



STEVE A. WILHELM,

ARB CASE NO. 12-044

COMPLAINANT,

ALJ CASE NO. 2011-FRS-027

v.

DATE: March 28, 2012

BNSF RAILWAY CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jeff R. Dingwall, Esq., San Diego, California

For the Respondent:

Andrea Hyatt, Esq., BNSF Railway Company, Fort Worth, Texas

Before: Paul M. Igasaki, Chief Administrative Appeals Judge, and Joanne Royce, Administrative Appeals Judge.

ORDER DISMISSING COMPLAINT

The Complainant, Steve A. Wilhelm, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration alleging that the Respondent, BNSF Railway Co., had retaliated against him in violation of the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA)¹ and its implementing regulations.² On February 1, 2012, a Department of Labor

¹ 49 U.S.C.A. § 20109 (Thomson/West 2012), 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.

² 29 C.F.R. Part 1982 (2011).

Administrative Law Judge (ALJ) issued a Decision and Order finding that Wilhelm had failed to show that the Respondent retaliated against him because he engaged in FRSA-protected activity.³

Wilhelm filed a petition for review with the Administrative Review Board. The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the FRSA.⁴

On February 29, 2012, the Board received a Notice of Intention to File Original Action in the United States District Court from Wilhelm, in which he gave notice of his intention to file an action in federal court, as authorized by 49 U.S.C.A. § 20109(d)(3), for de novo review of the claim currently pending before the Board. Wilhelm noted that he filed his FRSA complaint more than 210 days prior to filing the Notice and that he “has fully participated, cooperated and furthered his complaint in good faith.”

If the Board has not issued a final decision within 210 days of the date on which the complainant filed the complaint, and there is no showing that the complainant has acted in bad faith to delay the proceedings, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court, which will have jurisdiction over the action without regard to the amount in controversy.⁵ Accordingly, we ordered the parties to show cause no later than March 21, 2012, why the Board should not dismiss Wilhelm’s claim pursuant to 29 C.F.R. § 1982.114. The Board cautioned the parties that should they fail to timely reply to this Order, the Board may dismiss this claim without further notice.

BNSF responded to the show cause order stating that the Board should dismiss the “pending administrative action.” Wilhelm did not respond to the Board’s order. Accordingly, as provided in 29 C.F.R. § 1982.114, we **DISMISS** Wilhelm’s complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

³ Decision and Order at 7-12.

⁴ Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1982.110(a).

⁵ 49 U.S.C.A. § 20109(d)(3); 29 C.F.R. § 1982.114.