U.S. Department of Labor

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

NICK PFEIFER,

COMPLAINANT,

v.

UNION PACIFIC RAILROAD CO.,

RESPONDENT.

ARB CASE NO. 12-087

ALJ CASE NO. 2011-FRS-038

DATE: November 19, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Bradford C. Kendall, Esq.; and Rick D. Holtsclaw, Esq.; *Holtsclaw & Kendall, L.C.*; Kansas City, Missouri

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

ORDER DISMISSING COMPLAINT

On September 9, 2010, the Complainant, Nick Pfeifer, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration alleging that the Respondent, Union Pacific Railroad 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 July 24, 2012, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Dismissing

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[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).

Complaint finding that Pfeifer had failed to show that the Respondent retaliated against him because he engaged in FRSA-protected activity.[3]

Pfeifer 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 July 30, 2012, Pfeifer filed a complaint in U.S. District Court for the District of Kansas. On August 14, 2012, the Board received a Notice of Intent to File Original Action in the United States District Court from Pfeifer 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. Pfeifer 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.[5] The FRSA's implementing regulations further provide:

> Fifteen days in advance of filing a complaint in Federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending upon where the proceeding is pending, a notice of his or her intention to file such complaint. The notice must be served on all parties to the proceeding. A copy of the notice must be served on the Regional Administrator, the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. The complainant shall file and serve a copy of the district court complaint on the above as soon as possible after the district court complaint has been filed with the court.[6]

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[3] *Pfeifer v. Union Pacific Railroad Co.*, 2011-FRS-038 (July 11, 2012).

[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.

[6] 29 C.F.R. § 1982.114(b).

Pfeifer has failed to comply with these regulations. He neither filed his notice of intent fifteen days in advance of filing his complaint in district court, nor has he filed a copy of the district court complaint with the Board. An inspection of the court's docket establishes that Pfeifer has filed the complaint in accordance with his notice. Further, the FRSA's regulations provide no sanction for a party's failure to comply with the advance notice and service requirements. Accordingly, as provided in 29 C.F.R. § 1982.114, we **DISMISS** Pfeifer's complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge