



Issue Date: 28 February 2013

CASE NO.: 2012-FRS-00083

IN THE MATTER OF:

**JOSHUA MODE,
ROBERT JOHNSTON,
ROCKY MAKOVY,
and TERRY STILES,
Complainants**

vs.

**KANSAS CITY SOUTHERN RAILWAY CO.,
Respondents**

ORDER OF DISMISSAL

This case comes under the Federal Rail Safety Act (FRSA),¹ as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.² The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against by Employers for taking any action relating to the fulfillment of safety or other requirements established by the above Act. The initial complaint to OSHA was filed on 2 Jul 12, which issued a decision dismissing the complaint on 13 Aug 12. Timely objections were filed, the case was referred to OALJ, and on 19 Sept 12, I held a conference call with the parties. Both Complainants and Respondent agreed to a litigation timeline that would culminate in a hearing on 26 Mar 13. On 30 Jan 13, Complainants filed a notice that they intended to file their complaints in federal district court and the current administrative proceeding should be terminated. I held a conference call on 5 Feb 13, at which time Respondent indicated it did not believe it had grounds to object. Complainants filed their complaint in district court on 13 Feb 13.

¹ 49 U.S.C. § 20109.

² Pub. L. No. 110-53 (Aug. 3, 2007).

The statute provides for de novo review in federal district court. "With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States"³

Based on Complainants' clearly stated intention of pursuing remedies in district court and absence of objection from Respondent, this litigation is terminated and the administrative complaint is dismissed.⁴

In view of the foregoing, the hearing scheduled on **26 Mar 13** in **Dallas, Texas** is hereby **CANCELLED**.

ORDERED this 28th day of February, 2013 at Covington, Louisiana.

PATRICK M. ROSENOW
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.

³ 49 U.S.C. § 20109(c)(3).

⁴ The statute provides 270 days from the filing of the initial OSHA complaint to (1) conduct an initial investigation and issue a decision, (2) file objections, conduct discovery and file dispositive motions, (3) conduct a formal administrative hearing, (4) prepare a transcript and submit legal briefs, (5) write and issue a full APA compliant decision, (6) file a notice of appeal from that decision and submit appellate briefs, and (7) make a decision on the appeal and issue a final agency decision. Even assuming a complainant is willing to forgo many of these steps and makes clear his desire to reach a rapid resolution, it is very difficult to comply with that time limit and also protect in any meaningful way the due process rights of the respondent. In this case, Complainants did not try to obtain a rapid administrative decision, but instead took an active role in setting a schedule that would by definition prevent compliance with the 270 limit. Whether or not that would constitute bad faith or otherwise equitably stop them from invoking the 270 day provision and filing de novo in district court was discussed in the telephone conference but not asserted as a grounds in opposition by Respondent.

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).