In the Matter of:

MICHAEL DUGGER, **ARB CASE NO. 16-079**

COMPLAINANT, **ALJ CASE NO. 2016-FRS-036**

v. **DATE: August 17, 2017**

UNION PACIFIC RAILROAD CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Gregory G. Paul, Esq.; ***Morgan & Paul, PLLC;*** **Pittsburgh, Pennsylvania**

***For the Respondent*:**
Doris A. Beutel-Guthrie, Esq.; ***Union Pacific Railroad Co.;*** **Houston, Texas**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge;*** **Leonard J. Howie III,** ***Administrative Appeals Judge;*** **and Tanya L. Goldman,** ***Administrative Appeals Judge***

FINAL DECISION AND ORDER

A Department of Labor Administrative Law Judge (ALJ) granted Respondent Union Pacific Railroad Company's motion for summary decision in this case arising under the employee protection provisions of the Federal Railroad Safety Act.[1] The ALJ found that Complainant Michael Dugger had failed to raise a genuine issue of material fact regarding

[1] 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2016) (FRSA). The FRSA's implementing regulations are found at 29 C.F.R. Part 1982 (2016).

whether he timely filed his whistleblower complaint with the Occupational Safety and Health Administration (OSHA). We affirm.[2]

Within 180 days after an alleged FRSA violation occurs, any employee who believes that he or she has been retaliated against in violation of the FRSA may file a complaint alleging such retaliation.[3] "[The] limitations period begins to run from the time that the complainant knows or reasonably should know that the challenged act has occurred."[4] Thus, an employer violates the FRSA on the date that it communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action.[5]

In whistleblower cases, statutes of limitation, such as section 20109(d)(2)(ii), run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision.[6] "Final" and "definitive" notice is a communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities.[7]

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[2] The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under FRSA. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

[3] 49 U.S.C.A. § 20109(d)(2)(ii); 29 C.F.R. § 1982.103(d)(2016).

[4] *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (11th Cir. 1982). See also *Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999)(statute of limitations begins to run "on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights").

[5] *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128; ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001). *See Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period began to run when the tenure decision was made and communicated rather than on the date his employment terminated).

[6] *See, e.g., Rollins, v. American Airlines,* ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 2 (ARB Apr. 3, 2007); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005); *Jenkins v. United States Envtl. Prot. Agency,* ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003).

[7] *Larry v. The Detroit Edison Co.*, No. 1986-ERA-032, slip op. at 14 (Sec'y June 28, 1991*). Cf. Yellow Freight Sys., Inc. v. Reich,* 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer's intent to discharge complainant).

On August 11, 2015, Complainant Dugger resigned from his management position with Respondent Union Pacific Railroad.[8] On August 18, 2015, Respondent gave Dugger a letter terminating his employment and stating in pertinent part:

> Your employment relationship with Union Pacific Railroad Company ("Union Pacific") is formally terminated as of August 18, 2015. You are no longer required or permitted to report to work, to access Union Pacific property, or to perform any job duties on Union Pacific's behalf. You are disqualified from returning to any agreement craft where you may retain seniority and will not be considered for any future employment with the Union Pacific Railroad Company or any related companies.[9]

On September 9, 2015, Dugger attempted to return to work by exercising his union seniority rights in a locomotive engineer position, but Respondent denied his request. On March 1, 2016, Dugger filed a FRSA complaint with OSHA alleging that Respondent's refusal to allow him to "mark up" violated the FRSA's employee protection provisions.[10]

To be covered under the FRSA, the alleged violation, in this case must have occurred on or after September 3, 2015. Therefore, if the August 18, 2015 termination notification is found to be the relevant violation, Dugger's complaint is untimely. But if the September 9th denial of Dugger's attempt to return to work by exercising his union seniority rights is considered to be a qualifying violation, Dugger's complaint is timely.

We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies also governs our review.[11] Summary decision is appropriate if there is no genuine issue of material fact. We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[12] Here, the parties do not dispute the basic

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8 Ruling on Motion for Summary Decision at 1-2.

9 *Id.* at 3. Respondent alleged that it terminated Dugger's employment because he misused some UPS shipping labels. *Id.* at 1.

10 *Id.* at 1.

11 29 C.F.R. § 18.72 (2016).

12 *Lee v. Schneider Nat'l, Inc.,* ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.,* ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

facts relevant to the timeliness of the filing of the complaint, but they do disagree on the legal ramifications of Respondent's August 18, 2017 termination notification.

The ALJ found that the August 18 notification was the relevant violation for purposes of determining the limitations period. The ALJ concluded that the termination notification is neither ambiguous nor equivocal and that Dugger did not suggest that he did not understand it.[13] The ALJ rejected Dugger's argument that until he actually attempted to exercise his seniority rights, and was denied, that the August 18 notification was no more than a threat, which did not constitute an adverse action. The ALJ concluded:

> On 18 Aug 15, Respondent told Complainant he was no longer an employee and would not be allowed to come back to work notwithstanding any craft seniority. That was the last adverse action taken by Respondent. Respondent's refusal to allow him to "mark up" was absolutely consistent with what it had told Complainant weeks earlier and was a consequence of the 18 Aug 15 adverse action, rather than a new one. His complaint to OSHA was untimely and is dismissed.[14]

The ALJ's decision that Dugger did not timely file his complaint is correct as a matter of law, and the ALJ properly found that Dugger has failed to raise a genuine issue as to any material fact whether he timely filed his complaint. Undoubtedly an employer who unambiguously notifies an employee that: 1) his employment relationship is terminated as of a date certain, 2) the employee may not report to work or enter the employer's premises or perform any job duties on the employer's behalf, 3) the employee is disqualified from returning any agreement craft where he may retain seniority and 4) will not be considered for any future employment with the employer or any companies related to the employer, has taken adverse actions against the employee.[15] Those adverse actions begin the running of a limitations period. The question then remains whether these actions begin the running of the relevant limitations period given the facts of this case.

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[13] Ruling on Motion for Summary Decision at 3.

[14] *Id.* at 4.

[15] 49 U.S.C.A. § 20109(a)("A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, **may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee**")**(**emphasis added**).** *Accord Shultz, v. Congregation Shearith Israel of the City of New York*, __ F.3d __, 2017 WL 3427130, at *4 (2d Cir. 2017)("The Supreme Court's conclusion that a discrimination claim accrues upon notice of termination, rather than upon the implementation of that decision, necessarily implies that the notification of termination qualifies as an adverse employment action").

Dugger argues that only once his bid for a position was denied did he have the requisite damages to pursue a cause of action. But given the public policy of the whistleblower laws, the issue of whether a complainant has sustained damages has never been a prerequisite to a finding of retaliation; "the absence of a tangible injury goes only to remedy, not to whether the employer committed a violation of the law."[16] Further, the August notice not only terminated Dugger's employment, but denied him the right to bid upon the job he subsequently was denied, so Dugger did, in fact sustain a compensable damage by virtue of this notice and the Secretary could have ordered reinstatement and reversal of Respondent's order that Dugger was forbidden to "mark up."

Moreover, the ALJ's conclusion that "Respondent's refusal to allow him to "mark up" was absolutely consistent with what it had told Complainant weeks earlier and was a consequence of the 18 Aug 15 adverse action, rather than a new one," is consistent with Board precedent. In *Johnsen v. Houston Nana, Inc. JV,*[17] Respondent HNJV terminated Complainant Johnsen's employment and notified him that he would not be eligible for rehire. Johnsen argued that the limitations period on his complaint began to run when he subsequently applied for re-hire and was rejected. The Board held,

> HNJV has not subjected Johnsen to adverse action since December 10, 1998, the date on which he was terminated and informed that he was ineligible for rehire. HNJV's refusal to rehire Johnsen months later does not constitute a separate discriminatory act. *See Hadden, supra,* slip op. at 4, *citing Mitilinakis v. Chicago*, 735 F. Supp. 839 (N.D. Ill. 1990) ("[P]laintiff cannot extend the limitations period by repeatedly renewing her demand for reinstatement and then counting her time to file from each denial.").[18]

The Board continued that Johnsen had thirty days from the date the employer informed him that his employment was terminated and he was not eligible to be rehired to file **any** complaint alleging that the employer would not rehire him because he engaged in protected activity and that because he received definitive, final and unequivocal notice that the employer had taken adverse action against him, his complaint was barred by the applicable limitations period.

Finally, Dugger's reliance on *Green v. Brennan*[19] is misplaced. In *Green*, the Supreme Court held that ordinarily, a " 'limitations period commences when the plaintiff has a complete

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16 *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 20 (ARB Sept. 13, 2011), *aff'd sub nom Halliburton, Inc., v. ARB*, 771 F.3d 254 (5th Cir. 2014).

17 ARB No. 00-064, ALJ No. 1999-TSC-004 (ARB Feb. 10, 2003).

18 *Id.* at 5.

19 136 S. Ct. 1769 (2016).

and present cause of action.' " *Ibid.* "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S. Ct. 542, 139 L.Ed.2d 553 (1997). Although the standard rule can be displaced such that the limitations period begins to run before a plaintiff can file a suit, we "will not infer such an odd result in the absence of any such indication" in the text of the limitations period.[20]

Here, not only could Dugger have obtained relief as of August 18th, but the FRSA specifically provides that the limitations period begins when an employee believes that he or she has been retaliated against in violation of the FRSA. If Respondent did retaliate against Dugger, after receiving the August 18th notice, Dugger knew (or should have known) of such retaliation on that date.

Accordingly, we **AFFIRM** the ALJ's order granting summary decision in this case because Dugger has failed to raise a genuine issue of material fact regarding whether his complaint was timely filed.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge

TANYA L. GOLDMAN
Administrative Appeals Judge

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[20] *Id.* at 1776.