



Issue Date: 20 August 2018

CASE NO.: 2017-FRS-85

In the Matter of:

JUSTIN WALKER,
Complainant

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent

ORDER OF DISMISSAL

This case comes under the Federal Rail Safety Act (FRSA),¹ as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.² The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against by Employers for taking any action relating to the fulfillment of safety or other requirements established by the above Act.

Complainant filed his initial complaint with the Occupational Safety and Health Administration (OSHA) on 2 Jun 17. The complaint was considered by OSHA and dismissed on 27 Jul 17. He filed his objections and the case was referred to the Office of Administrative Law Judges for a de novo hearing, and both parties agreed to a hearing date of 10 Jan 18. On 20 Dec 17, Respondent filed a Motion for Summary Decision. Complainant moved to strike the motion as untimely, and I continued the hearing date first to 26 Mar 18 and then to 10 May 18 to allow both sides to fully brief both the timeliness and the substantive issues. On 6 Feb 18, I found the motion timely but denied it on substantive grounds. The parties then litigated evidentiary issues related to allegation of retaliation against other whistleblowers in terms of relevance to both the instant substantive claim by Complainant and possible punitive damages. The case was continued again to 14 Aug 18.

On 8 Aug 18, Complainant’s Counsel announced by email that his client intended to withdraw the administrative claim and file a complaint in federal district court. In a subsequent conference call, Respondent indicated that while it had no legal grounds that would support any opposition to the withdrawal, it would note for the record the additional expense in preparation that resulted from the last-minute nature of the withdrawal.

¹ 49 U.S.C. § 20109.

² Pub. L. No. 110-53 (Aug. 3, 2007).

Employees under the Act may bring an original action at law or equity for de novo review in the appropriate district court of the United States 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.³ An employee does not act in bad faith by continuing to participate in the administrative process after acquiring his statutory right to file in district court.⁴ Accordingly, whether the late notice was a consequence of a good faith reassessment of the best litigation options for Complainant or a cynical effort to force an opposing party to waste as much money as possible,⁵ the Act and interpreting case law allows for him to start over in district court at any point before a final secretarial decision.

The motion to withdraw is granted.

ORDERED this 20th day of August, 2018 at Covington, Louisiana.

PATRICK M. ROSENOW
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.

³ 49 U.S.C. § 20109(d)(3).

⁴ *Gunderson v. BNSF Railway Company*, 850 F.3d 962 (8th Cir. 2017) (Noting that although the complainant wasted a great deal of scarce resources, the Court was constrained to allow him to file anew).

⁵ With a similar collateral impact on the Administrative Law Judge and staff.

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

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).