



In the Matter of:

XAVIER A. ROSADILLO,

ARB CASE NO. 10-085

COMPLAINANT,

ALJ CASE NO. 2009-FRS-008

v.

DATE: October 31, 2011

UNION PACIFIC RAILROAD CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Xavier A. Rosadillo, *pro se*, P.A., Sahurita, Arizona

For the Respondent:

Rami S. Hanash, Esq., *Union Pacific Railroad Company*, Omaha, Nebraska

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Xavier Rosadillo filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that his employer, Union Pacific Railroad (Union Pacific), terminated his employment in violation of the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C.A. § 20109 (Thomson/Reuters 2011), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No.110-53.

Prior to a hearing, an Administrative Law Judge (ALJ) determined that the Department of Labor lacked jurisdiction over Rosadillo's FRSA complaint. See Recommended Decision and Order (R. D. & O) Dismissing Complaint (Mar. 31, 2010).

Rosadillo appealed to the Administrative Review Board (ARB or the Board). We affirm.

BACKGROUND

Rosadillo worked for Union Pacific beginning in October 2000, most recently as a fireman-in-training. He took an employer-ordered drug test on July 31, 2005, and tested positive for cocaine. A few days later, on August 5, 2005, Rosadillo admitted that he had used illegal drugs, accepted dismissal, and entered into an Employee Assistance Program (EAP) with the goal of conditional reinstatement. As a part of his participation in the EAP, Rosadillo signed a "Personal Program" stating that he would refrain from using any illegal drugs. Rosadillo admitted on October 27, 2005, to subsequent cocaine use. On December 14, 2005, Union Pacific terminated Rosadillo's participation in the EAP for failure to comply with the terms of his personal program. After an investigation by Union Pacific, Rosadillo was returned to "dismissed status" on February 14, 2006. R. D. & O. at 2.

On June 15, 2006, Rosadillo's union appealed the termination. After a hearing the Public Law Board¹ denied Rosadillo's claim for reinstatement on January 19, 2009. R. D. & O. at 3.

On January 9, 2009, Rosadillo filed a complaint with OSHA alleging "that he was wrongfully terminated for substance abuse." OSHA Case Activity Worksheet (Jan. 9, 2009). OSHA dismissed Rosadillo's complaint because it was not filed within 180 days of Rosadillo's termination on July 31, 2005. OSHA Findings (Mar. 11, 2009). On April 24, 2009, the case was assigned to an ALJ for a hearing. The ALJ issued an order to show cause why the matter should not be dismissed for lack of jurisdiction because nothing in the record indicated that any alleged violation of the Act occurred after August 3, 2007, the date that amendments to the FRSA, which gave the OALJ jurisdiction over FRSA whistleblower claims, became effective. After responses from both parties, the ALJ dismissed for lack of jurisdiction.

¹ The ALJ's reference to "Public Law Board" is designated as the National Railroad Adjustment Board which arbitrates disputes between railway employers and unions on a range of issues, including employee discipline. See R. D. & O. at 2 n.3 (citing 45 U.S.C.A. § 153 Second (Thomson/Reuters 2011)).

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated authority and assigned responsibility to the ARB to act for the Secretary of Labor in review or on appeal of decisions and recommended decisions by ALJs as provided for or pursuant to the Federal Railroad Safety Act. *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924, 3925 para. 5(c)(15) (Jan. 15, 2010). We review the ALJ's factual findings to determine whether they are supported by substantial evidence. 29 C.F.R. Part 1982.110 (2011). The Board generally reviews the ALJ's conclusions of law under the de novo standard. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

The Federal Rail Safety Act protects railroad employees who suffer adverse actions because, among other things, they have complained to a supervisor or governmental agency about a violation of a rail safety rule or because they participated in an investigation of an alleged violation. 49 U.S.C.A. § 20109(a) (Thomson/Reuters 2011). On August 3, 2007, Congress enacted numerous amendments to the FRSA as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Sec. 1521), 121 Stat. (9/11 Commission Act). Under the 2007 amendments, Congress transferred authority for rail employees' whistleblower claims from the National Railroad Adjustment Board to the Labor Department under OSHA. The 2007 FRSA Amendments became effective on August 3, 2007, the date the statute was enacted. *See Abbott v. BNSF Ry. Co.*, 2008 WL 4330018 (D. Kan. Sept. 18, 2008). OSHA's jurisdiction over such claims became effective on that date. R. D. & O. at 3.

Rosadillo alleged adverse actions that occurred *prior* to the effective date of the 2007 FRSA amendments. Specifically, his initial termination of July 31, 2005, and the return to dismissed status on February 14, 2006, are both prior to the Act's August 3, 2007 effective date. *See* R. D. & O. at 2. Because these adverse actions alleged by Rosadillo occurred prior to the effective date of the FRSA amendment, the ALJ has no jurisdiction.

Rosadillo also contends that a letter from the company to the Union dated December 12, 2007, and a subsequent decision to reject the recommendation constitutes adverse action that would bring his claims within the Labor Department's jurisdiction. Specifically, Rosadillo points to a company letter to the Union dated December 12, 2007, recommending that Rosadillo return to service with no pay pending approval by the EAP. *See* Rosadillo Letter to ALJ (Feb. 2, 2010) attaching Carrier's Exh. E, p. 1. Based on the letter, the recommendation stems from discussions between the company and the union

concerning a number of disciplinary actions involving company employees, including Rosadillo. *Id.*²

Even if we considered Union Pacific's alleged decision on June 8, 2008, changing its position from recommending reinstatement to recommending upholding the dismissal, the complaint must still be dismissed as untimely. Union Pacific's decision allegedly occurred on June 8, 2008, and Rosadillo did not file his complaint until January 9, 2009, 215 days later, making his complaint untimely. 29 C.F.R. § 1982.103(d) (FRSA complaints must be filed within 180 days of an alleged violation).³

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's recommended order and **DISMISS** Rosadillo's complaint.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI,
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

² The Service Unit (e.g., the company) ultimately *rejected* the recommendation in June 2008. See Rosadillo Letter to ARB General Counsel Dunlop (June 18, 2010).

³ Rosadillo's claim challenging the company's decision to reject the recommendation was appealed to the Public Law Board (or National Railroad Adjustment Board), and the Board denied the appeal on January 19, 2009. See Rosadillo Letter to ARB General Counsel Dunlop at 1 (June 18, 2010). Under 45 U.S.C. § 153 First (q), Rosadillo could have petitioned for review of the Public Service Board's decision in the United States District Court.