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**Issue Date: 29 April 2011**

Case No.: **2010-FRS-24**

*In the Matter of*:

SELBY JOHN GODDARD,
Complainant

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

This proceeding arises from a claim for whistleblower protection under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended. The statute and implementing regulations prohibit 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. *See* 49 U.S.C. § 20109(a)–(c); 75 Fed. Reg. 53522 *et seq.* (2010) (to be codified at 29 C.F.R. Part 1982). The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges ("OALJ") found at 29 C.F.R. Part 18, Subpart A, also apply. *See* 75 Fed. Reg. at 53531 (to be codified at 29 C.F.R. § 1982.107(a)). Reference may be made to the Federal Rules of Civil Procedure to address issues not specifically covered by the OALJ Rules of Practice and Procedure. *See* 29 C.F.R. §§ 18.1(a) and 18.29(a)(8). In this case, the Complainant, Selby John Goddard ("the Complainant"), alleges that the Respondent, Norfolk Southern Railway Company ("the Respondent"), violated the FRSA when it retaliated against him because he reported a workplace injury. *See* 49 U.S.C. § 20109(a)(4).

The Respondent has filed a Motion for Summary Decision, and makes three arguments in support. First, the Respondent alleges that, because the Complainant pursued grievance arbitration under the Railway Labor Act, 45 U.S.C. §§ 151-188, his whistleblower claim is barred by the election of remedies provision of the FRSA. *See* 49 U.S.C. § 20109(f). Second, the Respondent argues that the Complainant's whistleblower claim is untimely because it was

filed with the Occupational Health and Safety Administration ("OSHA") on February 12, 2010, which was after expiration of the 180-day statute of limitations contained within the FRSA. Furthermore, the Respondent contends that, even if the complaint is deemed timely, there are no genuine issues of material fact because the Complainant cannot satisfy his prima facie burden of proving an actionable unfavorable employment action motivated by protected activity.

In his response opposing the Motion, the Complainant argues that the FRSA's election of remedies provision does not preclude his whistleblower claim because the grievance arbitration was pursued under his collective bargaining agreement, and is therefore not a claim under "another provision of law" as used in the FRSA. *See* 49 U.S.C. § 20109(f). The Complainant also contends that his whistleblower claim is timely because the statute of limitations did not accrue until September 24, 2009, which was less than 180 days before he filed his complaint on February 12, 2010. In the alternative, the Complainant seeks leave to amend his complaint under 29 C.F.R. § 18.5(e) to include retaliatory conduct that allegedly occurred on September 24, 2009. Finally, the Complainant argues that, at minimum, the evidence demonstrates a genuine issue of fact as to whether his protected activity was a contributing factor to the adverse employment actions against him.

In reaching my ruling on the Respondent's Motion, I have considered the entire record, including the complaint filed with OSHA, the findings of OSHA, the objections to the findings, and the materials submitted in connection with the Motion. As no hearing has been held, I have accepted all of the Complainant's factual allegations as true. For the reasons discussed below, I find that the record does not create a genuine issue of material fact, and that the Respondent is entitled to judgment as a matter of law based upon the Complainant's failure to timely file his complaint under the FRSA.

### ***Procedural History***

In a letter dated April 3, 2009, the Respondent discharged the Complainant from employment following an investigation into the Complainant's alleged cheating during the Respondent's annual rules examination on March 11, 2009. The Complainant received this letter on or about April 6, 2009. The United Transportation Union filed a grievance on behalf of the Complainant, which was referred to arbitration before the Public Law Board on April 17, 2009, pursuant to the Railway Labor Act, 45 U.S.C. §§ 151-188. On August 19, 2009, the Public Law Board issued an award reinstating the Complainant to his former position, but noted that reinstatement "is expressly conditioned on his retaking and passing the 2009 Rules Test." (Complainant's EX 2; Respondent's EX A, Ex. 7). The Complainant retook the four rules tests on September 24, 2009, but failed to obtain passing scores on three out of the four tests. Accordingly, in a supplemental award dated October 28, 2009, the Public Law Board upheld the Complainant's dismissal because he "failed to satisfy the explicit condition for his return to service." (Complainant's EX 3; Respondent's EX A, Ex. 9). The Complainant made a complaint with OSHA during a meeting with Ms. Denise Keller on February 12, 2010, alleging that he had been terminated as a result of reporting a 2006 workplace injury. He also alleged that he had been "terminated again" after the Respondent misrepresented his test scores to the Public Law Board. On April 28, 2010, OSHA issued findings on behalf of the Secretary of Labor and concluded that the complaint was untimely because it had not been filed within 180 days after

the Complainant's termination in April 2009. The Complainant filed his objections to OSHA's findings with the Office of Administrative Law Judges on or about May 24, 2010. By telephone conference on September 30, 2010, I gave the parties until February 1, 2011, to file dispositive motions. The Respondent filed its motion for summary decision on February 1, 2011. The Complainant filed his response on March 2, 2011.

### ***Background***

The Complainant testified at his deposition on September 8, 2010, and the parties each submitted a copy of the transcript with their briefs on summary decision. (Complainant's EX 1; Respondent's EX A). I will hereafter refer to the deposition transcript as "Depo. Tr." The Complainant was first hired by the Respondent in 1995 as a brakeman. (Depo. Tr. 9). He was subsequently promoted to conductor in 1996 and became an engineer in 2000. (Depo. Tr. 9-10). The Complainant most recently worked as an engineer with the Respondent's Pocahontas Division, based out of Portsmouth, Ohio. (Depo. Tr. 14; Complainant's Brief at 3).

On December 22, 2006, the Complainant was injured while working for the Respondent. (Depo. Tr. 42-43; Respondent's Brief at 3). He suffered injuries to both his head and neck. (Depo. Tr. 42-43, 49, 54). This injury occurred while the Complainant was working with the Respondent's Lake Division. (Depo. Tr. 23, 98, 113). As a result of the injury, the Complainant was unable to work from December 2006 until October 2008. (Depo. Tr. 16-17, 54). After returning from his injury, the Complainant worked with the Respondent's Pocahontas Division until his termination.

During each year of employment, the Complainant was required to take an annual rules examination. (Depo. Tr. 119). The examination consisted of four tests: the "T&E [Train & Engineer] Rules Exam"; the "Power Brake Exam"; the "Signals Exam"; and the "Engineer Recertification Exam". (Depo. Tr. 56; Respondent's EX B). On March 11, 2009, the Complainant attended a regularly scheduled rules class and attempted the four required tests at the conclusion of the class. (Depo. Tr. 54-55, 57). After initially failing the tests, the Complainant was permitted to retake the tests on the same day. (Depo. Tr. 57-58). During the retest, however, the Complainant was caught in possession of answer sheets to the rules tests. (Depo. Tr. 61-62). An investigatory hearing was conducted by the Respondent on March 26, 2009, where the Complainant was represented by two officials from the United Transportation Union. (Depo. Tr. 56). Both the Complainant and his supervisor, Steve Meddings, testified at the hearing and provided different accounts regarding the events of March 11, 2009. The Complainant alleged that the answer sheets had remained in his pocket during the test, and that he had merely intended to discard them afterwards. (Depo. Tr. 61-64). Mr. Meddings stated, however, that he had seen the Complainant using the answer sheets during the test. (Depo. Tr. 61-62). Following the investigation, the Respondent terminated the Complainant in a letter dated April 3, 2009, which was received by the Complainant on April 6, 2009. (Depo. Tr. 69-70; Respondent's EX A, Ex. 6; Respondent's Brief at 16).

The Complainant's union filed a grievance on his behalf and the dispute proceeded to arbitration before the Public Law Board, pursuant to the Railway Labor Act. (Depo. Tr. 71). The Public Law Board issued an award on August 19, 2009, in which it conditionally reinstated the

Complainant to his previous employment. (Depo. Tr. 70-72). The Board found that the Complainant's actions demonstrated what it described as "a breathtaking lapse of judgment," but concluded that the evidence in support of the Complainant having actually cheated was "not conclusive." (Complainant's EX 2; Respondent's EX A, Ex. 7). The award specified, however, that the Complainant's reinstatement was "expressly conditioned on his retaking and passing the 2009 Rules Test." (*Id.*). The Complainant testified that he did not actually return to work prior to retaking the examination. (Depo. Tr. 72). He stated that it was his understanding that he only had to retake and pass one of the tests – the T&E Rules Test – in order to be reinstated. (Depo. Tr. 73-75). At a previous deposition in February 2010, however, the Complainant testified that he had understood that he had to retake all four tests. (Depo. Tr. 80; Respondent's EX A, Ex. 8). The Complainant retook the four tests on September 24, 2009, which were administered in Mr. Meddings' office. (Depo. Tr. 75, 83). Both Mr. Meddings and the Complainant's union representative were present during the examination. (Depo. Tr. 83). The Complainant failed three out of the four tests. (Depo. Tr. 80; Complainant's EX 3; Respondent's EX A, Ex. 9). He testified, however, to his belief that he had actually passed three out of the four tests, and that the Respondent had made a mistake in reporting his scores to the Public Law Board. (Depo. Tr. 82, 85). He later alleged that the Respondent had misrepresented his scores to the Public Law Board. (Depo. Tr. 88-89; Complainant's EX 5; Respondent's EX A, Ex. 10).

On October 28, 2009, the Public Law Board upheld the Complainant's termination because the Complainant "failed to achieve passing scores on three of the four examinations, including the 2009 Norfolk Southern T&E Rules Exam." (Complainant's EX 3; Respondent's EX A, Ex. 9). The Complainant alleged that he was actually fired for a second time by the Respondent after failing the tests. (Depo. Tr. 81). He later acknowledged, however, that the Public Law Board had simply upheld his previous termination. (Depo. Tr. 81-82). On February 12, 2010, the Complainant met with Ms. Denise Keller of OSHA, and made complaints regarding his termination from the Respondent and the alleged misrepresentation of his test scores. (Depo. Tr. 88-89; Complainant's EX 5; Respondent's EX A, Ex. 10).

### ***Standard for Summary Decision***

The OALJ Rules of Practice and Procedure provide that an Administrative Law Judge "may enter summary [decision] for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary decision has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to the nonmoving party, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). In reviewing a motion for summary decision, I must view all of the evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587; *Allen v. Highlands Hospital Corp.*, 545 F.3d 387, 393 (6th Cir. 2008).

As stated above, the Respondent makes three arguments in support of its motion for summary decision: (1) the Complainant's claim is barred by the FRSA's election of remedies provision; (2) the Complainant's claim is time-barred because it was not filed within the FRSA's 180-day statute of limitations; and (3) the Complainant has failed to produce evidence to satisfy his *prima facie* case of proving an actionable unfavorable employment action motivated by protected activity. For the reasons discussed below, however, I find that the Respondent has established that the Complainant's whistleblower claim is untimely under the FRSA. Therefore, I have not addressed the Respondent's remaining arguments in reaching my conclusion that summary decision should be granted in this case.

***Timeliness of the Complaint Under 49 U.S.C. § 20109(d)(2)(A)(ii)***

The parties agree that the Complainant filed his whistleblower complaint with OSHA on February 12, 2010. The Respondent contends, however, that the whistleblower claim is time-barred because it was not filed within the FRSA's 180-day statute of limitations. The FRSA provides that a whistleblower claim "shall be commenced not later than 180 days after the date on which the alleged violation of [the FRSA] occurs." 49 U.S.C. § 20109(d)(2)(A)(ii). The new implementing regulations similarly provide that "[w]ithin 180 days after an alleged violation of … FRSA occurs, an employee who believes that he or she has been retaliated against in violation of … FRSA may file … a complaint alleging such retaliation." 75 Fed. Reg. at 53530 (to be codified at 29 C.F.R. § 1982.103(d)). The regulations state, however, that "[t]he time for filing a complaint may be tolled for reasons warranted by applicable case law." *Id.*

In support of its timeliness argument, the Respondent contends that the 180-day limitations period began to accrue on April 6, 2009, which was the date on which the Complainant received his notice of dismissal from the Respondent. (Respondent's EX A, Ex. 6). The Respondent cites the recent decision of *Swenk v. Exelon Generation Company*, where the Administrative Review Board held that "[i]n whistleblower cases, statutes of limitation … run from the date an employee receives 'final, definitive, and unequivocal notice' of an adverse employment decision." ARB No. 04-028, ALJ No. 03-ERA-30, slip op. at 4 (ARB Apr. 28, 2005) (citing *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003)). The Respondent thus argues that the Complainant received "final, definitive, and unequivocal notice" of his dismissal on April 6, 2009, for purposes of the FRSA's limitations period.

The Respondent further argues that any retaliatory acts that may have occurred on September 24, 2009, do not render the whistleblower claim timely because they occurred as a part of the grievance procedure with the Public Law Board. (Respondent's Brief at 17). As a part of the Public Law Board's initial arbitration decision, the Complainant was given the opportunity to retake the Respondent's rules examination and secure reinstatement as an employee. The retest occurred on September 24, 2009. The Respondent, however, cites to the Supreme Court's decision in *Delaware State College v. Ricks*, which held that a grievance procedure does not toll the running of a statute of limitations. 449 U.S. 250, 261–62 (1980). Accordingly, the Respondent contends that any alleged retaliatory action on September 24, 2009, was "essentially inseparable from the grievance process" and therefore does not render the Complainant's whistleblower complaint timely. (Respondent's Brief at 17).

The Complainant responds that the 180-day statute of limitations did not accrue until September 24, 2009, when he retook the Respondent's rules examination. The Complainant contends that the retaliatory acts at issue "centered on the Complainant's ability and opportunity to properly prepare for this test." (Complainant's Brief at 7, 12). More specifically, the Complainant argues that he was required to retake all four tests, was not provided with a review class or training DVDs, was not given access to a company computer to find rule updates, and was incorrectly notified that he passed one of the exams. (*Id.*). At his deposition, he testified that he was also subjected to unfair testing conditions, where he was required to take the test in his supervisor's office, his supervisor repeatedly spoke on the phone during the test, and his supervisor left and re-entered the office on several occasions. (Depo. Tr. 100). The Complainant contends that all of this conduct is included in the scope of the original complaint filed on February 12, 2010, and that the language of the complaint "clearly indicates that Complainant's allegations made to the Department of Labor concerned Respondent's conduct in connection with the rules examination." (*Id.*). The Complainant thus argues that the FRSA's limitations period did not accrue until September 24, 2009, and his whistleblower complaint is therefore timely.

As an initial matter, I address the significance of the termination letter received by the Complainant on April 6, 2009. It is well-established that in a wrongful discharge or retaliation case, the statute of limitations does not accrue until the employer gives notice that it has *officially* made the adverse employment decision. *See Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam); *Ricks*, 449 U.S. at 258; *Lyons v. Metropolitan Government of Nashville & Davidson County*, No. 09-6084, 2011 WL 1042271, at *7 (6th Cir. Mar. 22, 2011); *Kessler v. Board of Regents*, 738 F.2d 751, 755 (6th Cir. 1984); *Swenk*, ARB No. 04-028, ALJ No. 03-ERA-30, slip op. at 4. The Sixth Circuit has interpreted this rule to mean that "a discriminatory [practice] ceases and is complete … when the plaintiff is given unequivocal notice of the employer's … decision." *Howard v. United Parcel Service, Inc.*, 48 F. App'x 920, 922 (6th Cir. 2002) (internal quotation marks omitted). In this case, it is undisputed that the letter received by the Complainant on April 6, 2009, notified him that the Respondent was terminating his employment. The letter unequivocally stated that the Complainant was "hereby dismissed from all service with Norfolk Southern Railway." (Respondent's EX A, Ex. 6). I thus find that the Complainant received "unequivocal notice" of the Respondent's decision to terminate his employment on April 6, 2009.

The Complainant contends, however, that the actionable discriminatory conduct at issue is the Respondent's alleged actions on September 24, 2009. He argues for the first time before this Office that "the retaliatory acts committed by Respondent centered on the Complainant's ability and opportunity to properly prepare for this test." (Complainant's Brief at 12). He alleges that he was denied adequate preparation for the examination and was subjected to unfair testing conditions. (Depo. Tr. 100; Complainant's Brief at 12). The Complainant's counsel made a similar representation at the deposition on September 8, 2010. (Depo. Tr. 47). The Complainant asserts that the language of his whistleblower complaint encompasses this conduct, and that the statute of limitations therefore did not begin to accrue until September 24, 2009.

I first address the Complainant's argument that the language of the original whistleblower complaint includes the Respondent's alleged conduct on September 24, 2009. The complaint states as follows:

> Complainant alleges he was terminated as a result of reporting his work place injury. Complainant reported he was placed back to work through arbitration and was terminated again after Respondent misrepresented his test results to the Arbitrator as the test results were a condition of his reinstatement.

(Complainant's EX 5; Respondent's EX A, Ex. 10). While this language is rather broad, it does not mention, or even suggest, that the Respondent retaliated against the Complainant with regard to his "ability and opportunity to properly prepare" for the test on September 24, 2009. Instead, the complaint only references the Complainant's termination and the Respondent's alleged misrepresentation of the test results to the Public Law Board. Furthermore, a review of the record demonstrates that the Complainant did not mention these events (the alleged interference with his ability to properly prepare for the retest), nor allege that he was basing his whistleblower complaint on them, until his deposition on September 8, 2010. (Tr. 99-101, 108-109, 132-133). This was nearly seven months after the complaint was filed and one year after the Respondent allegedly committed the acts. I therefore find that the language of the original complaint does not encompass any conduct by the Respondent relating to the testing environment on September 24, 2009, or the Complainant's ability to prepare for the examination.

Second, while the Complainant does not raise this issue in his brief, I address whether the Respondent's alleged misrepresentation of the retest results impacts the timeliness of the complaint. The clear language of the whistleblower complaint alleges that the Respondent misrepresented the retest results to the Public Law Board. The parties agree, however, that the Complainant retook the rules examination on September 24, 2009, in accordance with the Public Law Board's arbitration decision. (Complainant's Brief at 6; Respondent's Brief at 6). It is well-settled that "the pendency of a grievance, or some other method of collateral review of an employment decision, *does not toll* the running of the limitations period." *Ricks*, 449 U.S. at 261 (citing *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976)) (emphasis added). In *Ricks*, the Supreme Court reasoned that "entertaining a grievance complaining of the [adverse employment] decision does not suggest that the earlier decision was in any respect tentative." *Id.* Instead, the Court found that "[t]he grievance procedure, by its nature, is a *remedy* for a *prior decision*, not an opportunity to influence that decision before it is made." *Id.* (emphasis added); *see also Swenk*, ARB No. 04-028, ALJ No. 03-ERA-30, slip op. at 4. Thus, the statute of limitations begins to accrue once the adverse employment decision is made, and is not affected by any subsequent actions taken during a grievance procedure. This rule has been consistently applied by both the Sixth Circuit and the Administrative Review Board. *See, e.g., Jiqiang Xu v. Michigan State University*, 195 F. App'x 452, 456 (6th Cir. 2006); *Howard*, 48 F. App'x at 923; *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003).

In this case, it was the Public Law Board, and not the Respondent, that provisionally reinstated the Complainant and made his "[r]eturn to service … expressly conditioned on his retaking and passing the 2009 Rules Test." (Complainant's EX 2; Respondent's EX A, Ex. 7).

The record demonstrates that the Respondent never withdrew its termination of the Complainant on April 6, 2009, and that the proceedings before the Public Law Board arose out of the Complainant's grievance filed under the Railway Labor Act. (Complainant's EX 2-3; Respondent's EX A, Ex. 7, 9). It follows that the rules examination on September 24, 2009, and the Respondent's subsequent reporting of the scores, also took place as a part of the grievance arbitration. Because the arbitration was merely a process that sought to *remedy* the Respondent's previous decision to dismiss the Complainant, I find that the events relating to the rules test on September 24, 2009, did not toll the FRSA's 180-day statute of limitations. *See Ricks*, 449 U.S. at 261; *see also Jiqiang Xu*, 195 F. App'x at 456 ("The key date for the accrual of the limitations period is the injury, *not the completion of any grievance process*." (emphasis added)). Accordingly, I conclude that the Respondent's alleged misrepresentation of the test results did not affect the accrual date of the statute of limitations.

As stated above, I find that the Complainant received "unequivocal notice" that he was being dismissed by the Respondent on April 6, 2009. The whistleblower complaint makes no mention or suggestion of any retaliatory acts that occurred in connection with the examination on September 24, 2009. Accordingly, I find that the language of the complaint does not encompass any retaliatory conduct that may have hindered the Complainant's performance on the rules examination. Furthermore, while the complaint does mention the Respondent's misrepresentation of the examination scores, I find that the events of September 24, 2009, occurred as a part of the grievance procedure before the Public Law Board, and therefore do not toll the FRSA's statute of limitations. For all of these reasons, I conclude that the Complainant had 180 days from April 6, 2009, in order to file his whistleblower claim. Because the Complainant did not file his whistleblower complaint until February 12, 2010, he failed to comply with the 180-day statute of limitations. He has not raised any argument that the doctrine of equitable tolling should be applied in this case.[1] Accordingly, I conclude that the Complainant's FRSA claim is untimely.

***Leave to Amend the Complaint Under 29 C.F.R. § 18.5(e)***

The Complainant also requests leave to amend his whistleblower complaint to include the retaliatory acts that were allegedly committed by the Respondent on September 24, 2009. The OALJ Rules of Practice and Procedure provide that "whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings." 29 C.F.R. § 18.5(e) (2008). The decision of whether to grant leave to amend a complaint is a matter within the discretion of the trier of fact. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Under the Federal Rules of Civil Procedure, an amended complaint relates back to the date of the original complaint where "the

[1] The FRSA limitations period is not jurisdictional and is subject to equitable tolling, but this doctrine is narrowly applied and focuses on the Complainant's excusable ignorance of his or her statutory rights as a reason to modify the limitations period. *See School District of Allentown v. Marshall*, 657 F.2d 16, 19–20 (3d Cir. 1981). The Complainant bears the burden of justifying the application of equitable tolling principles. *See Santamaria v. United States Environmental Protection Agency*, ARB No. 05-023, ALJ No. 04-ERA-25, slip op. at 4 (ARB Mar. 31, 2005). In this case, neither the Complainant nor his counsel made any argument regarding equitable tolling.

amendment asserts a claim … that arose out of the conduct, transaction, or occurrence set out … in the original pleading." FED. R. CIV. P. 15(c)(1)(B); *see also* 29 C.F.R. § 18.1(a) ("The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."). The administrative law judge, however, must determine "that the amendment is reasonably within the scope of the original complaint." 29 C.F.R. § 18.5(e).

In this case, the Complainant contends that an amendment is proper because his "original complaint concerned the September 24, 2009 test." (Complainant's Brief at 13). He argues that the language of the original complaint is broad enough to encompass the Respondent's alleged conduct that "centered on the Complainant's ability and opportunity to properly prepare for [the] test." (*Id.* at 12). He therefore contends that this alleged conduct is reasonably within the scope of the original complaint. Furthermore, because the Complainant testified at his deposition regarding this conduct, he argues that the "Respondent has been given sufficient notice of these allegations not to be prejudiced at any hearing concerning this matter." (*Id.* at 13). For the following reasons, however, I find that an amendment to include the alleged events of September 24, 2009, is not warranted in this case.

First, I find that any conduct relating to the testing environment, or the Complainant's "ability and opportunity to properly prepare" for the test, is not "reasonably within the scope" of the original complaint. I have already found that the whistleblower complaint does not encompass this conduct. As stated above, while the language of the complaint is broad, it does not mention, or even suggest, that the Respondent retaliated against the Complainant with regard to his "ability and opportunity to properly prepare" for the test on September 24, 2009. Instead, the complaint only references the Complainant's termination and the Respondent's alleged misrepresentation of the test results to the Public Law Board. Furthermore, a review of the record demonstrates that the Complainant did not mention these events, nor allege that he was basing his whistleblower complaint on them, until his deposition on September 8, 2010. (EX A, Tr. 99-101, 108-109, 132-133). This was nearly seven months after the complaint was filed and one year after the Respondent allegedly committed the acts. I therefore reject the Complainant's argument that the original complaint encompasses the Respondent's alleged conduct relating to the testing environment on September 24, 2009, or the Complainant's ability to prepare for the test. For this reason, I conclude that these events are not "reasonably within the scope" of the original complaint.

Second, I find that an amendment to include the Respondent's alleged conduct during the examination on September 24, 2009, will not facilitate a determination of the present controversy. As discussed above, I have found that any events which occurred on September 24, 2009, took place as a result of the Public Law Board's arbitration decision. The arbitration and subsequent decision were rendered as a part of the grievance process initiated under the Railway Labor Act. The Supreme Court, Sixth Circuit and Administrative Review Board, however, have all held that the pendency of a grievance process does not impact the timeliness of a whistleblower complaint. *See Ricks*, 449 U.S. at 261; *Howard*, 48 F. App'x at 923; *Jenkins*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14. The Supreme Court reasoned that "entertaining a grievance complaining of the … decision does not suggest that the earlier decision was in any respect tentative." *Ricks*, 449 U.S. at 261. The Sixth Circuit has similarly

held that "a discriminatory [practice] *ceases and is complete*, when the plaintiff is given unequivocal notice of the employer's … decision." *Howard*, 48 F. App'x at 922 (alterations in original). Accordingly, the court concluded that words and conduct that occur during a grievance procedure are not relevant to the completion of an employer's adverse employment decision because they "neither render [the employer's] prior decision ambiguous or uncertain nor affect in any way when [a plaintiff] received 'unequivocal notice' of that decision. *Id.* at 923. As stated above, it is undisputed that the Complainant was officially dismissed by the Respondent on April 6, 2009. Thus, the Complainant received "unequivocal notice" that he was being terminated on April 6, 2009. While the Public Law Board provisionally reinstated the Complainant, the Respondent never rescinded its April 6, 2009, dismissal because the Public Law Board made the Complainant's "[r]eturn to service … expressly conditioned on his retaking and passing the 2009 Rules Test." (Complainant's EX 2; Respondent's EX A, Ex. 7). Accordingly, I find that the Respondent's decision to terminate the Complainant was not rendered uncertain or ambiguous by the events of September 24, 2009. I therefore conclude that an amendment to include the alleged events of September 24, 2009, will not facilitate a determination of the present controversy.

Finally, I note that the Complainant has already had ample opportunity to request an amendment, or file a separate whistleblower complaint, to include the Respondent's alleged retaliatory acts on September 24, 2009. It is well-established that a new discrete retaliatory act "starts a new clock for filing charges alleging that act." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). *See also Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (per curiam) (finding that multiple discriminatory pay practices each constituted individual actionable violations); *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 00-CAA-9, slip op. at 8 (ARB Apr. 23, 2003) (finding that individual unsuitable job offers constituted separate retaliatory actions). In order for the retaliatory act to be actionable, however, a charge "must be filed within the [required] time period after the discrete … act occurred." *Morgan*, 536 U.S. at 113; *see also Pickett*, ARB No. 00-076, ALJ No. 00-CAA-9, slip op. at 8 ("This principle would require [a complainant] to file a complaint within thirty days of *each adverse action*." (emphasis added)). In this case, the Complainant never filed a separate whistleblower complaint alleging the retaliatory conduct that he claims occurred on September 24, 2009. Thus, this conduct cannot sustain a separate actionable retaliation claim under the FRSA.

Instead, the Complainant seeks to amend his original complaint to take advantage of the February 12, 2010, filing date, and thus render his overall whistleblower claim timely. The Complainant, however, did not make this request until faced with the Respondent's argument that his claim is time-barred. Furthermore, the record demonstrates that the Complainant did not allege the Respondent's conduct relating to the testing environment, or his ability to prepare for the test, until his deposition on September 8, 2010. (Depo. Tr. Tr. 99-101, 108-109, 132-133). This was nearly one year after these acts occurred, and five months after OSHA dismissed the Complainant's claim as untimely on April 28, 2010. Thus, the Complainant has waited until a very late stage in the present proceedings to request an amendment to his complaint, despite having ample opportunity to either timely file a new complaint with OSHA or request leave from this Office to amend the original complaint. *Cf. Jay v. Alcon Laboratories, Inc.*, ARB No. 08-089, ALJ No. 2007-WPC-002, slip op. at 4-5 (ARB Apr. 10, 2009) (affirming the denial of a complainant's motion to amend his complaint to include a new statutory claim where the

administrative law judge found that the complainant "requested the amendment at a 'very late' stage" and "only raised the [new] argument because his complaint would be considered timely under [the new] statute"). Moreover, the Complainant has not given any reason to explain this delay in requesting an amendment. *See, e.g., Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1024 (5th Cir. 1981) (affirming the denial of a request to amend a complaint in part because it was made more than one year after the suit was filed and no reason was given for the delay). Accordingly, I conclude that the late timing of the Complainant's request weighs against allowing an amendment in this case.

In summary, I find that the Complainant's request to amend the complaint under 29 C.F.R. § 18.5(e) was not properly raised in this case. While the Complainant contends that the complaint encompasses the events of September 24, 2009, I find that this argument is refuted by the clear language of the complaint, which makes no mention of any conduct by the Respondent that hindered the Complainant's performance on the rules test. In addition, while the complaint does allege that the Respondent "misrepresented" the test results to the Public Law Board, this conduct occurred during the grievance procedure brought under the Railway Labor Act and thus had no impact on the finality of the Respondent's decision to terminate the Complainant on April 6, 2009. Finally, I find that the timing of the Complainant's request weighs against allowing him to amend his complaint. For these reasons, I therefore deny the Complainant's request to amend his complaint under 29 C.F.R. § 18.5(e).

### *Conclusion*

As discussed above, I find that the FRSA's 180-day limitations period did not accrue on September 24, 2009. Instead, the statute of limitations began to run on April 6, 2009. Because the Complainant did not file his complaint until February 12, 2010, I conclude that his whistleblower claim is untimely. In addition, I find that an amendment to the complaint under 29 C.F.R. § 18.5(e), to include the events of September 24, 2009, is not warranted in this case. For these reasons, I conclude that the Respondent has shown that there is no genuine issue of material fact that the present claim is untimely under the 180-day statute of limitations of the FRSA, 49 U.S.C. § 20109(d)(2)(A)(ii).

## ORDER

**IT IS THEREFORE ORDERED** that the Respondent's Motion for Summary Decision filed on February 1, 2011, is **GRANTED.** The claim is **DISMISSED**.

**A**

John Paul Sellers, III
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS**: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within 10 business days of the date of issuance

of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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. § 1980.110(c). 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. § 1980.110(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 for Occupational Safety and Health. *See* 29 C.F.R. § 1980.110(a).

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. §§ 1980.109(c) and 1980.110(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 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. § 1980.110(a) and (b).