

**U.S. Department of Labor**

Office of Administrative Law Judges  
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Covington, LA 70433

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**Issue Date: 23 December 2015**

**CASE NO.: 2015-FRS-63**

**IN THE MATTER OF**

**GARY D. EPPLE**

**Complainant**

**v.**

**BNSF RAILWAY COMPANY**

**Respondent**

**ORDER DISMISSING COMPLAINT  
AND CANCELLING FORMAL HEARING**

This matter arises out of a complaint filed by Gary Epple ("Complainant") against BNSF Railway Company ("Respondent") under Section 1521 of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109. The FRSA allows the Complainant to file an action in United States District Court if the Department of Labor has not issued a final decision within 210 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the Complainant. 49 U.S.C. § 20109(d)(3).

Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") on January 20, 2011. The Secretary's Findings were issued on August 3, 2015, finding for the Complainant. Respondent submitted its objections to the Secretary's Findings to the Chief Administrative Law Judge on August 5, 2015, and requested a hearing before an administrative law judge. On August 20, 2015, this matter was assigned to the undersigned.

By letter dated December 7, 2015, Complainant through Counsel notified all parties under 49 U.S.C. § 20109(d)(3) that he intended to file a complaint in United States District Court.

On December 11, 2015, Respondent filed a Response and Objection to Complainant's Notice of Intention to File Original

Action in United States District Court arguing that Complainant is "using the kick-out provision to prolong litigation, increase attorney's fees and drive-up costs," and to correct errors in his preparation for trial. Although Respondent notes "1,782 days have elapsed from January 20, 2011 (the date of filing his complaint with OSHA) to December 7, 2015," when Complainant filed his intent to file, and argues he has "waived the right to file a federal lawsuit by continuing to participate in the administrative process beyond 210 days," it is \_\_\_\_\_ clear Complainant's complaint was pending before OSHA for well over 1,660 days before the Secretary entered findings.

On December 16, 2015, Complainant filed his federal lawsuit against Respondent in the United States District Court for the Western District of Oklahoma in Case No. CIV-15-1357-M.

On December 21, 2015, Complainant also filed his Response to Respondent's Objections.

Notwithstanding the foregoing,

The Department of Labor has not issued a final decision within 210 days of the filing of the administrative complaint on January 20, 2011. Moreover, I find there is no evidence of record which indicates that there has been any delay due to the bad faith of the Complainant.

As the Complainant has filed a complaint in United States District Court based on the same facts that constituted his action before the Office of Administrative Law Judges, jurisdiction in the latter has been divested. See Stone v. Duke Energy Corp., 432 F.3d 320 (5<sup>th</sup> Cir. 2005) (Sarbanes-Oxley case); see also Kelly v. Sonic Automotive, Inc. ARB No. 08-027 (Dec. 17, 2008) (Sarbanes-Oxley case).<sup>1</sup>

Consequently, based on the foregoing, I find I no longer have jurisdiction over the instant matter and hereby dismiss Complainant's Complaint before the Office of Administrative Law Judges based on lack of jurisdiction.

In view of the foregoing, the hearing scheduled on January 5, 2016, is hereby cancelled.

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<sup>1</sup> Similar to the governing statute in this case, the employee protection provision of the Sarbanes-Oxley Act, 18 U.S.C. §1514A(b)(1)(B), permits an employee to file an action in district court if the Secretary has not rendered a final decision within a specified time period.

**ORDERED** this 23<sup>rd</sup> day of December, 2015, at Covington, Louisiana.

LEE J. ROMERO, JR.  
Administrative Law Judge

**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](mailto: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).