

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 March 2018

Case Nos.: 2017-FRS-00025
2017-FRS-00075
2017-FRS-00076

In the Matters of

PATRICK BROWNING
Complainant

v.

NORFOLK SOUTHERN RAILWAY CORP.
Respondent

ORDER OF DISMISSAL

The above-captioned matters, based on complaints filed by Patrick Browning (“Complainant”) against Norfolk Southern Railway Corporation (“Respondent” or “Norfolk Southern”), arise under the employee protection provisions of the Federal Railroad Safety Act, U.S. Code, Title 49, §20109, as amended (“FRSA”) and its implementing regulations at 29 CFR, Part 1982. These matters have been consolidated for a formal hearing, scheduled to commence at 9:30 a.m., May 15, 2018 in Binghamton, New York and a prehearing conference has been scheduled for April 18, 2018.

The FRSA allows Complainant to file an action in United States District Court if (1) the Department of Labor (“DOL”) has not issued a final decision within 210 days of the filing of the complaint with the Occupational Safety and Health Administration (“OSHA”), and (2) there is no showing that there has been delay due to the bad faith of Complainant.

In the matter referenced by 2017-FRS-00025, OSHA issued a notice of determination by letter dated December 23, 2016, stating that the complaint was timely filed; Complainant’s appeal of that notice of determination states that Complainant filed his complaint in that matter on June 16, 2016. In the matter referenced by 2017-FRS-00075, OSHA issued a notice of determination by letter dated June 8, 2017 stating Complainant timely filed a complaint on July 31, 2015; in the matter referenced by 2017-FRS-00076, an OSHA notice of determination letter dated June 19, 2017 states Complainant timely filed a complaint on March 1, 2016.

The existing record in these consolidated matters reflects DOL has not issued a final decision any of the complaints since their dates of filing and more than 210 days have elapsed since the filing of those complaints.

By email received on March 6, 2018, Complainant's counsel enclosed a copy of a complaint filed in the United States District Court for the Northern District of New York which is date stamped as filed on March 7, 2018. That complaint brings an action against Respondent for the same violations under the FRSA as are alleged in the instant matters before this Office.

Under §20109(d)(3) of the FRSA, a de novo review of the complaint is permitted in the appropriate United States District Court if a final decision on the filed complaint has not been issued within 210 days after the complaint was filed, provided delay is not the result of bad faith of the complainant. Pursuant to implementing Federal regulations at 29 CFR §1982.114(b), a complainant is required to file notice of intention to file the complaint in U.S. District Court 15 days in advance of such filing with the federal District Court. The regulations also require that the complainant file a copy of the district court complaint with the appropriate official with jurisdiction over the complaint while it is before the United States Department of Labor. Under the FRSA, filing a complaint in United States District Court vests jurisdiction in that forum. 49 U.S.C. § 20109(d)(3); *see also* 29 C.F.R. § 1982.114(a).

In these cases, Complainant's counsel provided notice of Complainant's intent to file a complaint in federal District Court during a teleconference with the parties held on the record October 25, 2017,¹ and submitted a copy of a complaint alleging FRSA violations filed with a federal District Court on March 6, 2018. There has been no showing of any delay in District Court filing due to Complainant's bad faith. Accordingly, jurisdiction for further action on the complaints file under the FRSA has been removed to the United States District Court for the Northern District of New York. The current causes of action are therefore dismissed before this Office: the hearing scheduled for May 15, 2018, and the prehearing conference scheduled for April 18, 2018, are canceled.

SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

¹ In a letter to this Office from Respondent's counsel dated February 27, 2018 requesting a status conference, Respondent acknowledged that "Complainant's counsel advised the Court in our October 25, 2017 teleconference that Complainant would be removing these cases to federal court in accordance with 49 U.S.C. § 20109(d)(3)."