

U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222

(412) 644-5754
(412) 644-5005 (FAX)



Issue Date: 28 March 2016

CASE NO. 2016-FRS-6

In the Matter of:

JOHN R. YOPE,
Complainant

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent

ORDER OF DISMISSAL

This case arises under the employee protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”), Pub. L. No. 110-53 (Aug. 3, 2007) and the implementing regulations at 29 C.F.R. Part 1982. On August 6, 2014, complainant, John Yope (“Yope” or “Complainant”) filed a complaint with the Secretary of Labor alleging that his employer, Norfolk Southern Railway Company, (“Employer” or “NSRC”) violated the employee protection provisions of the FRSA.

On February 12, 2016, Yope provided notice of his intent to file a complaint in this matter in federal court, in accordance with 49 U.S.C. §20109(d)(3). For the reasons that follow, this matter is dismissed without prejudice to its reinstatement if Complainant fails to file an action in federal district court.

After investigation of Yope’s complaint, on September 29, 2015, the Occupational Safety and Health Administration (OSHA) found that the NSRC did not violate the FRSA and dismissed the complaint. On October 27, 2015, Yope objected to OSHA’s findings and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). The matter was subsequently assigned to the undersigned ALJ. A hearing in this case is currently scheduled to begin in Pittsburgh, Pennsylvania on April 26, 2016, before the undersigned ALJ.

On February 12, 2016, Yope provided notice of his intent to file a complaint in this matter in the applicable United States District Court, in accordance with 49 U.S.C. §20109(d)(3). Generally, 49 U.S.C. §20109(d)(3) permits a complainant to bring an action at law or in equity for *de novo review* in the appropriate district court for the United States with jurisdiction, if there is no final order of the Secretary, 210 days have passed since the filing of the complaint and there has been no delay due to the bad faith of the complainant.

The requirements of 49 U.S.C. §20109(d)(3) have been satisfied. Specifically, a hearing has not yet taken place and thus there has been no final order of the Secretary; more than 210 days have passed since the complaint was filed on August 6, 2014; and there is no evidence of delay due to bad faith of Complainant.

Based on Complainant's representations that he intends to file an action in federal district court, this case is being dismissed.¹ In the event that the Complainant fails to file an action in federal district court, any party may move to set aside this Order of Dismissal and reopen these proceedings.

ORDER

IT IS ORDERED:

1. That the hearing scheduled to begin on April 26, 2016, in Pittsburgh, Pennsylvania, in this matter is **CANCELLED**;
2. That the complaint, filed under the FRSA in this matter, is **DISMISSED WITHOUT PREJUDICE** to its reinstatement if an action is not filed in federal district court; and
3. Any pending motions and all hearing deadlines are moot.

NATALIE A. APPETTA
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

¹ To date, the undersigned has not received a copy of the complaint filed in federal court.

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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. - 29 -

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 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).