



**Issue Date: 10 February 2020**

Case No.: 2017-FRS-58

In the Matter of:  
JOHN STEWART,  
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,  
Respondent.

**ORDER REMANDING CLAIM TO OSHA FOR CONSOLIDATION  
WITH COMPLAINANT'S SUBSEQUENT CLAIMS**

This proceeding arises from a claim of whistleblower protection under the Federal Rail Safety Act (FRSA), as amended.<sup>1</sup> The statute prohibits retaliatory or discriminatory actions by railroad carriers against their employees who: (1) provide information to their employers, a Federal agency, or Congress, alleging violation of any Federal law relating to railroad safety or security, or fraud, waste or abuse of public funds intended to be used for railroad safety or security; (2) report a hazardous safety or security condition, refuse to work when confronted by a hazardous safety or security condition, or refuse to authorize use of any safety-related equipment, track, or structure in a hazardous condition; or (3) request medical or first aid treatment. In this case, the Complainant has requested review by the Office of Administrative Law Judges (“OALJ”) of a finding by the Occupational Safety and Health Administration (“OSHA”) that the Respondent did not violate the Act.

This case was scheduled for hearing beginning March 10, 2020, and continuing, if necessary, through March 12, 2020, in Cincinnati, Ohio. However, on January 13, 2020, the undersigned received a “Joint Motion for Stay of Case Pending Consolidation or, in the alternative, to Remand for Consolidation.” In this Motion, the parties indicate that “On November 27, 2019, Complainant filed with OSHA a new complaint against Respondent raising additional allegations of retaliation in violation of the Federal Railroad Safety Act (FRSA)... The parties believe that consolidation of the two complaints will promote administrative economy and enable the parties to avoid unnecessary fees and costs through potentially duplicative discovery and motion practice.” The parties further requested that the instant case be held in abeyance pending OSHA investigation and requested expedited determination with a subsequent appeal in that matter to the Office of Administrative Law Judges. However, if this is not feasible,

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<sup>1</sup> 49 U.S.C. § 20109.

in the alternative, the parties request that this case be remanded to OSHA for consolidation with the new complaints.

The FRSA (and the procedures set out in Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century which guide many aspects of the handling of these matters) does not directly address supplemental complaints or consolidation of multiple Agency findings. *See* 49 U.S.C. § 42121. While I may not remand the case to OSHA for additional investigation “on the basis that a determination to dismiss was made in error,” there is no such prohibition on remanding the case for consolidation purposes. (*i.e. see* 29 C.F.R. §1979.109(a)). The allegations in the Complainant’s initial action before me, and the subsequent alleged adverse actions which are currently before OSHA, appear to be sufficiently intertwined so that proceeding with either action unconsolidated would be piecemeal litigation and an inefficient use of the parties’ and court’s time. Further, the failure to consolidate may deprive the parties of their ability to fully present the issues relevant to their cases. With the undersigned’s past experience with similar matters and the administrative pitfalls with holding the current matter in abeyance and attempting to bring the second matter before me for consolidation, the undersigned has determined the most expedient method of consolidation will be remand of the instant matter to OSHA.

**IT IS THEREFORE ORDERED** the claim now pending before me is **REMANDED** to OSHA for consolidation with the Complainant’s subsequent claims. These consolidation claims may be returned to me for hearing and decision at the discretion of the Chief Judge. The hearing scheduled for March 10-12, 2020 in Cincinnati is **CANCELLED**.

PETER B. SILVAIN, JR.  
Administrative Law Judge