



**Issue Date: 02 December 2015**

CASE No: 2015-FRS-00040  
OSHA No.: 09-3290-13-102

*In the Matter of:*

**MICHAEL CASEY**

Complainant,

v.

**PACIFIC HARBOR LINES, INC.**

Respondent.

### **Final Order of Dismissal**

This claim for employment protection arises under the Federal Railroad Safety Act (FRS),<sup>1</sup> and the Secretary of Labor's implementing regulations.<sup>2</sup> Because what the worker, Mr. Casey, did wasn't something the Act protects, the claim is dismissed.

The discipline the Railroad imposed resulted from three days Casey was absent without excuse from work—in the vernacular of the railroading he had “laid off sick”—for a medical condition he acknowledges had nothing to do with work. The U.S. Court of Appeals for the Third Circuit has held that only an absence that arises from a medical condition related to work qualifies for protection under 49 U.S.C. § 20109(c)(2). *PATH v Sec'y of Labor*, 776 F.3d 157 (3d Cir. 2015). The Assistant Secretary of Labor recognized and followed this precedent when he dismissed Casey's complaint.

In this de novo review, however, the Assistant Secretary's view doesn't control. Nor am I bound to follow the decision of the Third Circuit, for the statute says any appeal for the final decision of the Secretary is heard in the court of appeals for the circuit where the violation allegedly occurred, or the circuit in which the worker resided

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<sup>1</sup> 49 U.S.C. § 20109.

<sup>2</sup> 29 C.F.R. Part 1982.

on the day of the violation.<sup>3</sup> Casey failed to work at his job in southern California, where he resides. Any appeal will lie in the Ninth Circuit, where the views of the Third do not control.

The Ninth has yet to consider the question. Each claim decided since the Third Circuit's decision in *PATH*, so far as I am aware, has followed its reasoning. Each has dismissed a claim predicated on discipline imposed after an unexcused absence from work on the advice of a physician treating a condition unrelated to railroad employment. I find the reasoning of the Third Circuit persuasive too. There being no activity the statute Casey relies on protects, his claim is dismissed on the merits.

At the initial conference held in this matter on November 18, 2015, the lawyer for Mr. Casey stated no claim for protection is predicated on 49 U.S.C. § 20109(b)(1)(A). I therefore have no occasion to discuss that portion of the statute.

Finally, I reject the Railroad's argument that the Secretary lacks authority to decide this claim. The Railroad points out that the notice of the Assistant Secretary's decision told the Complainant when and where to file his objections to those findings, and told him to serve a copy on the Railroads lawyer. Casey timely filed objections and a request for hearing, which he didn't serve on the Railroad. Any failure to have served those documents on the Railroad doesn't impair the Secretary's authority to adjudicate. "[S]ervice requirements, generally, are imposed to afford notice that litigation has commenced, rather than to trigger a court's power to adjudicate a claim."<sup>4</sup> The Railroad has had adequate notice to protect its interest—it has appeared and its motion to dismiss has succeeded. Belated service of the objections to the Assistant Secretary's findings have not prejudiced it.

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<sup>3</sup> 49 U.S.C. § 20109(d)(4).

<sup>4</sup> *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04-101, ALJ No. 2004-ERA-9, slip op. at 6 (ARB Oct. 31, 2005) (reversing an ALJ's dismissal of a whistleblower claim entered because the worker hadn't served a copy of the hearing request on the employer).

This claim is dismissed sine die.

So Ordered.

William Dorsey  
ADMINISTRATIVE LAW JUDGE

San Francisco, California

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).

