



Issue Date: 25 April 2017

Case No.: 2017-FRS-00051
OSHA No.: 2-0050-16-068

In the Matter of:

ROBERT JONES,
Complainant,

v.

CONSOLIDATED RAIL CORP.,
Employer.

ORDER DISMISSING COMPLAINT

This proceeding arises under the employee protection provisions of the Federal Railroad Safety Act of 2007, 49 U.S.C. § 20109 (2012) (“FRSA” or “the Act”), and its implementing regulations found at 29 C.F.R. Part 1982.

Robert Jones (“Complainant”) filed an amended complaint with the Secretary of Labor (“the Secretary”) on June 15, 2016, alleging that his former employer, Consolidated Rail Corporation (“Respondent”), brought disciplinary charges against him and terminated his employment in retaliation for reporting an unsafe working condition and his resultant injury.¹ On March 31, 2017, the Regional Administrator of the Occupational Safety and Health Administration (“OSHA”), acting on behalf of the Secretary, determined that Complainant’s protected activity was not a contributing factor in the adverse action taken against him and dismissed the complaint. On April 10, 2017, Complainant filed objections to the Secretary’s determinations with the Office of Administrative Law Judges (“OALJ”) and requested a formal hearing on the matter.²

However, on April 21, 2017, Complainant submitted a letter advising that he had filed an action in the United States District Court for the Eastern District of Pennsylvania on March 15, 2017, based on the FRSA violations alleged in the amended complaint. Complainant indicates

¹ Complainant’s submissions to the Court indicate that he first filed an FRSA complaint against Respondent on June 18, 2015. Having received no determination or other contact from OSHA regarding the initial complaint, Complainant filed an amended complaint on June 15, 2016, which includes both the original allegations contained in his initial complaint and additional allegations regarding retaliation that occurred after he filed the initial complaint.

² Although the case was docketed with this Court, a formal hearing has not yet been scheduled.

that his objections to the Secretary's determinations and request for hearing were "the result of a miscommunication or oversight," and requests that "the Department of Labor's actions [be] dismissed and terminated" in light of the district court case. On April 24, 2017, Respondent filed a letter stating that it does not object to OALJ's dismissal of this matter, "without conceding that [Complainant] has satisfied all of the elements necessary to perfect jurisdiction in the United States District Court for the Eastern District of Pennsylvania."³

Order

Accordingly, it is hereby ORDERED that the complaint before the Office of Administrative Law Judges filed by Robert Jones under the Federal Railroad Safety Act is DISMISSED, without costs awarded to either party.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

³ Under the enforcement provisions of the Act, if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint, and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. 49 U.S.C. § 20109(d)(3). Once the employee initiates an action in federal district court pursuant to the kick-out provision, the Secretary loses jurisdiction over the controversy. *See Stone v. Duke Energy Corp.*, 432 F.3d 320, 322-23 (4th Cir. 2005) (Sarbanes-Oxley case); *Despain v. BNSF Ry. Co.*, 186 F. Supp. 988, 991 (D. Ariz. 2016). In this matter, more than 210 days have passed since Complainant filed his complaint and the Secretary of labor has not issued a final decision. Further, there is no indication the delay is due to bad faith on the part of Complainant. He filed his original complaint with OSHA on June 18, 2015, later amended on June 15, 2016. OSHA did not issue a decision dismissing the complaint until March 31, 2017, after Complainant had already filed an action in the United States District Court for the Eastern District of Pennsylvania. The majority of any delay in this matter cannot be attributed to Complainant. Thus, because Complainant has filed suit in federal district court pursuant to the FRSA's kick-out provision, OALJ no longer retains jurisdiction over this matter.