



Issue Date: 01 February 2018

CASE NO.: 2017-FRS-00064

In the Matter of:

SCOTT WIDHALM,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

Appearances: Scott Widhalm
Self-represented Complainant

Keith M. Goman, Esq.
Gillian Dale, Esq.
Paul S. Balanon, Esq.
Jacob E. Godard, Esq.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER
GRANTING SUMMARY DECISION

This matter arises under the employee protection provisions of the Federal Rail Safety Act and its implementing regulations. 49 U.S.C. § 20109; 29 C.F.R. Part 1982. Complainant alleges that, in retaliation for his reporting a workplace injury, Respondent (1) cut off benefits (such as health insurance), (2) refused to allow him to return to his prior job after he recovered from the injury, and (3) denied him a promotion.¹ See 49 U.S.C. § 20109(a)(4), (c)(2).²

¹ R.Ex. 2 at 35-36, 125; R.Ex. 15 at 2. "C.Ex." refers to Complainant's exhibits. "R.Ex." refers to Respondent's exhibits. Without objection, I admit into evidence all exhibits that either party submitted.

² Respondent correctly observed in its brief that, when questioned at a deposition about all of the adverse actions he was alleging, Complainant said nothing about a failure to promote. R.Ex. 2 at 35-36, 125. In his opposition brief on this motion, Complainant offered nothing to refute Respondent's argument that Complainant essentially had abandoned this allegation. He offered no evidence to support this portion of his claim.

On January 8, 2018, Respondent moved for summary decision. It asserted that Complainant filed his administrative complaint with OSHA late, after the applicable 180-day filing deadline had run. As Complainant is self-represented, on January 9, 2018, I issued an Order to Show Cause, advising him about the motion. I discussed what summary decision is; that it could result in a decision of the case unfavorable to Complainant without a hearing; that he had a right to retain counsel (or a non-attorney representative); what was required when opposing summary decision; and ways to request additional time if needed (such as for additional discovery).³ Complainant filed a timely opposition with exhibits. Having been fully briefed and informed, I will grant Respondent's motion.

Undisputed Material Facts⁴

While working as a locomotive engineer for BNSF on April 3, 2013, Complainant reported that he had been exposed to smoke and fumes from a malfunctioning engine. R.Ex. 3 at ¶¶ 6-11. His treating physician took him off work for about a month. R.Ex. 2 at 59-60. Complainant returned to work (with a doctor's release) on or about April 28, 2013. *Id.*; R.Ex. 1 at 1. In late May or early June 2013, Complainant's doctor again took him off work. *Id.* That was the last time Complainant worked for BNSF. *Id.*

BNSF ceased providing fringe benefits (such as health, vision, and dental insurance) to Complainant's family on December 31, 2014, and ceased providing these benefits to Complainant a year later, on December 31, 2015. R.Ex. 2 at 35:23-36:21.

Meanwhile, on March 25, 2015, Complainant (represented by counsel) filed in state court a claim under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, *et seq.* R.Ex. 3 at 1.⁵ That Act establishes hybrid tort/workers' compensation remedies for injured rail workers. Complainant alleged that he had sustained workplace injuries on April 3, 2013, and additional injuries as sequelae of these and of the medication his doctors had prescribed. R.Ex. 3 at 2. In addition to various respiratory conditions, Complainant alleged that the injury and sequelae included morbid obesity (requiring surgery) from prescribed steroids and a variety of psychological conditions (PTSD, anxiety disorder, depression, and adjustment disorder). *Id.*

Complainant's physician, Dr. Pacheco, wrote in a report on October 14, 2015: "In my opinion, [Complainant] will not ever be medically capable of performing his job as a locomotive engineer." R.Ex. 4 at 2. Complainant's vocational expert testified at a deposition on January 13, 2016, that there was nothing BNSF could do "to get [Complainant] back working on the railroad." R.Ex. 6 at 90. The vocational expert added that, given Complainant's condition after two years and nine months of treatment, it was "more than likely that [Complainant is] not going to be able to return to competitive employment . . . in any capacity." *Id.* at 103.

³ I also allowed Complainant a few extra days to file an opposition.

⁴ As I review the facts on summary decision in the light most favorable to the non-moving party (here Complainant), I make these findings for purposes of this motion only.

⁵ Colorado state district court (Denver county), Case No. 2015CV31083.

Complainant gave a deposition in the FELA case on August 4, 2015. R.Ex. 8. He testified that he did not believe he would ever be able to work as a locomotive engineer or do any other railroad work within his craft, that he had not looked for any other kind of work, and that he believed he would never be able to work in any capacity because of his medical condition (though he was doing everything he could “to try and get [his] life somewhat back a little bit”). *Id.* at 318:25-382:10; 383:1-13; 385:9-23.

At trial on the FELA claim, Complainant testified to the jury on February 24, 2016, that he believed he would never be able to return to work in any capacity (part-time, full-time, sedentary, heavy) for the rest of his life. R.Ex. 9 at 68:2-69:5. This included never returning as a locomotive engineer, in any other railroad craft for which he was qualified, or in supervisory work. *Id.*

On February 29, 2016, the jury returned a verdict in favor of BNSF. R.Ex. 10. BNSF immediately placed Complainant in “estoppel” status. R.Ex. 1. I will discuss this in more detail below, but BNSF places employees in this status when the employees are ineligible to return to work based on a permanently disqualifying medical condition.

On March 7, 2016, the Colorado state trial court entered judgment in favor of BNSF and against Complainant. *Id.* It awarded BNSF costs of \$75,000 to \$80,000. C.Ex. 1. Complainant appealed. *Id.* The parties settled, with Complainant abandoning his appeal and BNSF abandoning the award of costs. *Id.*

On March 14, 2016, Complainant’s counsel on the FELA case emailed Complainant to confirm the settlement. *Id.* He included the following: “[BNSF] asked for a resignation as part of the deal and I declined that for you. So you still have your employment with them but will have to keep your medical leave of absence up to date.” *Id.*

Less than two months after testifying to the jury that he believed he would never be able to work in any capacity, Complainant wrote (on April 26, 2016) the following to Darron Boltin at BNSF:

My doctor is releasing me to return to work. If you could let me know the documents that are needed and the steps I need to take to return I would like to start the process. If there are others that I need to contact also could I have their names, titles, and email addresses?

R.Ex. 11. The doctor who Complainant expected to provide the release was Dr. Pacheco. R.Ex. 2 at 89:5-7. This is the same doctor who six months earlier opined that Complainant would never be able to return to his job. R.Ex. 4 at 2.

At a deposition seventeen months later, Complainant explained that he was not putting any dates on when he would return to work; he merely wanted to know what steps he would have to complete before he could return. R.Ex. 2 at 89:8-16. As this is summary decision, I accept

Complainant testimony for purposes of the motion.⁶ But regardless of Complainant's intent in his email to Boltin, BNSF's response was to reject any notion of Complainant's returning.

BNSF Senior General Attorney David M. Pryor responded on behalf of the Company by letter of May 13, 2016. R.Ex. 12. He used the expression "mark up" in his answer. *Id.* This railroad term refers to returning to work after an absence. Mr. Pryor wrote in pertinent part:

This letter is sent in response to your requests to mark up in train service, work you previously claimed you could not perform due to permanent medical restrictions [¶] Your request to mark up will not be allowed based on estoppel principles.

For years you and your medical providers consistently represented that your permanent medical restrictions prevented you from working in train service at BNSF. Moreover, you and your medical providers testified under oath – and produced reports stating – that you are unable to perform such work. In addition, your counsel made statements at your February trial indicating that your medical conditions prevented you from working at BNSF.

But recently, a few months after your FELA trial concluded, you attempted to mark up to train service.

The sworn testimony, timing of your trial and first attempt to mark up, medical records, and expert reports establish conclusively that you are estopped from claiming that you are now able to work in train service for BNSF.

Id. Complainant received the letter on the day it was written, May 13, 2016. R.Ex. 104:5-10.

Complainant had learned somewhat earlier that BNSF had put him on estoppel status. He understood then that it meant he was "basically estopped from working, and basically put on a board to sit and rot," earning no money. R.Ex. 2 at 86:3-11, 125:21-126:7.

When asked at a deposition about Mr. Pryor's May 13, 2016 letter, Complainant testified:

Q. And then it says, "Your request to mark up will not be allowed based on estoppel principles. What did you understand that to mean?"

A. That I was estopped from working.

Q. Meaning, BNSF was saying you're not allowed to come work here, right?

A. According to them, I was not ready to work yet.

⁶ Complainant's testimony is inconsistent with a statement he made in his OSHA complaint: "I have been released to work by my doctor with a letter stating I [sic] fit for duty. This release was submitted in April of 2016 to BNSF. I have been trying to get back to work since then . . ." R.Ex. 15 at 3. Perhaps Complainant was simply mistaken about the date Dr. Pacheco released him to return to work; it appears that that did not occur until July 2016. But Complainant's testimony is also inconsistent with the express language in his email to Boltin. Complainant stated there that his doctor was releasing him to return to work, and Complainant wanted to know the steps to return to work because he "would like to start the process."

Q. . . . You knew that to mean BNSF was claiming, at least, that you were estopped from returning to work *ever*, right?

A. Yes. They were estopping me from going back to work.

* * *

Q. At least since May 13th of 2016 when this letter was sent to you, you've understood that you've told BNSF you want to come back to work and are ready to come back to work, and they've told you we're not *ever* going to let you do that, right?

A. Yes.

R.Ex. 2 at 102:23-103:12; 104:5-10 (emphasis added).

Nonetheless, Complainant persisted. He disagreed with BNSF's decision because BNSF had not done any medical testing. *Id.* at 103:13-18. He saw Dr. Pacheco in July 2016. At Complainant's request, Dr. Pacheco sent BNSF a medical release on July 13, 2016. C.Ex. 3. There, the doctor states that Complainant's only diagnosis is "irritant induced asthma"; that Complainant had a normal chest exam and an "excellent response to inhaled steroids and bronchodilators"; that none of the medication he was taking impaired his alertness; and that he could return to full duty without restriction, effective July 25, 2016.

Pryor responded again, this time in a letter on October 10, 2016. R.Ex. 13. He wrote in pertinent part:

I previously sent you a letter in response to requests you made to mark up in train service, which is work you have claimed you cannot perform due to permanent medical restrictions. I tried to make it very clear that your requests to mark up would not be allowed based on estoppel principles.

BNSF's position – that you are estopped from ever working again in BNSF train service – is based on sworn testimony by you and your medical providers regarding permanent medical restrictions, medical records and reports, statements your counsel made at your FELA trial, and the timing of your requests to mark up so soon after your FELA trial concluded.

My understanding is that you have made multiple new inquiries to BNSF's Human Resources and Medical Departments about what you need to do to be allowed to mark up.

Again, you will not be allowed to mark up in BNSF's train service. You are estopped from doing so.

Id. (emphasis in original).

Complainant responded in an email on October 20, 2016. C.Ex. 4. He stated that, before the FELA trial, BNSF said it wanted to help keep him working, but that BNSF's conduct since the trial was not helpful, thus leaving him "very confused" about whether BNSF really was offering anything "more than an empty hand." *Id.* Nonetheless, confused or not, Complainant

acknowledged as follows: “I received your letter *once again* denying me the opportunity to return to work at BNSF You have taken the position that I am estopped from *ever* working again in BNSF train service.” *Id.* (emphasis added).

At a deposition, Complainant testified that he understood BNSF was not letting him come back to work, but he did not understand BNSF’s rationale. R.Ex. 2 at 105:16-106:2. He conceded that Pryor was repeating in his letter of October 10, 2016, what he previously said in his letter of May 13, 2016: that BNSF was not going to allow Complainant to return to work at the Company. R.Ex. 2 at 105:12-15. This was consistent with what he wrote in the October 20, 2016 email that BNSF was “once again” denying him reemployment.

On November 1, 2016, Complainant filed a grievance, asserting that BNSF’s refusal to mark him up for service was in breach of the collective bargaining agreement. R.Ex. 14. After denials at initial steps in the grievance process, the Union’s General Chairman filed an appeal on May 9, 2017. *Id.* The current status of the union grievance is not on the record.

Filing date. Complainant filed his administrative complaint at the Occupational Safety & Health Administration website on April 11, 2017. R.Ex. 16 at 1.

Discussion

Legal requirements for summary decision. On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.72 (2015); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56).

Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.72(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

I. Complainant Untimely Filed His Administrative Complaint With OSHA.

A complainant alleging a violation of the employee protection provisions of the Federal Rail Safety Act must file a complaint with OSHA “not later than 180 days after the date on which the alleged violation . . . occurs.” 49 U.S.C. § 20109; 29 C.F.R. § 1982.103(d). The limitations period begins when the employee “knows or reasonably should know that the challenged act has occurred.” *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (5th Cir. 1982). The employee should know of the act’s occurrence when he receives “final, definitive, and unequivocal notice” of the adverse action. *Jenkins v. U.S. Environmental Protection Agency*, ARB No. 98-146 at 13 (ARB

Feb. 28, 2003). This requires a communication that is “conclusive” and “free of misleading possibilities.” *Dugger v. Union Pacific RR. Co.*, ARB No. 16-079 at 2 (ARB Aug. 17, 2017).

Here, BNSF’s Senior General Attorney Pryor wrote to Complainant on May 13, 2016, that Complainant was estopped from returning to train service at BNSF.⁷ Complainant received the BNSF’s letter on the same day. The letter – both to a reasonable reader and as Complainant understood it – stated BNSF’s conclusive, non-misleading, definitive, unequivocal, and final statement that it would not reinstate Complainant to train service. Complainant repeatedly testified that he understood Pryor’s letter to mean that BNSF would never allow him to come back to work even if he was ready, willing, and able to return. Complainant testified to this at his deposition when asked directly about the May 13, 2016 letter, and again when he agreed that Pryor’s October 10, 2016 letter repeated the same point as Pryor had written in his May 13, 2016 letter – namely, that BNSF was refusing ever to return Complainant to service. R.Ex. 2 at 104:5-10, 105:12-106:2.

Complainant’s statements that he did not understand BNSF’s rationale for its decision are not relevant. The date the employee learns of the employer’s *reasons* for an adverse action does not affect the date that the limitations period begins to run; the relevant date is when the employee knows or should have known of the adverse action itself. *See Coppinger-Martin v. Nordstrom, Inc.*, ARB No. 07-067 (ARB Sept. 25, 2009). Thus, in *Coppinger-Martin*, the complainant did not learn about the employer’s true reasons for her termination until six months after she was notified of the termination. The ARB held that the limitations period began to run when Complainant first received notice of the termination, not when she learned the reasons for it. *See also Halpern v. XL Capital, Ltd.*, ARB No. 04-120 (ARB Aug. 31, 2005) (holding that a whistleblower did not need evidence of retaliatory motive to file a complaint).

Also irrelevant is Complainant’s subjective purpose when he wrote the initial email to Boltin. Even accepting that Complainant was merely asking for the steps he would have to complete when and if he did become able to return to work (and wanted to return), it remains that BNSF took the adverse action when it notified Complainant that he was ineligible to return at any time. BNSF emphasized various sworn statements from Complainant and from his experts that each of these people stated that Complainant’s work-related disability was permanent. BNSF explained that, under estoppel principles, this foreclosed Complainant from contending that he was able to return. BNSF closed the door to Complainant’s returning at any time and preemptively foreclosed any process in which Complainant might engage aimed at returning. That was a final, unequivocal adverse action, complete as of May 13, 2016, regardless of whether Complainant actually was applying to return at that time or was merely requesting information about what he’d have to do to return.

⁷ As the statement was from BNSF’s counsel, it was not, as Complainant suggested in deposition testimony, merely Mr. Pryor’s opinion. *See* R.Ex. 2 at 105:12-15. Pryor wrote his letter on BNSF letterhead, which identified him as BNSF’s Senior General Attorney, and he signed it personally. As a matter of law, Pryor spoke for his client corporation, Respondent BNSF Railway Company. *See Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (“Each party is deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all facts, notice of which can be charged upon the attorney.’”).

Nor do Complainant's continuing efforts to return to employment after May 13, 2016, reset the limitations period. Once an employer notifies the affected person of the adverse action, the limitations period begins to run; the employee cannot reset the limitations period simply by repeating the same request and obtaining the employer's repetition of the same denial (or other adverse determination). See *Sweatt v. Union Pac. R.R. Co.*, No. 14-CV-7891, 2016 WL 128036 at *3 (N.D. Ill. Jan. 12, 2016), *aff'd*, 678 F. App'x 423 (7th Cir. 2017) (Title VII) (reasoning that the limitations period "would be meaningless if [employee] could reset it simply by requesting the same surgery a second time and again being told 'no'"). "When an initial discriminatory act is time-barred, a later related event is not actionable if it is merely a consequence of the first; to be actionable, the later event must involve an independent act of discrimination." *Brown v. Unified School Dist. 501, Topeka Pub. Schools*, 465 F.3d 1164, 1187 (10th Cir. 2006) (Title VII and 42 U.S.C. § 1981); see *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980). Thus, after an employer previously informed an employee that he was not eligible for rehire, the employer's repetition of this statement when employee's union referred him for work did not restart the limitations period. See *Johnsen v. Houston Nana, Inc.*, ARB No. 00-064 at 4-5 (ARB Jan. 27, 2003).

Here, BNSF gave its definitive adverse decision to Complainant on May 13, 2016, when it first responded to Complainant's expression of interest in returning to work at some point. Complainant's continued submissions of information (such as his doctor's release) and arguments (such as that BNSF wanted to help him before the FELA trial and had reversed course after the trial) did not extend the limitations period past 180 days following May 13, 2016.

Conclusion. The limitations period on the claim related to BNSF's denial of Complainant's request to return to work began to run on May 13, 2016, and ended 180 days later, on Wednesday, November 9, 2016. Complainant filed his complaint with OSHA on April 11, 2017. The complaint was not timely filed as to this alleged violation.

Complainant did not oppose summary decision on his allegations about BNSF's ceasing to pay benefits. Even if he had, those claims are time-barred. Complainant testified that BNSF ceased paying some benefits on December 31, 2014, and ceased paying the remaining benefits on December 31, 2015. The limitations periods began to run at the latest on December 31, 2015, and ended 180 days later, on Tuesday, June 28, 2016. Complainant's filing on April 11, 2017, was untimely.

Finally, Complainant abandoned his allegations concerning BNSF's alleged denial of a promotion when he did not disclose any facts about it when asked during discovery and did not oppose summary decision on this claim. Even if Complainant had not abandoned this claim, any failure to promote could only have occurred on or before Complainant last worked for BNSF in early June 2013. The limitations period on this claim ran by the end of 2013 at the latest.⁸

⁸ Every "discrete discriminatory act starts a new clock for filing charges alleging that act." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (Title VII) (distinguishing "continuing violation" cases, on which the limitations period does not begin to run until the ongoing violation ceases). "Discrete acts such as termination, *failure to promote*, denial of transfer, or *refusal to hire* are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id.* at 114 (emphasis added). Con't . . .

Accordingly, each of the violations of the Act that Complainant alleges is time-barred.

II. Complainant Is Not Entitled To Equitable Relief From His Late Filing.

Complainant does not assert equitable tolling. But, as Complainant is self-represented, I will consider the issue *sua sponte*.

The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation.

29 C.F.R. § 1982.103(d); *see also Hyman v. KD Resources*, ARB No. 09-076 (Mar. 31, 2010) (Sarbanes-Oxley Act) at 8.

Equitable tolling is available “when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.” *Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4 (Clean Air Act),⁹ *citing School Dist. of City of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981); *Williams v United Airlines, Inc.*, ARB No. 08-063 at 2 (Sept. 21, 2009) (*citing same*). This record contains no facts to support equitable relief.

First, Complainant did not suggest – and offered no evidence to show – that, when the filing deadline arrived, he was incapacitated in some extraordinary way that kept him from filing at that time. To the contrary, Complainant’s treating physician opined several months earlier that Complainant was capable of returning to his prior railroad work without restriction.

Second, there is no evidence that BNSF misled or in any way advised Complainant about his rights under the Federal Rail Safety Act or about the Act’s filing deadline. For example, some defendants agree to extend the statute of limitations or waive it entirely because the parties are pursuing a pre-filing settlement and additional time might allow them to settle without the cost of litigation. There is no evidence that BNSF did that, anything like that, or in any other way misled Complainant about the Act, its substantive provisions, or its procedural requirements (including the time limit on filing the OSHA complaint).¹⁰

Complainant’s allegations of a refusal to reinstate him to rail service, denial of benefits, and denial of promotion are discrete claims. Each triggered a separate limitations period. All of those periods ran before Complainant filed his OSHA complaint. Even if BNSF’s alleged violations constitute a continuing violation (which I do not find they do), Complainant alleges nothing potentially actionable after May 13, 2016; any continuing violation claim therefore also would be stale by the time Complainant filed the OSHA complaint.

⁹ The equitable considerations include both equitable tolling (extraordinary circumstances preventing filing or filed precise claim but in wrong forum) and equitable estoppel (employer misled employee and induced late filing). *Id.*

¹⁰ Complainant’s FELA counsel’s statement about the settlement of the FELA case is not a basis for equitable relief. I refer to the email on March 14, 2016, in which Complainant’s FELA counsel wrote to Complainant that counsel had rejected BNSF’s request that Complainant resign as part of the settlement. *See* C.Ex. 1. Counsel added to this

As to the third consideration – filing the precise claim in the wrong forum – Complainant did initiate a claim under the grievance procedure on November 1, 2016. But this was not the claim that Complainant subsequently filed with OSHA or any other claim under the Federal Rail Safety Act. All record evidence is to the contrary.

In its appeal of the claim, Complainant’s Union’s General Chairman Lopez stated:

The Carrier [BNSF] has denied [Complainant’s] right under his Collective Bargaining Agreement and claimed he is estopped from returning to service.

* * *

The contractual right of an employee to return to service after suffering an on-duty injury is well established on the former ATSF properties of the BNSF.¹¹ This right was recently affirmed at PLB 7706, Award 2.

The position of the [Union] is the claim entered by [Complainant] . . . is valid . . . and is supported by the BNSF/BLE ATSF Schedule, governing on property agreements, governing national agreement rules and arbitration award precedents governing same.

R.Ex. 14 at 1.

his conclusion and advice: “So you still have your employment with them [BNSF] but will have to keep you medical leave of absence.” *Id.*

This cannot be a basis for equitable estoppel, which applies “when *the defendant* has actively misled the plaintiff”: it was an opinion that Complainant’s own lawyer offered, not BNSF’s statement. *See Udofot, supra* (emphasis added). The only statement from BNSF that can be inferred from the email is that it asked if Complainant would, as part of the FELA settlement, resign his employment. That is a question, not a statement of a fact on which someone could rely and be misled.

Complainant’s FELA counsel’s statement also is not misleading. It was correct that, as of the time of the FELA settlement, Complainant remained an employee of BNSF, although he was on an unpaid leave. Nothing about this implies or suggests – not to mention expressly states – that BNSF agreed in the FELA settlement that it would not terminate the employment or that it would allow Complainant to return to paid active duty.

Moreover, anything that might have misled or confused Complainant in the March 2016 email was cured. Complainant learned before May 13, 2016, that BNSF had placed him in “estoppel” status. He understood this to mean that BNSF would not allow him to return to work. On May 13, 2016, Complainant received Pryor’s letter, in which Pryor stated that, under estoppel principles, BNSF viewed Complainant’s disabling condition to be permanent and that BNSF therefore would not allow Complainant to return to work. Even if Complainant had somehow been misled about returning to paid work at BNSF, he knew or should have known on or before May 13, 2016, that BNSF would not permit him to do that. The limitations period did not begin until May 13, 2016. Thus, even were I to find any misleading statement in Complainant’s FELA counsel’s email, the misleading statement was cured on or before the limitations period began to run and was therefore harmless.

¹¹ When General Chairman Lopez addresses former ATSF properties of the BNSF, he refers to properties of the former Atchison, Topeka & Santa Fe, which was merged into other companies at the end of 1996. Complainant apparently was working for the BNSF on property formerly owned by the ATSF, and the applicable collective bargaining agreement apparently had some different provisions for workers on such properties.

The Union's appeal on behalf of Complainant is grounded entirely on an alleged violation of Complainant's rights under the applicable collective bargaining agreement. Chairman Lopez expressly states as much. He refers to these rights as "contractual." He cites as authority (1) rules and agreements related to the collective bargaining agreement, and (2) arbitration awards of the relevant arbitral authority, the Public Law Board ("PLB") under the Railway Labor Act. Chairman Lopez never mentions the Federal Rail Safety Act, nor does he mention either discrimination or retaliation for activity the Federal Rail Safety Act protects. This is a separate and distinct claim under the collective bargaining agreement. It is being pursued by a labor union on Complainant's behalf. It cannot be said that it was the current case pending before me, mistakenly filed in the wrong forum.

Complainant therefore has failed to establish a basis for equitable relief from his failure to file this claim within the applicable 180-day limitations period.¹²

Order

For the foregoing reasons, Respondent BNSF Railway Company's motion for summary decision is GRANTED. Complainant's claim is DENIED, and this case is DISMISSED. The hearing set

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¹² Nothing in this Decision and Order is intended to endorse BNSF's apparent practice of refusing to return to service injured workers who file FELA claims and offer expert opinion in the litigation that the worker will never be able to perform rail service again. While the Railroad's "estoppel" argument might have some currency when the jury in the FELA case returns a verdict in favor of the worker, it is difficult to understand how a rail employer could defend this "estoppel" practice when the Railroad prevails in the FELA case.

It cannot be said that in this case that the BNSF was relying on Complainant's or his experts' opinions about the nature and extent of his disability; to the contrary, the BNSF contested the FELA claim. It cannot be said that, based on the jury's verdict, the FELA court accepted and awarded the worker a remedy based on his and his experts' opinions; to the contrary, the court dismissed Complainant's case and denied him any awarded. It cannot be said that, having persuaded a state court that he was permanently disabled and received an award based on that assertion, Complainant then sought the benefits of resumed employment with BNSF, based on the entirely contrary assertion that his permanent disability had dissipated. Finally, under most workers' compensation law, a finding that a disability is "permanent" means no more than that it is not likely to heal further on its own and that no available treatment is likely help. "Permanent" is not a finding that the condition will last forever or that improvement in medical science cannot provide useful future treatment that will reduce any disability. It is a term of art, not a literal opinion that no change is possible. In all, when a FELA court rejects the worker's claim and the worker establishes that he or she has medically improved and can safely return to work, a refusal to allow the worker to return to her duties, absent some other rationale, might violate the anti-retaliation provisions in the Federal Rail Safety Act.

For the present purposes, however, I do not reach the question of whether BNSF's "estoppel" practice is lawful when applied in cases in which the FELA court rejects the worker's claim – or in any other circumstance. I do not have a full record or briefing on the question. The ruling expressed in this Decision and Order concerns application of the limitations period in the Federal Rail Safety Act and does not reach the question of whether Complainant would have met his burden to establish liability had he filed a timely complaint.

for February 13, 2018, is VACATED.

This Decision and Order will be served on Complainant and on Respondent's counsel by email or facsimile. All other service is by U.S. mail.

SO ORDERED.

STEVEN B. BERLIN
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.

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).