



IN THE MATTER OF:

JACOB WAGNER,

ARB CASE NO. 15-030

COMPLAINANT,

ALJ CASE NO. 2014-FRS-059

v.

DATE: February 27, 2015

GRAND TRUNK WESTERN RAILROAD  
COMPANY, d/b/a CN,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

*For the Complainant:*

Nicholas D. Thompson, Esq.; *Nichols Kaster PLLP*, Minneapolis, Minnesota

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Joanne Royce, *Administrative Appeals Judge*

### FINAL DECISION AND ORDER DISMISSING COMPLAINT

On July 16, 2012, the Complainant, Jacob Wagner, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Grand Trunk Western Railroad (GTW), had retaliated against him in violation of the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA)<sup>1</sup> and its implementing regulations.<sup>2</sup> Upon investigation, OSHA found that there was reasonable cause to believe that GTW violated

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<sup>1</sup> 49 U.S.C.A. § 20109 (Thomson/West 2012).

<sup>2</sup> 29 C.F.R. Part 1982 (2014).

the FRSA by suspending Wagner for twenty days, and it awarded damages. GTW requested review of OSHA's determination before a Department of Labor Administrative Law Judge. On January 9, 2015, the presiding ALJ issued a Decision and Order Dismissing Complaint (D. & O.) finding that GTW established by clear and convincing evidence that it would have taken adverse action against Wagner even in the absence of protected activity.<sup>3</sup>

Wagner filed a petition for review with the Administrative Review Board. The Secretary of Labor has delegated to the Board authority to issue final agency decisions under the FRSA.<sup>4</sup>

On February 19, 2015, the Board received a copy of a federal complaint filed in the United States District Court for the Eastern District of Michigan as authorized by 49 U.S.C.A. § 20109(d)(3), for de novo review of the claim currently pending before the Board.<sup>5</sup> If the Board has not issued a final decision within 210 days of the date on which the complainant filed the complaint, and there is no showing that the complainant has acted in bad faith to delay the proceedings, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court, which will have jurisdiction over the action without regard to the amount in controversy.<sup>6</sup>

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<sup>3</sup> *Wagner v. Grand Trunk Western R.R. Co.*, 2014-FRS-059, slip op. at 23 (Jan. 9, 2015).

<sup>4</sup> *See* Secretary's Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

<sup>5</sup> On February 20, 2015, the Board received an e-mail from the legal assistant to the ALJ, who had issued the D. & O., informing the Board that Wagner had filed a copy of a Notice of Intent to File Original Action in United States District Court (dated January 26, 2015) with the ALJ. In the Notice, Wagner stated that he had filed his FRSA complaint more than 210 days prior to filing the Notice and that as of that date, the Secretary of Labor had not issued a final decision. Although the Administrative Review Board was listed in the Notice's caption, the Board has no record of having received this Notice.

<sup>6</sup> 49 U.S.C.A. § 20109(d)(3); 29 C.F.R. § 1982.114.

Accordingly, given that Wagner has filed a de novo complaint in this action in federal district court as provided in 49 U.S.C.A. § 20109(d)(3) and 29 C.F.R. § 1982.114, we **DISMISS** Wagner's complaint.

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**