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Issue Date: 14 September 2011

CASE NO.: 2011-FRS-21

IN THE MATTER OF

JERRY L. JOHNSON

Complainant

v.

BNSF RAILWAY COMPANY

Respondent

DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION AND CANCELLING FORMAL HEARING

This proceeding arises under the employee protective provisions of the Federal Rail Safety Act (herein FRSA), 49 U.S.C. § 20109, Public Law 110-53.

On September 2, 2011, Respondent BNSF Railway Company filed by facsimile a "Motion for Summary Decision" asserting that there is no genuine issue as to any material fact and that Respondent is entitled to a decision as a matter of law. More specifically, based on its submission, Respondent asserts Complainant has failed to timely file the instant complaint and therefore this proceeding should be dismissed in that it is barred by the statute of limitations. Respondent also asserts Complainant elected his remedy by pursuing a grievance under the Railway Labor Act (herein RLA), thereby precluding him from pursuing a FRSA claim.

On September 1, 2011, a conference call was conducted with the parties. Complainant was directed to respond to Respondent's motion no later than September 9, 2011.

On September 9, 2011, Complainant filed an opposition to Respondent's motion. Complainant does not dispute the timing of the complaint filing. Complainant contends that his case is not time barred because Respondent made two separate adverse employment actions and two time limits apply to the filing of those actions. Further, Complainant argues he properly pursued the grievance under both the RLA and the FRSA.

Background

Complainant was employed by Respondent for nearly 20 years in the Maintenance of Way Department. He worked as a trackman, welder and water service foreman.

Accepting Complainant's version of the pertinent facts as alleged in his complaint, on April 13, 2009, Complainant suffered a back injury while "hooking up a sand hose" and reported the incident to his supervisor. An incident report was not completed. Respondent denies knowledge of the incident. On April 17, 2009, Respondent issued a 10-Day Record Suspension/Waiver to Complainant for sleeping on the job, and he was placed on probationary status for one year. Complainant's supervisors noticed him sleeping on the job on prior occasions, but this behavior was "consistently laughed off" by the supervisors, who never took disciplinary action. Complainant missed his scheduled doctor's appointment for his back injury on April 17, 2009, because he was detained by Respondent.

On February 25, 2010, Respondent found Complainant in violation of MSRP S-28.64 and issued a Level S 30-day Record Suspension against him for dishonesty. After a hearing, Complainant was placed on an additional one-year probationary period.

Complainant's back injury worsened on March 22, 2010, while he was operating a tile chipper. Complainant completed an injury report on March 22, 2010, and he complained of both his current and prior back injuries to management.

Respondent conducted a formal investigation on July 26, 2010, to determine Complainant's responsibility "in connection with [his] alleged failure to immediately report an incident/injury which occurred on April 14, 2009." On August 12, 2010, Respondent issued a second Level S 30-day Record Suspension against Complainant for failing to immediately report his April 14, 2009 injury. The letter informing Complainant of his suspension also immediately terminated Complainant's

employment because the suspension occurred within six months of his last suspension.

Respondent conducted another formal investigation on August 9, 2010, to determine Complainant's responsibility "in connection with [his] alleged dishonest conduct in reporting the facts of an alleged incident/injury that occurred on April 13, 2009." Complainant received another termination letter from Respondent on September 2, 2010, which stated his termination was the result of dishonestly reporting the April 2009 injury in the March 2010 personal injury report. Respondent asserts the purpose of the second letter was to provide Respondent with a stronger position if Complainant appealed the dismissal under the collective-bargaining agreement (CBA) existing between Respondent and the Brotherhood of Maintenance of Way Employees, the union to which Complainant belongs.

Complainant appealed his dismissal under the terms of the CBA on September 20, 2010. The RLA governed this appeal. His initial appeal was denied because Respondent found that the discipline assessed was justified and double jeopardy was not violated because the investigations involved separate issues. Complainant appealed to Respondent's General Director of Labor Relations, which also denied his appeal. The matter was set for conference on March 8, 2011, but the parties were unable to resolve the matter. The matter is pending scheduling before the Administrative Review Board.

Complainant filed a FRSA complaint, dated and post-marked March 1, 2011, with the OSHA Regional Office in Denver, Colorado. His position was that Respondent terminated his employment on September 2, 2010, and that Respondent violated the FRSA by delaying his medical treatment on April 17, 2009, retaliating against him for reporting the work-related injuries, and retaliating against him for reporting unsafe work conditions.

On May 13, 2011, the Regional Administrator issued findings on the matter. The Regional Administrator found Complainant was terminated on August 12, 2010, and, therefore, his complaint was dismissed due to it being filed untimely.

Complainant appealed to the Office of Administrative Law Judges, seeking the Court to: (1) declare that Complainant timely filed his FRSA complaint; (2) order Respondent to make Complainant whole through all available remedies including

reinstatement, back pay with interest, front pay and compensatory damages.

DISCUSSION

A. Summary Decision

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d)(2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 1999-STA-21 (ARB Nov. 30, 1999)(under the Act and pursuant to 29 C.F.R. § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Webb v. Carolina Power & Light Co., Case No. 1993-ERA-42 @ 4-6 (Sec'y July 17, 1995). This section is analogous to and derived from Fed. R. Civ. P. 56. Dugas v. Union Pac. R.R. Co., Case No. 2009-FRS-00007 (July 22, 2009). This section permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 1991-ERA-31 and 1991-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present **affirmative evidence** in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. However, such evidence must consist of more than the mere pleadings themselves. Id. at 324. Affidavits must be made on personal knowledge, set forth such facts as would be **admissible** in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. F.R.C.P. 56 (e).

A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit . . . cannot thereby create an issue of material fact. See Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993); Rockefeller v.

U.S. Department of Energy, Case No. 1998-CAA-10 (ALJ Sept. 28, 1998); Lawrence v. City of Andalusia Waste Water Treatment Facility, Case No. 1995-WPC-6 (ALJ Dec. 13, 1995). Consequently, Complainant may not oppose Respondent's Motion for Summary Decision on mere allegations. Such responses must set forth specific facts showing that there is a genuine issue of fact for a hearing. 29 C.F.R. § 18.40(c); Flor v. U.S. Department of Energy, Case No. 93-TSC-0001, slip op. at 10 (Sec'y Dec. 9, 1994).

The determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 1987-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Id. at 587.

Accordingly, in order to withstand Respondent's Motion, it is not necessary for Complainant to prove his allegations. Instead, he must only allege the material elements of his **prima facie** case. Bassett v. Niagara Mohawk Power Co., Case No. 1986-ERA-2, 4 (Sec'y July 9, 1986). Timely filing or meeting requirements to toll the statutory time limit is an essential requirement.

Timeliness

1. The Filing Period

The applicable statutory period in which an employee alleging retaliation in violation of the FRSA must file a complaint is **180 days** after the alleged violation occurred. 49 U.S.C. § 20109(d)(2)(A)(ii).

The time period for administrative filings begins on the date that the employee is given final and unequivocal notice of the respondent's employment decision. Ross v. Florida Power & Light Co., Case No. 96-ERA-36 (Dec. 3, 1997). "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action,

discussion, or change; "unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities. Rollins v. American Airlines, Inc., ARB No. 04-140, Case No. 2004-AIR-9, slip op. @ 2-3 (ARB Apr. 3, 2007). The United States Supreme Court has held that the proper focus is on the time of the discriminatory act, not on the point at which the consequences of the act became painful. Chardon v. Fernandez, 454 U.S. 6, 9, 102 S. Ct. 28 (1981); Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S.Ct. 498 (1980). The subsequent entertaining of a grievance by respondent does not suggest that the earlier decision was in any respect tentative, even if respondent expresses willingness to change its prior decision if the grievance is found to be meritorious. Id. at 261.

In the instant matter, Complainant was informed of Respondent's decision to terminate his employment on August 12, 2010. Complainant filed a complaint with OSHA on March 1, 2011. This filing was outside of the 180-day statutory period which tolled on February 12, 2011.

Complainant argues that he was fired twice because there are two separate adverse employment actions at issue in this matter. Complainant asserts that he suffered the first adverse employment action when Respondent terminated his employment on August 12, 2010, and the second adverse employment action when Respondent terminated his employment for dishonesty on September 2, 2010. To support his argument, Complainant relies on Respondent's assertion that two separate investigations were necessary. Complainant contends two separate time limits apply and his complaint was timely based on the second termination letter.

In McDonald v. University of Missouri, Case No. 90-ERA-59 (Nov. 7, 1991), the complainant was terminated by her employer on more than one occasion, and the ALJ applied the last date of termination in assessing whether the complaint was timely. However, McDonald is distinguishable from the instant case because the first two terminations of the complainant in McDonald were cancelled by the employer, and the complainant continued to be paid by the employer until the last termination. Id. at 7.

Here, Complainant's employment was terminated by the letter dated August 12, 2010. Unlike the complainant in McDonald, he was never reinstated to employment. Complainant could not be severed from employment which he did not have in September, notwithstanding the wording of the September 2, 2010 letter. No

duplicative adverse action occurred as a result of the September letter.

Subsequent events that "occur as a part of the grievance procedure . . . do not toll the FRSA statute of limitations." Delaware State College v. Ricks, 449 U.S. 250, 261 (1980). "The key date for the accrual of the limitations period is the injury, not the completion of any grievance process." Id. Therefore, the limitations period began to run when Respondent unequivocally terminated Complainant's employment on August 12, 2010.

Accordingly, I find that Complainant was given final and unequivocal notice of Respondent's employment decision on August 12, 2010, which constituted the commencement of Complainant's filing period. Consequently, I find and conclude that Complainant failed to file his complaint with the Department of Labor in a timely manner.

2. Equitable Tolling

Courts have held that time limitation provisions in like statutes are not jurisdictional, in the sense that a failure to file a complaint within the prescribed period is an absolute bar to administrative action, but rather analogous to statutes of limitation and thus may be tolled by equitable consideration. Donovan v. Hakner, Foreman & Harness, Inc., 736 F.2d 1421 (10th Cir. 1984); School District of Allentown v. Marshall, 657 F.2d 16 (3rd Cir. 1981); Coke v. General Adjustment Bureau, Inc., 654 F.2d 584 (5th Cir. 1981). The Allentown court warns, however, that the restrictions on equitable tolling must be **scrupulously observed**; the tolling exception is not an open invitation to the court to disregard limitation periods simply because they bar what may be an otherwise meritorious cause. Rose v. Dole, 945 F.2d 1331, 1336 (6th Cir. 1991).

In Allentown, the court, relying on Smith v. American President Lines, Ltd., 571 F.2d 102 (2nd Cir. 1978), which interpreted Supreme Court precedent, observed that tolling might be appropriate (1) where a respondent actively misled the complainant respecting the cause of action; (2) where the complainant has in some extraordinary way been prevented from asserting his rights; or (3) where a complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. Allentown, 657 F.2d at 19-20; see also Prybys v. Seminole Tribe of Florida, Case No. 1995-CAA-15 (ARB Nov. 27,

1996); see also Halpern v. XL Capital, Ltd., Case No. 2004-SOX-54 (ARB August 31, 2005).

Complainant failed to raise any equitable tolling arguments. However, the factors required for equitable tolling are not met in this case. No evidence was presented to show that Respondent actively misled Complainant, Complainant was prevented from asserting his rights in some extraordinary way or Complainant raised the claim in the wrong forum. Consequently, I conclude that Complainant is not entitled to equitable tolling.

B. Pursuit of a Grievance under the RLA

The FRSA states, "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. § 20109(f). The Supreme Court interpreted the phrase "all other law," found at 49 U.S.C. § 11341(a), to include obligations under a collective bargaining agreement. Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117, 133 (1991). The Ninth Circuit has held that an employee "must elect to pursue his claim under either a statutory procedure or a union-assisted negotiation procedure; he cannot pursue both avenues, and his election is irrevocable." Vinieratos v. U.S. Dep't of the Air Force, 939 F.2d 762, 768 (9th Cir. 1991).

In Koger v Norfolk S. Ry. Co., Case No. 2008-FRS-00003 (May 29, 2009), an ALJ, relying on Vinieratos, held that an appeal under the RLA was an election of remedies which precluded a FRSA claim. The ALJ emphasized that Congress mandated an election of remedies under the FRSA, distinguishing this explicit provision from judicially created election of remedies provisions. Id.

However, as Complainant points out, conflicting case law exists. Several ALJ's have found that pursuit of a claim under a CBA is not "another provision of law." See Jensen v. Union Pac. R.R. Co., Case No. 2011-FRS-0005 (Aug. 19. 2011); Powers v. Union Pac. R.R., Case No. 2011-FRS-12 (May 17, 2011); Mercier v. Union Pac. R.R., Case No. 2008-FRS-4 (June 3, 2009). Recently, two ALJs found that the addition of subsections (g) and (h) to the FRSA in the 2007 amendments allow an individual to file a grievance pursuant to a CBA or appeal discipline pursuant to a CBA while pursuing a complaint under the FRSA. See Milton v. Norfolk Southern Railway Corp., Case No. 2011-FRS-00004 (July 11, 2011); Thompson v. Norfolk Southern Railway Corp., Case No. 2011-FRS-00015 (Aug. 8, 2011).

Because I find that Complainant's action under the FRSA was time barred I need not resolve this issue.

In light of the evidence presented regarding the failure of Complainant to timely file his FRSA complaint, and based on the foregoing jurisprudence, I find that Respondent is entitled to summary decision in this matter and its Motion for Summary Decision is hereby **GRANTED.**

Accordingly,

IT IS HEREBY ORDERED that Respondents' Motion for Summary Decision be, and it is, **GRANTED.**

IT IS FURTHER ORDERED, in view of the foregoing, that the formal hearing scheduled for September 19, 2011, in Cheyenne, Wyoming, is hereby **CANCELLED.**

ORDERED this 14th day of September, 2011, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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. § 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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. § 1982.110(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. §§ 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).