



IN THE MATTER OF:

KENNETH HENIN,

ARB CASE NO. 2019-0028

COMPLAINANT,

ALJ CASE NO. 2017-FRS-00011

v.

DATE: MAR 22 2019

SOO LINE RAILROAD COMPANY,  
d/b/a CANADIAN PACIFIC,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Keith E. Ekstrom, Esq., and Fredric A. Bremseth, Esq.;  
*Bremseth Law Firm, P.C.*; Minnetonka, Minnesota

For the Respondent:

Daniel Oberdorfer, Esq., Tracey Holmes Donetsky, Esq., and  
Greta Bauer Reyes, Esq.; *Stinson Leonard Steet LLP*;  
Minneapolis, Minnesota

Before: James A. Haynes and Daniel T. Gresh, *Administrative  
Appeals Judges*

PER CURIAM

ORDER GRANTING RECONSIDERATION, REINSTATING  
COMPLAINANT'S APPEAL AS TIMELY FILED AND DISMISSING  
COMPLAINT

This case arises under the whistleblower protection provisions of the

Federal Railroad Safety Act of 1982 (FRSA) and its implementing regulations.<sup>1</sup> On January 28, 2019, Complainant filed a petition for review of a Department of Labor Administrative Law Judge's (ALJ) Decision and Order Granting Summary Decision for Respondent (D. & O.), issued on January 11, 2019. On February 5, 2019, the Clerk of the Appellate Boards, on behalf of the Administrative Review Board, issued a notice of appeal, constituting the Board's acceptance of the petition for review. Subsequently, on February 8, 2019, the Board received Respondent's Motion to Dismiss Complainant's Petition as Untimely. On February 26, 2019, Complainant informed the Board of his intention to file an action in federal court, as a final order of the Secretary of Labor had not been issued prior to that date.

Also on February 26, 2019, the Board issued an Order Granting Respondent's Motion to Dismiss Complainant's Petition as Untimely. Specifically, the Board noted that pursuant to 29 C.F.R. § 1982.110(a), "[a] petition must be filed within 14 days of the date of the decision of the ALJ." In addition, the Board noted that it has adopted principles employed by federal courts under the Federal Rules of Appellate Procedure.<sup>2</sup> So in this case, the Board determined that the petition for review was due on or before January 25, 2019, in accordance with Rule 26(a)(1) of the Federal Rules of Appellate Procedure.<sup>3</sup> Because Complainant filed the petition for review in this case on January 28, 2019, the Board held that his petition for review was not timely filed. In addition, the Board noted that 29 C.F.R. § 1982.110(b) provides, "[i]f no timely petition for review is filed, . . . the decision of the ALJ will become the final order of the Secretary" and "the resulting final order is not subject to judicial review."

On February 28, 2019, the Board received a copy of a federal complaint filed in the United States District Court for the District of Minnesota as authorized by 49 U.S.C. § 20109(d)(3) for de novo review of the claim currently pending before the Board. In addition, Complainant filed a Motion for Reconsideration of the Board's Order Granting Respondent's Motion to Dismiss Complainant's Petition as Untimely.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the

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<sup>1</sup> 49 U.S.C. § 20109 (2008); 29 C.F.R. Part 1982 (2018).

<sup>2</sup> See *OFCCP v. Fla. Hosp. of Orlando*, ARB No. 11-011, ALJ No. 2009-OFC-002, slip op. at 4 (ARB July 22, 2013).

<sup>3</sup> See Fed. R. App. P. 26(a)(1)(A)-(C).

Board issued the decision.<sup>4</sup> In considering whether to reconsider a decision, the Board has applied a four-part test to determine whether the movant has demonstrated:

- (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision; (iii) a change in the law after the court's decision, and (iv) failure to consider a material fact presented to court before its decision.<sup>5</sup>

In his Motion for Reconsideration, Complainant states that he did not receive the ALJ's D. & O. Granting Summary Decision for Respondent, issued on January 11, 2019, until January 22, 2019. A review of the ALJ's D. & O., filed with Complainant's petition for review, indicates that it was issued on January 11, 2019, and that a copy of the D. & O. was sent that same day via certified mail to Complainant. The Board subsequently received the record in this case including a copy of the ALJ's docket sheet which again indicates that the ALJ's D. & O. was issued on January 11, 2019. But the record also contains a copy of the ALJ's D. & O. indicating, inexplicably, that it was issued on January 15, 2019. In its review of the record, the Board also noted that it contained the certified mail receipts providing the receipt numbers for the copies that were sent to Complainant and his counsel. A review of those certified mail receipt numbers confirms that Complainant did not receive the ALJ's D. & O. until January 22, 2019.

Pursuant to Rule 26(c) of the Federal Rules of Appellate Procedure:

When a party may or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service.

Because the ALJ's D. & O. was not delivered to the Complainant until January 22, 2019, and because "3 days are added after the period would otherwise expire", the petition for review in this case was due on or before January 28, 2019, under Rule 26(c) of the Federal Rules of Appellate Procedure.<sup>6</sup> Complainant filed the petition for review on January 28, 2019,

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<sup>4</sup> *Wimer-Gonzales v. J.C. Penney Corp., Inc.*, ARB No. 10-148, ALJ No. 2010-SOX-045, slip op. at 2-3 (ARB Feb. 7, 2012).

<sup>5</sup> *Wimer-Gonzales*, ARB No. 10-148, slip op. at 3.

<sup>6</sup> See Fed. R. App. P. 26(c).

and therefore his petition for review was timely filed.<sup>7</sup>

Complainant has presented sufficient information in his Motion for Reconsideration to alert the Board to the error in its Order Granting Respondent's Motion to Dismiss Complainant's Petition as Untimely, issued on February 26, 2019. Because the Board was unaware of a material fact, i.e., that the ALJ's D. & O. was not delivered to the Complainant until January 22, 2019, Complainant's Motion for Reconsideration is granted and his appeal is reinstated on the Board's docket as timely filed.<sup>8</sup>

Because the Board has not issued a final decision in this case 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>9</sup> Accordingly, because the Complainant has filed a de novo complaint in this action in federal district court as provided in 49 U.S.C. § 20109(d)(3) and 29 C.F.R. § 1982.114, we dismiss this complaint.

### CONCLUSION

Accordingly, Complainant's Motion for Reconsideration is **GRANTED**, Complainant's appeal is **REINSTATED** as timely filed, and given that Complainant has filed a de novo complaint in this action in federal district court as provided in 49 U.S.C. § 20109(d)(3) and 29 C.F.R. § 1982.114, this complaint is **DISMISSED**.

**SO ORDERED.**

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<sup>7</sup> If the ALJ's D. & O. was issued and sent on January 15, 2019, as the copy contained in the record indicates, because Complainant filed the petition for review on January 28, 2019, his petition for review would also be timely filed within the 14 day time period provided at 29 C.F.R. § 1982.110(a).

<sup>8</sup> As Complainant actually did timely file his petition for review, the decision of the ALJ below did not become the final order of the Secretary, as the Board had previously indicated in its Order Granting Respondent's Motion to Dismiss Complainant's Petition as Untimely issued on February 26, 2019.

<sup>9</sup> 49 U.S.C. § 20109(d)(3); 29 C.F.R. § 1982.114.