

Purcell

U.S. Department of Labor

Administrative Review Board  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210



HARRY MULLEN,

ARB CASE NO. 13-059

COMPLAINANT,

ALJ CASE NO. 2012-FRS-003

v.

DATE: JUL - 9 2013

NORFOLK SOUTHERN CORP.,

RESPONDENT.

2013 JUL 10 AM 10 04  
US DEPT OF LABOR  
ADMIN LAW JUDGES  
WASHINGTON, DC

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant:*

Charles A. Collins, Esq.; *Charles A. Collins, P.A.*, St. Paul, Minnesota

*For the Respondent:*

Joseph P. Sirbak, Esq.; *Buchanan Ingersoll & Rooney PC*, Philadelphia, Pennsylvania

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Joanne Royce, *Administrative Appeals Judge*

### FINAL DECISION AND ORDER DISMISSING COMPLAINT

On April 28, 2011, the Complainant, Harry Mullen, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Norfolk Southern Corp., had retaliated against him in violation of the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA)<sup>1</sup> and its implementing regulations.<sup>2</sup> Following OSHA's dismissal of Mullen's complaint, Mullen requested review of his claim before a Department of Labor Administrative Law Judge. On April 30, 2013, the presiding ALJ issued a Decision and

<sup>1</sup> 49 U.S.C.A. § 20109 (Thomson/West 2012).

<sup>2</sup> 29 C.F.R. Part 1982 (2012).

Order Dismissing Complaint, finding that Norfolk Southern established by clear and convincing evidence that it would have taken adverse action against Mullen even in the absence of protected activity.<sup>3</sup>

Mullen 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.<sup>4</sup>

On June 11, 2013, the Board received a Notice of Intent to File Original Action in the United States District Court from Mullen in which he notified the Board 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. Mullen noted that he filed his FRSA complaint more than 210 days prior to filing the Notice and that as of that date, the Secretary of Labor had not issued a final decision.

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.<sup>5</sup>

In response to Mullen's notice of his intention to file a de novo claim in district court, the Board ordered the parties to show cause why the Board should not dismiss Mullen's claim before the Department of Labor. The Board cautioned the parties that should they fail to timely respond to the Board's Order that "the Board may dismiss [the] claim without further notice." Mullen did not respond to the Board's Order to Show Cause. Norfolk Southern responded averring that it did not object to the dismissal with prejudice of the Complainant's complaint, but that it reserved the right "to contend in federal district court that complainant's federal court complaint is barred by the doctrines

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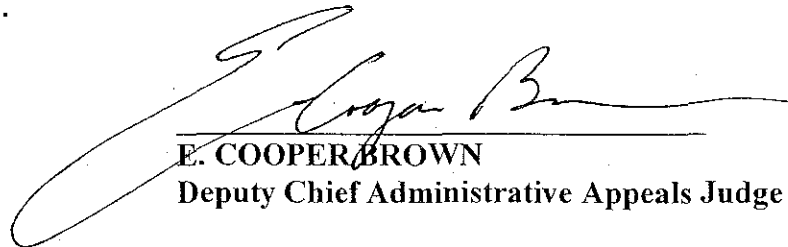
<sup>3</sup> *Mullen v. Norfolk Southern Corp.*, 2012-FRS-003 (Apr. 30, 2013).

<sup>4</sup> See Secretary's Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 222 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

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

of claim or issue preclusion, waiver, estoppel, failure to exhaust remedies, or any other applicable legal doctrine.”<sup>6</sup> Accordingly, in accordance with 29 C.F.R. § 1982.114 and Mullen’s notification of his intent to proceed in district court and given his failure to respond to the Board’s Order to Show Cause, we **DISMISS** Mullen’s complaint.

**SO ORDERED.**



**E. COOPER BROWN**  
Deputy Chief Administrative Appeals Judge



**JOANNE ROYCE**  
Administrative Appeals Judge

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<sup>6</sup> Respondent’s Response to Order to Show Cause at 1.