**U.S. Department of Labor**

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

In the Matter of:

ROBERT A. BARBOZA,

COMPLAINANT,

v.

BNSF RAILWAY COMPANY,

RESPONDENT.

ARB CASE NO. 2018-0076

ALJ CASE NO. 2017-FRS-00111

DATE: DEC 19 2019

Appearances:

*For the Complainant*:
Robert A. Barboza; *pro se*; Corona, California

*For the Respondent*:
Keith M. Goman, Esq., and Gillian Dale, Esq.; *Hall & Evans, L.L.C.*; Denver, Colorado; and Paul S. Balanon, Esq.; *BNSF Railway Company*

Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges*

## FINAL DECISION AND ORDER

PER CURIAM. This case arises under the Federal Rail Safety Act of 1982 (FRSA). 49 U.S.C. § 20109 (2008), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. 110-53, and as implemented at 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18, Subpart A (2019). Complainant Robert Barboza filed a complaint alleging that the Respondent, BNSF Railway Company, retaliated against him in violation of the FRSA's whistleblower protection provisions because he engaged in protected activity. Complainant appeals from a Decision and Order of a Department of Labor Administrative Law Judge (ALJ) issued on August 29, 2018, dismissing the

complaint and granting summary decision because Complainant failed to prove a genuine issue of material fact existed that any timely adverse action occurred.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to review ALJ decisions in cases arising under the FRSA and issue final agency decisions in these matters. Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); *see* 29 C.F.R. § 1982.110(a).

The Administrative Review Board (Board or ARB) reviews an ALJ's grant of summary decision de novo, applying the same standard applicable to the ALJ for granting summary decision under 29 C.F.R. § 18.72. *See* Fed. R. Civ. P. Rule 56. To be entitled to summary decision, the movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a).

## DISCUSSION

On March 16, 2017, Complainant filed the instant complaint alleging that Respondent engaged in adverse action against him because he engaged in FRSA-protected activities. On August 29, 2018, the ALJ issued a Decision and Order Granting Summary Decision because there was a failure of proof that the original complaint had been filed within 180 days after an adverse action by Respondent. 49 U.S.C. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d). Complainant filed a petition for review with the Board, which the Board accepted. Both parties filed briefs.

Upon review of the ALJ's grant of summary decision, we conclude that it is a reasoned decision based on the undisputed facts and the applicable law. The ALJ properly concluded that Complainant failed to set forth any genuine issue of material fact that any adverse actions occurred within the 180-day limitations period. For this reason, the ALJ properly concluded that Respondent has established that there is no genuine issue as to any material fact and is entitled to summary decision as a matter of law.

Accordingly, we **ADOPT** and attach the ALJ's Decision and Order Granting Summary Decision as the final agency decision in this matter. The complaint is hereby **DENIED**.[1]

**SO ORDERED.**

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[1] Respondent's Motion to strike Complainant's Reply Brief is denied.

18-076

**U.S. Department of Labor**

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**Issue Date: 29 August 2018**

CASE NO. 2017-FRS-00111

*In the Matter of*

**ROBERT A. BARBOZA,**
Complainant,

v.

**BNSF RAILWAY COMPANY,**
Respondent.

Appearances: Jeff R. Dingwall, Esq.[1]
for Complainant

Keith M. Goman, Esq.
Gillian Dale, Esq.
Paul S. Balanon, Esq.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

## DECISION AND ORDER GRANTING SUMMARY DECISION

This case arises under the Federal Rail Safety Act, 49 U.S.C. § 20109, and its implementing regulations, 29 C.F.R. Part 1982.[2] On May 11, 2018, Respondent BNSF moved to dismiss. *See* 29 C.F.R. § 18.70(c). It asserts two grounds: (1) that this Office lacks jurisdiction because Complainant failed to prosecute his claim before OSHA; and (2) that Complainant failed to plead

[1] Prior to submitting Complainant's opposition to this motion, Mr. Dingwall moved to withdraw as Complainant's counsel. I provisionally granted the motion, contingent on Mr. Dingwall's filing a timely opposition to Respondent's current motion as well as serving complete responses to all of Respondent's then-pending discovery. The requirements were aimed at avoiding undue delay or prejudice to either party. *See* 29 C.F.R. § 18.22(e). Mr. Dingwall complied with the requirements, including the filing an opposition to Respondent's present motion. I then granted his motion to withdraw. At this time, Complainant is self-represented.

[2] Except as otherwise provided in the Act or its implementing regulations, the applicable procedural rules are the "Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges," 29 C.F.R. Part 18, subpart A. *See* 29 C.F.R. § 1982.107(a).

that BNSF took any employment action adverse to him within the applicable 180-day statute of limitations. BNSF submitted 24 exhibits in support of its motion.

Prior to Complainant's filing an opposition, I held a telephone conference with both parties' respective counsel on June 4, 2018. I informed the parties that I would treat Respondent's motion as for summary decision, not a motion to dismiss. The applicable procedural rules allow an ALJ to consider summary judgment on the ALJ's own motion after notifying the parties of the facts and that might not be in dispute. 29 C.F.R. § 18.72(f)(3). Here, the facts that might not be in dispute were those asserted in Respondent's motion. More to the point is that Respondent was relying on its 24 exhibits to support its assertions; its motion went well beyond the Complainant's pleadings. As it would be necessary to make certain factual determinations and consider a number of exhibits, the motion was better treated as for summary decision.[3]

Complainant submitted his "Opposition to Respondent's Motion for Summary Decision" on June 18, 2018. He acknowledged that I had advised the parties that I would decide the motion on summary decision under 29 C.F.R. § 18.72. *See* Complainant's Opp. Br. at 1 ("During a June 4, 2018 conference call with counsel for both parties and with Complainant, the Court advised that the instant motion would be taken under consideration as a Motion for Summary Decision pursuant to 29 C.F.R. § 18.72.") Complainant submitted three exhibits in support of his opposition.[4]

Without objection, I admit all exhibits that the parties submitted.[5] I will grant summary decision based solely on Respondent's second argument – a failure of proof of an adverse action within the 180-day limitations period.

## Facts[6]

BNSF hired Complainant as a trackman/laborer in Flagstaff, Arizona in May 2006. C.Ex. B at 31. About three years later, he transferred to work as a truck driver for BNSF, work that he was still doing in February 2016. *Id.* at 32.

*The safety complaint and Complainant's medical leave.* In early February 2016, Complainant went on a medical leave, asserting that he had work-related anxiety and high blood pressure. R.Ex. 2 at 98:12-99:1, 100:11-16. He remained on the leave for nearly 14 months, through March 26, 2017. *Id.* The leave was Complainant's idea; no one suggested it to him. *Id.* at

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[3] *See* FED. R. CIV. P. 56(d) ("If, on a motion under Rule 12(b)(6) [for failure to state a claim upon which relief can be granted] or 12(c) [for judgment on the pleadings], matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

[4] Complainant submitted exhibits (C.Ex.) A-C. Respondent submitted exhibits (R.Ex.) 1-24.

[5] Respondent moves for permission to file a reply brief. As Complainant offered new evidence and argument with his opposition and Respondent's reply is limited to that new evidence and argument, I grant the motion and order Respondent's reply FILED *nunc pro tunc*.

[6] As is legally required on summary decision, the facts recited are based on the evidence viewed in the light most favorable to Complainant as the non-moving party. I make no credibility determinations and do not weigh the evidence. Accordingly, the facts recited in the text above are for purposes of this motion only.

101:11-16; C.Ex. B at 38 ("I pulled myself out of service"). It was also Complainant's decision to return to work in March 2017 (after getting medical clearance). *Id.* at 101:17-25.

Complainant began the leave shortly after an incident that involved a safety complaint he made. R.Ex. 2 at 100:20-101:10; C.Ex. B at 38-39. He had been asked to ride in the back seat of an F250 truck. C.Ex. B at 38. The truck was hauling a trailer that Complainant suspected was overweight. *Id.* In his opinion, the safety chains connecting the trailer to the truck were not heavy enough. *Id.* He also noted that the trailer lacked a sway-control apparatus and a brake-control unit. *Id.*

Complainant told foreman Steve Dulmage that he wanted to get the trailer weighed. *Id.*; R.Ex. 3. Dulmage got "upset." C.Ex. B at 38. After completing their work for the day, they weighed the trailer; it was overweight. *Id.* They returned in the F250 to the terminal, where Complainant "tagged it out of service." *Id.* at 39.

Complainant went to his hotel room. C.Ex. B at 39. Dulmage called him and that said supervisor Jimmy Capps [phonetic] wanted to talk to him. *Id.* Complainant called Capps and said that he wanted to talk about the trailer. *Id.* Capps said that he did not want to talk about the trailer; he wanted to let Complainant know that his job had been "abolished" along with that of Complainant's co-worker Alex Florez. *Id.* Florez was informed through the usual protocol under the collective bargaining agreement, but Capps informed Complainant personally. *Id.* Complainant believed Capps and Dulmage were reacting to Complainant's safety reports about the F250 truck. *Id.* It does not appear – and Complainant does not allege – that this was a termination of the employment; it appears that Complainant could bid for other jobs at BNSF consistent with his skills and seniority. *See* C.Ex. B at 43.

*Complainant's internal complaint to Human Resources.* Complainant went on his medical leave. About three weeks later, on February 28, 2016, he filed an internal complaint with the BNSF human resources department. R.Ex. 2 at 111:10-116:14. He asserted that his job was abolished in retaliation for his having raised safety concerns with Dulmage. *Id.*; R.Ex. 3.

On April 15, 2016, a BNSF human resources manager notified Complainant that, after investigation, Human Resources could not substantiate his allegation of retaliation. R.Ex. 3. When Complainant expressed dissatisfaction, BNSF's Director of Human Resources talked with Complainant and then wrote to him on August 29, 2016. The Director stated that, after talking with Complainant and reviewing the investigating HR manager's file, it had been determined that her investigation was "sound" and did not substantiate his allegations of retaliation, harassment, or any mistreatment. R.Ex. 4.

Complainant alleges in the current action that he continued to email the Director and other managers into October 2016 about the alleged retaliation, but there is no evidence on the record to support that allegation.

*Complainant's injury/illness report and BNSF claims interview.* On September 5, 2016, Complainant filed an "Employee Personal Injury/Occupational Illness Report" form with BNSF. R.Ex. 5. He said that he was first treated or diagnosed with his condition in 2014, "over 2 years

ago." *Id.* He reported high blood pressure, a need for mental health therapy, and that he was taking antidepressant medication. *Id.*

BNSF claims representative Kelly Buzby called Complainant the next day to interview him about his report of a work-related condition. C.Ex. B. Complainant consented to having the interview recorded, and a transcript appears on the record. *Id.*

Complainant told Buzby that he'd had an emotional condition because of the constant work-related travel and isolation from his family. *Id.* at 33. The symptoms were high blood pressure, anxiety, and thoughts of suicide and of doing "detrimental things" to himself and others. *Id.* He said that his psychiatrist had diagnosed an adjustment disorder. *Id.*

Answering Buzby's questions, Complainant stated that, in the past 10 years, he had one relationship that lasted seven years and another that lasted three; apparently both had ended. *Id.* at 33-34, 45. He had a 19-year-old daughter, a sister, and his father, but he had no contact with any of them. *Id.* at 33. He did see his mother whenever possible. *Id.* When asked about recreation, he stated that he drank himself to sleep every night for the past 10 years. *Id.* at 34.

Complainant told Buzby that, for the past 10 years, he'd been traveling for work on a switch maintenance gang. *Id.* at 35.[1] He had started therapy earlier, in 2004, because of problems with relationships at home and "problems with the issues on the road, which was drinking." *Id.* As he said, "The drinking was my crutch to cope." *Id.* In his opinion, his anxiety "progressed with . . . the abuse of alcohol" . . . "the isolation and being in the hotel and thinking about what happened that day at work and as [he drank] more and it increasingly gets worse and worse and worse . . . ." *Id.* at 36. Complainant stated that, having been away from work for six months on his current medical leave, he had stopped drinking." *Id.*

Complainant told Buzby that he was uncomfortable about returning to work because human resources had twice rejected his claims of retaliation and had done nothing on his behalf; he'd be returning to the same situation that he'd left in February 2016. *Id.* at 38. He described HR's handling of his complaints as "a mental molestation." *Id.* at 40.

Complainant described to Buzby the safety incident in early February 2016, asserting again that his job had been abolished in retaliation for his safety complaint. *Id.* at 38-39. He said of the people with whom he'd been working on that crew in February 2016 that there had been "multiple, multiple, multiple issues," and that the one that led to his going out on a medical leave was "the one that broke the camel's back." *Id.* at 39. He said that he "got resistance trying to do [his] job every day and that's why [he] pulled [himself] . . . out of service because it was creating a very volatile situation and [he] needed to be removed from that situation." *Id.* at 40.

Complainant also told Buzby that he might have a carpal tunnel injury from work. C.Ex. B at 41. He had noticed the symptoms in the last six months (*i.e.*, starting sometime in or around March 2016), he had mentioned the symptoms to a doctor about three months earlier (June

[1] The high blood pressure had started six or seven years earlier. *Id.* at 36.

2016); and he'd had neurological testing a month before this interview, on August 3, 2016. *Id.* He expected to see a specialist later in the week of this interview. *Id.* at 42.

Finally, Complainant told Buzby that he was still living in Kingman, Arizona and was trying to get a transfer to California. C.Ex. B at 43, 45.

*BNSF's notice of investigation.* Respondent's Operating Rules require immediate reports of workplace injury and occupational illness. R.Ex. 6. Rule 1.2.5 states: "All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed . . . . If an employee receives a medical diagnosis of occupational illness, the employee must report it immediately to the proper manager." R.Ex. 6.

Given Complainant's report on September 5, 2016, that he had sustained a work-related injury or illness "over 2 years ago," BNSF notified Complainant on September 9, 2016, that it would conduct an investigative hearing on September 20, 2016, "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to immediately report an injury in 2014 while working as a truck driver on the Southern California Division." R.Ex. 7. Respondent cited Operating Rule 1.2.5. *Id.*

On September 14, 2016, BNSF notified Complainant that BNSF and the Union had agreed to postpone the investigative hearing to September 20, 2016. R.Ex. 8. On November 9, 2016, BNSF and the Union agreed to a second postponement, this time to January 17, 2017. R.Ex. 9.

On December 23, 2016, Complainant signed a statement as follows: "I Robert Barboza was not in any way submitting a claim for a personal bodily injury that occurred on any of the BNSF's property. It was an occupational illness that I had reported on September 6th. [Signed] Robert Barboza 12-23-16." Having received this statement, on January 12, 2017, BNSF notified Complainant it had canceled the investigation "in its entirety." R.Ex. 11.

Complainant returned to work at BNSF on March 26, 2017. R.Ex. 2 at 98:12-99:1, 100:11-16.

*The OSHA complaint and case processing at OSHA.* Ten days before returning to work, on March 16, 2017, Complainant filed an online complaint with OSHA under the Federal Rail Safety Act. R.Ex. 12. By then, he was living in California. *Id.* Completing the online form, he alleged the following adverse actions (apparently from a check box or drop-down list): denial of benefits, discipline, harassment/intimidation, negative performance evaluation, suspension, and threat to take any of the above. *Id.* at OSHA 19. He stated that these adverse actions started on September 9, 2016, occurred again on September 14, 2016 and November 9, 2016, and were continuing through the present time. *Id.*

An OSHA Regional Investigator called Complainant the same day as he filed his complaint. R.Ex. 13 at OSHA 42. Complainant referred the investigator to his attorney. *Id.* The attorney told the OSHA investigator that he would file a formal complaint by March 24, 2017. *Id.* After several reminders, the attorney failed to submit the promised formal complaint. *Id.* The attorney

also agreed to arrange for the OSHA investigator to interview Complainant.[8] R.Ex. 17-18. Eventually, the OSHA investigator gave Complainant's counsel a final deadline to submit a more detailed complaint. When counsel failed to meet the deadline, the OSHA investigator recommended that OSHA dismiss the case. Only after that did Complainant's counsel file a more detailed, formal complaint with OSHA on August 17, 2017. R.Ex. 19-20 ("First Amended Complaint").[9]

In the First Amended Complaint, Complainant alleged that he had complained to BNSF management on February 28, 2016, about "numerous safety and security issues and retaliation and harassment" (including violations of BNSF and Department of Transportation safety rules and regulations); that he had complained directly about safety issues before that (including taking unsafe "machines" out of service); that BNSF notified Complainant on April 15, 2016, that it would not be taking any [remedial] action based on his complaints; that Complainant continued to press his concerns; that he met with the Human Resources Director on or about July 11, 2016, reiterated his concerns, and reported that he had been experiencing anxiety because of these concerns and that he did not feel he could return safely to work; that on August 29, 2017, the Human Resources Director notified him that no action would be taken in response to his complaints; that Complainant continued to email BNSF management (including the Human Resources Director) about his concerns into October 2016; that, before this, on September 5, 2016, Complainant filed the injury/illness report form; that the claims representative interviewed him on the following day; that on September 9, 2016, BNSF notified Complainant of the investigative hearing; that BNSF notified Complainant of postponements of the hearing on three occasions (Sept. 14, 2016; Nov. 9, 2016; Jan. 6, 2017); that BNSF canceled the investigation on January 20, 2017; and that Complainant returned to work on March 27, 2017. R.Ex. 20 at OSHA 12-14.

Finally, Complainant alleged: "Since returning to work [Complainant] Barboza has been subjected to ongoing harassment, intimidation and a hostile work environment due, in whole or in part, to his having raised safety concerns; refused to violate or assist in the violation of Federal laws, rules and/or regulations related to railroad safety; filing a complaint with OSHA under the FRSA; and/or for reporting hazardous safety and security concerns." *Id.* at OSHA 14.

## Discussion

### I. This Office Has Jurisdiction to Decide This Case, Complainant Properly Invoked that Jurisdiction, and Complainant May Add Allegations in this Forum.

Congress delegated to the Secretary of Labor authority to receive complaints, investigate the allegations, decide the merits, and remedy violations of the Federal Rail Safety Act. *See* 49 U.S.C. § 20109(d)(1), (2). The Secretary, in turn, charged the Department's Occupational Safety

[8] The record is silent as to whether Complainant's counsel arranged the interview. From the ongoing later correspondence, it appears unlikely that Complainant submitted to an OSHA interview.

[9] As Complainant's filing of the First Amended Complaint with OSHA was untimely, OSHA dismissed the complaint. Complainant's request for a hearing before an administrative law judge followed. For the present litigation, OSHA produced to Respondent a redacted copy of Complainant's First Amended Complaint, which Respondent submitted as an exhibit in support of its present motion. *See* R.Ex. 20.

& Health Administration with the responsibility to receive the complaints, decide whether an investigation was warranted, conduct appropriate investigations, and issue preliminary determinations on the merits. 29 C.F.R. §§ 1982.103-1982.105. The Secretary authorized the Department's administrative law judges to hear and decide *de novo* cases in which any party objected to OSHA's preliminary determinations. 29 C.F.R. §§ 1982.106-1982.109.

Respondent asserts that this Office (OALJ) lacks jurisdiction to hear Complainant's case because Complainant failed to cooperate in the OSHA investigation. For this contention, Respondent cites nothing in the Act, the regulations, or case law addressed to the Act. Rather, it misplaces its reliance on *dicta* in a footnote concerning exhaustion of administrative remedies in a Title VII case against a federal agency, citing *Clark v. Chasen*, 619 F.2d 1330, 1337 n.18 (9th Cir. 1980) (reversing lower court's dismissal that had been based on a failure to exhaust administrative remedies).[10] In *Clark*, the Ninth Circuit rejected the employer's argument that, to exhaust administrative remedies, the employee was required to do more than fulfill the statutory prerequisites to civil litigation. 619 F.2d at 1335-37.

Here, except as I will discuss with respect to the timeliness of Complainant's filing of the OSHA complaint, he satisfied all regulatory requirements to have his case heard *de novo* before an ALJ. He filed a complaint with OSHA. *See* 29 C.F.R. § 1982.103. The regulations do not require that the complaint be filed in any particular form; completion of the online form was sufficient. *See id.*, § 1982.103(b). The regulations charge OSHA with certain responsibilities and give the respondent employer certain opportunities to be heard, but they state no further requirements for complainants at OSHA. Rather, if a complainant fails to respond to or satisfy OSHA's inquiries or requests, the complainant runs the risk under the regulations that OSHA will dismiss the complaint – perhaps without a full investigation. *See* 29 C.F.R. § 1982.104(e)(1). Indeed, that is what happened at OSHA in this case.

Once OSHA issues its findings and preliminary determination, including potentially a dismissal without a full investigation, a party may request a hearing before an ALJ. *See* 29 C.F.R. § 1982.106(a). This is done by filing objections to OSHA's findings and preliminary determination within 30 days. *Id.* Complainant did that. Much as in *Clark*, there is no basis to require Complainant to do more to invoke this Office's jurisdiction.

Nor is a complainant limited at this Office to allegations that he or she has raised at OSHA. To the contrary, the regulations anticipate that the scope of the case will develop throughout the case processing at the Department of Labor, including at OALJ. The pleading requirements at OSHA are extraordinarily informal. A complainant may, for example, file the complaint orally (such as by telephone) and in any language. 29 C.F.R. § 1982.103(b). The complainant need not serve the complaint on the respondent; OSHA notifies the respondent of the complaint and its allegations. *Id.* § 1982.104(a). The respondent may file a responsive position statement, but it is not required to do so. *Id.* § 1982.104(b). OSHA conducts an initial review, interviews the complainant if appropriate, and decides whether to conduct a full investigation. *See id.* § 1982.104(e). Either at that point or following a full investigation, OSHA issues its findings and a preliminary order. *Id.* § 1982.105. Any party desiring review may request a *de novo*

[10] The Ninth Circuit is controlling in the present case; all activity was in Arizona or California.

hearing before an ALJ. *Id.* § 1982.106. The ALJ may not remand the case to OSHA for further investigation. *Id.* § 1982.109(c). Rather, if there is jurisdiction, the ALJ is to hear the case on the merits. *Id.* To achieve an appropriate adjudication, the judge may allow parties to amend and supplement their pleadings. 29 C.F.R. § 18.36. Indeed, "ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed . . . ." *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123 at *10 (May 25, 2011).

In all, the applicable pleading requirements are very informal. In cases being litigated before an ALJ, the parties often learn the full scope of the case through amended pleadings, mandatory disclosures, discovery, and other litigation processes. Hearings before the Department's ALJs are not subject to the formality of federal pleading requirements. *See Evans v. Environmental Protection Agency*, ARB No. 08-059 (July 31, 2012) (rejecting in whistleblower cases application of the plausibility requirements in pleadings under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), or *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). Thus, as an integral part of the regulatory scheme, a complainant may add allegations at OALJ that he or she did not raise at OSHA. *See Sylvester, supra*; 29 C.F.R. § 18.36.[11] I therefore conclude that I have jurisdiction to consider all evidence that Complainant puts before me on the motion.

II. Complainant Failed to Offer Evidence of an Adverse Action Occurring within the Applicable 180-Day Limitations Period.

*General legal requirements for summary decision.* On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.72 (2015); *see also*, FED. R. CIV. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56).

*Limitations period.* A complainant alleging a violation of the employee protection provisions of the Federal Rail Safety Act must file a complaint with OSHA "not later than 180 days after the date on which the alleged violation . . . occurs." 49 U.S.C. § 20109; 29 C.F.R. § 1982.103(d). The limitations period begins when the employee "knows or reasonably should know that the challenged act has occurred." *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (5th Cir. 1982).

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[11] The entire adjudicatory process at the Department of Labor provides an administrative remedy in appropriate cases. It cannot be said that a complainant has failed to exhaust administrative remedies when the complainant is still processing his case at the administrative agency – here the Department of Labor. Remedies available through adjudication at OALJ are part of those administrative remedies. Thus, an example of failure to exhaust administrative remedies would occur if a complainant who is dissatisfied with an OSHA preliminary order takes an immediate appeal to a U.S. Court of Appeals. The complainant will have failed to exhaust the remedial process under the Labor Secretary's regulations; those include a hearing before an ALJ and an appeal to the Administrative Review Board.

Complainant filed his OSHA complaint on March 16, 2017. The limitations period excludes adverse actions occurring prior to September 17, 2016. The adverse actions that Complainant alleges almost all fall outside the 180-day limitations period. The exceptions are the following: that BNSF notified Complainant of postponements of the investigative hearing on two occasions (November 9, 2016 and January 6, 2017); that BNSF canceled the investigation on January 20, 2017; that Complainant received no response when he continued into October 2016 to email BNSF management (including the Human Resources Director) after the Human Resources Director wrote to him (outside the limitations period) affirming BNSF's investigative findings that it had not retaliated against him; and that, after returning to work on March 27, 2017, he was subjected to ongoing harassment, intimidation, and a hostile work environment.

But allegations are not enough. To raise a genuine issue of material fact and thus defeat Respondent's motion for summary decision, Complainant cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue exists when, based on the evidence, a reasonable factfinder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

On summary decision:

> A party asserting that a fact . . . is genuinely disputed must support the assertion by: (i) Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . ., admissions, interrogatory answers, or other materials; or (ii) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

29 C.F.R. § 18.72(c)(1). It is not the ALJ's obligation to search the record for materials a party does not cite; the ALJ may consider other materials but is not required to do so. 29 C.F.R. § 18.72(c)(3).

As the Ninth Circuit has explained concerning the burdens on summary judgment:

> A moving party without the ultimate burden of persuasion at trial . . . has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.
>
> If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything.

> If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment. But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion.

*Nissan Fire & Marine Ins. Co, Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000) (citations omitted). As it is Complainant's burden to prove that his protected activity was a contributing factor in an unfavorable personnel action,[12] *Nissan Fire* applies here.

BNSF offered evidence that the only conduct that Complainant alleged within the limitations period did not amount to adverse action. That shifts the burden to Complainant to produce enough evidence to create a genuine issue of material fact. *See Nissan Fire.*

The record on the present motion contains evidence of two BNSF actions within the limitations period: (1) a joint management-union postponement of BNSF's investigation into whether Complainant timely notified BNSF of a workplace injury; and (2) BNSF's cancellation of the investigation in its entirety.

But Complainant cites no evidence to support any of the other allegations said to have occurred within the limitations period, and though I am not required to search for uncited evidence, I have found none. I find no declarations, discovery responses, stipulations, or other documents or materials to show that Complainant continued emailing BNSF management to complain about retaliation within the limitations period, and I have found no evidence to show that, after returning to work on March 27, 2017, Complainant was subjected to ongoing harassment, intimidation, and a hostile work environment.

"Summary judgment 'is the "put up or shut up" moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.'" *Johnson v. Cambridge Industries, Inc.*, 325 F.3d 892, 901 (7th Cir. 2003), quoting *Schacht v. Wisconsin Dep't of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999). Here, the record is devoid of evidence (even viewed in the light most favorable to Complainant) based on which a reasonable factfinder could find that BNSF took either of these adverse actions.[13] Complainant thus has not shown a

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[12] *See Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035 (Sept. 30, 2016) (reissued).

[13] Even if there was evidence that BNSF continued to supply no relief to Complainant based on his internal complaint of retaliation, any claim on that theory would be untimely. The human resources manager notified Complainant on April 15, 2016, that, after investigation, Human Resources found his complaint unsubstantiated. When Complainant expressed dissatisfaction, BNSF's Director of Human Resources talked with Complainant, reviewed the file, and wrote to Complainant on August 29, 2016, affirming the manager's determination. All of this occurred beyond the limitations period.

Once an employer notifies the affected person of the adverse action, the limitations period begins to run; the employee cannot reset the limitations period simply by repeating the same request and obtaining the employer's repetition of the same denial (or other adverse determination). *See Sweatt v. Union Pac. R.R. Co.*, No. 14-CV-7891, 2016 WL 128036 at *3 (N.D. Ill. Jan. 12, 2016), *aff'd*, 678 F. App'x 423 (7th Cir. 2017) (Title VII) (reasoning that the limitations period "would be meaningless if [employee] could reset it simply by requesting the same surgery a second time and again being told 'no'"). "When an initial discriminatory act is time-barred, a later related event is

genuine issue as to ongoing denials of requests for HR investigations or ongoing harassment, intimidation or a hostile work environment.

I turn to the timely incidents on which the record provides supporting documentation.[14] These are (1) BNSF's notice to Complainant of a jointly agreed BNSF/Union postponement of the investigation hearing, and (2) BNSF's cancellation of the investigation in its entirety. I find neither of these adverse.

BNSF asserts that notice of an investigatory hearing to determine whether discipline is appropriate under BNSF's operating rules is not an adverse action. To the contrary, however, where, for example, a letter charging a disciplinary offense affects the worker's personnel record and causes anxiety or emotional distress, that is sufficiently adverse to resist summary decision. *Stallard v. Norfolk Southern Ry. Co.*, ARB No. 16-028 (Sept. 29, 2017) at *5-*7, citing *Williams v. American Airlines*, ARB No. 09-018 (Dec. 29, 2010).[15]

Complainant reported anxiety and emotional distress to Buzby. If BNSF decided the investigation against Complainant, it would have resulted in serious discipline. Combined with any other serious disciplinary infraction during BNSF's "review period" (typically 1 to 3 years), it could lead to a termination from employment; it therefore could seriously affect Complainant's personnel record under the progressive discipline policy. I therefore conclude that BNSF is not entitled to summary disposition on whether the notice of investigation was adverse action.

Instead, I conclude that BNSF is entitled to summary disposition as to the notice itself because BNSF gave Complainant the notice of investigation outside the limitations period. The notice was a complete and final statement that a disciplinary investigation would occur. It was

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not actionable if it is merely a consequence of the first; to be actionable, the later event must involve an independent act of discrimination." *Brown v. Unified School Dist. 501, Topeka Pub. Schools*, 465 F.3d 1164, 1187 (10th Cir. 2006) (Title VII and 42 U.S.C. § 1981); *see Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980). Thus, after an employer previously informed an employee that he was not eligible for rehire, the employer's repetition of this statement when employee's union referred him for work did not restart the limitations period. *See Johnsen v. Houston Nana, Inc.*, ARB No. 00-064 at 4-5 (ARB Jan. 27, 2003).

Complainant's internal complaint was to BNSF's Human Resources Department. As the head of that department, the Director expressly affirmed the rejection of Complainant's internal complaint. That was final notice of the adverse decision on the complaint. The limitations period began to run on August 29, 2016, because as a matter of law Complainant should have known from receipt of that the Director's determination that BNSF's decision was "final, definitive, and unequivocal." *See Jenkins v. U.S. Environmental Protection Agency*, ARB No. 98-146 at 13 (ARB Feb. 28, 2003). It was a communication that was "conclusive" and "free of misleading possibilities." *Dugger v. Union Pacific RR. Co.*, ARB No. 16-079 at 2 (ARB Aug. 17, 2017). Complainant could not restart the limitations period by continuing to repeat or argue about the same internal complaint.

[14] Complainant argues – correctly – that events occurring beyond the limitations period can be admissible as background. For example, to understand what the joint BNSF/Union postponement of the investigative hearing on Complainant's injury report, I must have in mind that, outside the limitations period, BNSF notified Complainant that there would be an investigation. That background is necessary to understand what was being postponed. But this kind of background information will not satisfy Complainant's obligation to show facts sufficient to establish a genuine issue about an adverse action that occurred *within the limitations period.*

[15] Respondent cites several cases in support of its argument that the notice of investigation was not adverse action. All of the cited cases were out-of-Circuit and not from the ARB; none was controlling. The ARB cases cited in the text above are controlling.

complete at the time Complainant received it: September 9, 2016.[16] Complainant's OSHA complaint therefore was not timely as to the notice itself.

And the actions in which BNSF engaged within the limitations period were not adverse. BNSF agreed with Complainant's union to a postponement of the hearing; later, it cancelled the investigation altogether. Far from adverse, the cancellation of the investigation was favorable to Complainant. The postponement was neither positive nor negative; by agreement of the parties, it was simply a change in the date for the investigative hearing. Complainant offers no argument to explain what is adverse about an agreed rescheduling, and I see nothing adverse about it.

Thus, of the timely allegations of adverse action, Complainant failed to raise a genuine issue on some when he failed to offer any evidence of what occurred, and he failed as to the others because, although his evidence was sufficient, BNSF's actions were not adverse.

*No basis to defer ruling.* Complainant argues that, even if he cannot currently show a genuine issue of material fact, he might learn more during discovery. He argues that an employer in a whistleblower case has better access to relevant evidence, and a complainant must rely on discovery to gather the needed evidence.

Even construing this as a request to defer a ruling on Respondent's motion until Complainant has had additional time for discovery, I would deny the request. The only evidence that Complainant needs concerns adverse action. The limitations period only begins to run on an adverse action when the complainant knows or should know that the adverse action has happened. *See Allen v. U.S. Steel Corp., supra*, 665 F.2d at 692; *see also,* fn. 13 above. That is why an employee who suffers an adverse action almost always knows or should know that it has occurred.

Adverse actions include discharge, demotion, suspension, reprimand, and such conduct as intimidation, threats, restraining, coercion, blacklisting, or disciplining. *See* 29 C.F.R. § 1982.102(b). Although not impossible, it is difficult to imagine an adverse action of which an employee would be unaware at or about the time it occurred.[17] Discovery should not be necessary, or if necessary, should not be complex or time-consuming for an employee to know that an adverse action has occurred. Most often a complainant could resist summary decision on adverse action by submitting a declaration in which he or she states what happened.

In any event, Complainant failed to comply with the procedural requirements to defer a ruling on Respondent's motion. The applicable rule requires the non-moving party to show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its position." 29 C.F.R. § 18.72(d). Represented by counsel, Complainant submitted no declaration or affidavit about facts being unavailable to him at this time. Even in his brief, he offered no specific reasons that he could not present facts needed for his opposition at this time. BNSF has responded to all discovery Complainant propounded, and Complainant is not pursuing a motion

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[16] *See* fn. 13 for a discussion of when an adverse action occurs.

[17] Of all these forms of adverse action, only blacklisting could be action of which the employee would know nothing. But Complainant here returned to work at BNSF as soon as he asked to return. This is not a blacklisting case.

to compel. He has not identified what discovery devices he would use or what he would ask to obtain the evidence he needs to oppose this motion. This does not meet the regulatory requirement. *Id.*

*Equitable tolling.* Complainant does not assert equitable tolling. He was represented by counsel from the time the case was at OSHA through the briefing on this motion. I therefore need not reach the issue.[18]

Conclusion and Order

For the foregoing reasons, Respondent BNSF Railway Company's motion for summary decision is GRANTED. Complainant's claim is DENIED and DISMISSED. Complainant shall taking nothing by reason of his complaint.

SO ORDERED.

Digitally signed by STEVEN B BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

[18] Complainant has shown no basis for tolling in any event. Tolling is generally available in FRSA cases "for reasons warranted by applicable case law." 29 C.F.R. § 1982.103(d); *see also Hyman v. KD Resources*, ARB No. 09-076 (Mar. 31, 2010) (Sarbanes-Oxley Act) at 8. Applicable case law allows equitable tolling "when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4 (Clean Air Act),18 *citing School Dist. of City of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981); *Williams v United Airlines, Inc.*, ARB No. 08-063 at 2 (Sept. 21, 2009) (*citing* same). This record contains no facts to support tolling under any of these conditions.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

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, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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. If you e-File your reply brief, only one copy need be uploaded.

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)