



**Issue Date: 20 July 2012**

**CASE NO.: 2011-FRS-00036**

**In the Matter of:**

**DON KINNERSLEY,  
Complainant,**

**v.**

**UNION PACIFIC RAILROAD COMPANY,  
Respondent.**

**ORDER OF DISMISSAL/WITHDRAWAL**

By Order of June 13, 2012, the hearing in this matter scheduled to be held from June 26, 2012, to June 28, 2012 at Omaha, Nebraska was canceled at Complainant's request, because Complainant wished to withdraw his case. However, Complainant was advised that he should request withdrawal in writing and, if a settlement was involved, the settlement agreement should be submitted for approval. Complainant has verified in writing that he wishes to withdraw his complaint, and the request is being granted.

**Background.**

This case has been brought under the employee protection provisions of the Federal Rail Safety Act (FRSA), as amended, 49 U.S.C. §20109. Implementing regulations appear at 29 C.F.R. Part 1982, Interim Final Rule, added by 75 Fed. Reg. 53522 (Aug. 31, 2010).

When a complainant withdraws his objection to the Secretary's findings, 29 C.F.R. §1982.111(c) is applicable:

(c) At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw its objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If a case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. If the ARB

approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. [Emphasis added.]

If a settlement is involved while a case is pending before the Office of Administrative Law Judges, the settlement must be submitted for approval, and 29 C.F.R. §1982.111(d)(2) is applicable:

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ, or by the ARB if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be.

Any settlement approved by an administrative law judge constitutes the final order of the Secretary and is enforceable. 29 C.F.R. §1982.111(e). Finally, if the Complainant plans to remove the case to federal district court, inasmuch as over 210 days have elapsed since he filed the complaint, he is required to file a notice of his intention to do so 15 days in advance with this tribunal, under 49 U.S.C. §20109(d)(3) and its regulatory counterpart, 29 C.F.R. §1982.114.

## **Discussion**

On June 26, 2012, Complainant, through counsel, filed a Request for Withdrawal of Complaint and Dismissal of Case. In that request, Complainant moved for his complaint brought under FRSA, 49 U.S.C. §20109 be withdrawn and the cause of action against the Respondent Union Pacific Railroad company be dismissed. That request was served upon opposing counsel. Also, Complainant separately advised this office, in a signed letter filed on June 26, 2012, which provides in its entirety:

To whom it may concern:

I am withdrawing my complaint against the union pacific railroad. Even knowing that they violated my rights, I have no alternative but to withdraw.

It is unclear whether a copy of the letter was served upon opposing counsel. Complainant is advised that, as he is represented, all communications should come from his counsel and copies must be provided to the opposing counsel or parties.

As noted above, the regulations permit a party to withdraw a complaint by providing a written request, and Complainant has done so here. Withdrawal of the claim has the effect of reinstating the determination of the Assistant Secretary. 29 C.F.R. §1982.111(c). Here, by letter of August 12, 2011, the Secretary of Labor, acting through the Regional Administrator for OSHA, determined that there was no reasonable cause to believe that Respondent violated 49

U.S.C. §20109, following which the “Secretary’s Findings” were set forth. (That determination is tantamount to the Assistant Secretary’s findings mentioned in the regulation.) Although Complainant has sought to withdraw his complaint, he is actually withdrawing his objections to those findings, which will now become the final order of the Secretary.

No objection to the request for withdrawal/dismissal has been filed by Respondent.

Notwithstanding Complainant’s apparent reluctance to withdraw his claim, he has clearly stated his wish to do so. As a complainant bears the burden of proof in a whistleblower case, and his complaint was initially determined to lack merit, there is no apparent reason to disapprove the request for withdrawal/dismissal. Complainant’s objections are therefore withdrawn and, as the regulations provide that the Assistant Secretary’s findings will constitute the final Order of the Secretary, the case will be dismissed with prejudice. 29 C.F.R. §1982.111(c). Accordingly,

### **ORDER**

**IT IS HEREBY ORDERED** that Complainant’s request for withdrawal/dismissal is **GRANTED**, the objections are **WITHDRAWN**, and the claim is **DISMISSED WITH PREJUDICE**.

**A**

PAMELA J. LAKES  
Administrative Law Judge

Washington, D.C.