CP Opp. to RP Motion, 8. In addition, Complainant attempts to distinguish *Bond v. Boeing Company* from his own case, arguing that *Bond* is dissimilar because it concerns a working arrangement and the complainant in that case should therefore have become aware of the adverse employment action when her employer ceased paying her for her work. *Id.* In contrast, asserts Complainant, he was not receiving a paycheck from BNSF at the time of the adverse action and therefore had no reason to be aware of any action on the part of BNSF. *Id.*

Finally, Complainant takes issue with Respondent’s argument that, in his words, “certified mail is fool proof.” *Id.* He describes two occasions when he sent certified mail that was lost or misplaced by USPS before it reached its recipient. *Id.* at 8-9. These examples, he suggests, show that certified mail was not a suitable method for BNSF to use to inform him of his termination.

### **Legal Standards**

#### ***Summary Decision Standard***

In cases before this tribunal, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show there is no genuine issue as to any material fact and the party is entitled to summary decision as a matter of law. *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB June 28, 2011). “A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation.” *Frederickson*, ARB No. 07-100, at 5-6 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The primary purpose of summary judgment is to isolate and promptly dispose of unsupported claims or defenses. *Catrett*, 477 U.S. at 323-24.

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and is supported by sufficient evidence. *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006). The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth “specific facts” showing that there is a genuine issue of fact for hearing. 29 C.F.R. § 18.40(c); *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Where the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial,” there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Catrett*, 477 U.S. at 322-23. In assessing a motion for summary decision, the administrative law judge must consider

the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party. *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6.

### *Standards Applicable to FRSA Claims*

The FRSA protects employees of railroad carriers engaged in interstate or foreign commerce by prohibiting their employers from retaliating against them for “the employee’s lawful, good faith act done ... to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security . . .” 49 U.S.C. §20109(a).

To prevail in an FRSA claim, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity under the Act, (2) he suffered an adverse personnel action of discharge, demotion, suspension, reprimand, or any other discriminatory action, and (3) the protected activity was a contributing factor in the decision to take the adverse action against Complainant. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (Nov. 30 2006); *Nathaniel v. Westinghouse Hanford Co.*, 1991-SWD-002 (Sec’y Feb. 1, 1995), slip op. at 8-9; *Dodd v. Polysar Latex*, 1988-SWD-4 (Sec’y Sept. 22, 1994). However, even if the complainant establishes that an activity protected under the Act was a contributing factor in an adverse personnel action, “the employer may avoid liability if it can prove ‘by clear and convincing evidence’ that it ‘would have taken the same unfavorable personnel action in the absence of that [protected] behavior.’” *Harp v. Charter Comm.*, 558 F.3d 722, 723 (7th Cir. 2009) (quoting *Allen v. Administrative Review Board*, 514 F.3d 468, 475–76 (5th Cir.2008)).

However, in order to reach the merits of a FRSA claim, a complainant must first file the claim in a timely manner. In accordance with 49 U.S.C. §20109(d)(2)(A)(ii), the initial claim must be filed not later than 180 days after the date on which the alleged violation occurred.

### Discussion

After reviewing the information provided by the parties, I find that Complainant did not file his claim in a timely manner, and that Respondent is therefore entitled to summary decision as a matter of law. Complainant’s claim must be dismissed because it was not filed within the applicable statute of limitations period of 180 days. *See* 49 U.S.C. §20109(d)(2)(A)(ii). Because I find that Complainant’s FRSA claim is time-barred, I do not reach the issues of whether he engaged in protected activity that was a contributing factor in his termination. Consequently, Respondent’s motion is **GRANTED**.

### *Timeliness*

For a Complainant to bring a claim under the FRSA, he must file his initial complaint “not later than 180 days after the date on which the alleged violation ... occurs.” 49 U.S.C. §20109(d)(2)(A)(ii). The statute of limitations in a whistleblower case begins to run from the

date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision such as a termination. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003). “Final” and “definitive” notice has been interpreted to mean communication that leaves no further chance for action, discussion, or change. *Id.* “Unequivocal” notice refers to communication that is not ambiguous or misleading. *Larry v. The Detroit Edison Co.*, No. 86-ERA-32, slip op. at 14 (Sec’y June 28, 1991). The time for filing a complaint begins when the employee knew or should have known of the adverse action. *Riden v. Tennessee Valley Auth.*, No. 89-ERA-49, slip op. at 2 (Sec’y July 18, 1990). In determining when the statute of limitations begins to run, an employee is assumed to have a “reasonably prudent regard for his rights.” *Id.*

I find that Complainant has raised no genuine issue of material fact as to whether his complaint was filed within the applicable statute of limitations period. Complainant argues that the limitations period began to run not when the letter was delivered to him, but when he learned of the adverse employment action over six months later. He maintains that he did not know, nor should he have known of the termination because he had no reason to believe that a termination letter would arrive in the mail.

I find this argument unconvincing in light of the common law presumption that a letter, correctly addressed and mailed, is received by the addressee (the “mailbox rule”). *See, e.g., Hagner v. U.S.*, 285 U.S. 427, 430 (1932); *Wilhelm v. Burlington Northern*, ALJ No. 2011-FRS-00027 (ALJ February 1, 2012). Respondent correctly relies on *Bond v. The Boeing Company*, in which the administrative law judge found that the statute of limitations began to run on the date a letter was delivered to an employee’s postal box. 2010-SOX-00040, slip op. at 3 (ALJ Sept. 13, 2010). Here, Complainant provides no evidence to suggest that there was any interference with USPS’s delivery of the letter. As proof of delivery, Respondent provides a USPS record showing the date of attempted delivery to Complainant. RP Ex. A. Absent any evidence to the contrary, this record is sufficient to show that the letter was delivered to Complainant.

Further, Complainant does not state that the letter was sent to the incorrect address. Instead, he argues that it was inappropriate for BNSF to send the letter over two months after his leave of absence ended, stating that “there [was] no reason for Mr. Pauly to suspect BNSF was sending a letter to fire him.” CP Opp. to RP Motion, 7. However, the fact that Complainant was not expecting or failed to retrieve the letter is irrelevant to the question of whether the letter was actually delivered to Complainant. While Complainant provides examples of instances in which certified mail has, in his experience, been unreliable, he provides no evidence to suggest that the letter did not arrive in his mailbox. And while Complainant may have had no knowledge of the letter or the adverse action until well after the date of delivery to his mailing address, knowledge of delivery is not required for the statute of limitations to begin running. Since Complainant provides no evidence to overcome the presumption that the correctly addressed letter was received, I find that the statute of limitations began to run on February 1, 2013, on the date of delivery of the termination letter. As such, I find that Complainant’s FRSA claim, filed September 21, 2013, was not timely filed.

For the reasons stated above, I find that no genuine issue of material fact exists regarding whether Complainant timely filed his FRSA claim. Accordingly, Respondent's *Motion for Summary Decision* is hereby **granted**.

**ORDER**

Respondent's *Motion for Summary Decision* is hereby **GRANTED** and this claim is **DISMISSED**.

**IT IS SO ORDERED:**

CHRISTINE L. KIRBY  
Administrative Law Judge