



**Issue Date: 05 April 2013**

**Case Number: 2013-FRS-00037**

*In the Matter of:*

**LORI BRISBOIS,**

*Complainant*

v.

**CANADIAN PACIFIC RAILWAY CO.,**

*Respondent*

### **ORDER OF DISMISSAL**

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 (“FRSA”), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. (Aug. 3, 2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008), and the FRSA regulations issued under 29 C.F.R. Part 1982.

On February 26, 2013, the United States Department of Labor, Office of Administrative Law Judges (“OALJ”) received correspondence from Jeff R. Dingwall, counsel for Lori Brisbois (“Ms. Brisbois” or “Complainant”), seeking a hearing before an administrative law judge under the FRSA, attached to which was a January 18, 2013 letter to Complainant from the Occupational Safety and Health Administration (“OSHA”), Chicago Regional Office. According to OSHA’s letter, Complainant contacted OSHA on January 11, 2013 alleging that she had suffered an adverse employment action as a result of engaging in activity protected by one of the twenty-two whistleblower statutes administered by OSHA. The letter further states that Complainant called again on January 18, 2013, spoke with an OSHA investigator, was told that her complaint appeared to be untimely, she decided not to pursue the complaint, and she was told OSHA would take no further action regarding her allegations.

On March 5, 2013, the undersigned issued a Notice of Docketing and Order directing the parties, including OSHA’s Office of Whistleblower Protection Programs, to file briefs on the following issues: (1) whether OALJ has the authority to conduct a hearing on Complainant’s FRSA claim; (2) whether Complainant’s FRSA complaint was timely filed with OSHA; and (3) whether Complainant’s FRSA hearing request was timely filed with OALJ?

On March 22, 2013, Complainant and counsel for Respondent Canadian Pacific Railway, Co. ("Respondent") filed briefs on the issues set forth in my March 5, 2013 Order. The Office of the Solicitor, Chicago Regional Office, U.S. Department of Labor ("Solicitor's Office"), filed a brief on behalf of OSHA on April 1, 2013.

Section 1982.104, 29 C.F.R., requires a complainant to file his or her whistleblower complaint with OSHA. OSHA then must investigate the complaint and issue written findings and an order as to whether or not there is reasonable cause to believe that the respondent retaliated against the complainant in violation of the FRSA. 29 C.F.R. § 1982.105(a). The parties may thereafter object to OSHA's written findings and order by filing objections and a request for hearing with OALJ within 30 days of receipt of the findings and preliminary order. 29 C.F.R. § 1982.106(a).

Although Complainant now alleges that she filed an "oral complaint" with OSHA, OSHA's January 18, 2013 letter clearly states that it believed Ms. Brisbois had elected not to pursue a complaint and never investigated her complaint or issued written findings and an order regarding her complaint. Since an OSHA investigation and determination on a whistleblower complaint are prerequisites to a hearing before OALJ, 29 C.F.R. §§ 1982.104-1982.106, Ms. Brisbois' appeal and request for hearing must be dismissed. However, I note OSHA states in its response to my March 5, 2013 Order that OSHA is willing to initiate an investigation and issue findings concerning the allegations of which Ms. Brisbois is complaining in the event I decline to construe its January 18, 2013 letter as the agency's findings on Ms. Brisbois' FRSA complaint. This dismissal is therefore without prejudice to Complainant's rights to pursue her FRSA complaint before OSHA.

**SO ORDERED.**

**STEPHEN L. PURCELL**  
Chief 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).