



In the Matter of:

ROBERT A. BARBOZA,

ARB CASE NO. 2018-0076

COMPLAINANT,

ALJ CASE NO. 2017-FRS-00111

v.

DATE: January 17, 2020

**BNSF RAILWAY
COMPANY,**

RESPONDENT.

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***

ORDER DENYING RECONSIDERATION

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. On August 29, 2018, a Department of Labor Administrative Law Judge (ALJ) issued a

Decision and Order Granting Summary Decision because there was a failure of proof that an adverse action occurred within the 180-day limitations period. 49 U.S.C. § 20109(d)(2)(A)(ii).

Complainant appealed the ALJ's decision to the Administrative Review Board (ARB or Board) and we concluded that the ALJ's grant of summary decision was a reasoned ruling based on the undisputed facts and the applicable law. The Board issued an order holding that 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 and that Respondent established that there was no genuine issue as to any material fact and was entitled to summary decision as a matter of law. On December 23, 2019, Complainant filed a Motion for Reconsideration of the Board's order affirming the ALJ's dismissal.

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 Board issued the decision. *Henin v. Soo Line R.R. Co.*, ARB No. 2019-0028, ALJ No. 2017-FRS-00011, slip op. at 3 (ARB Mar. 22, 2019) (citing *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)). The ARB considers several factors to determine whether a movant has demonstrated grounds for reconsideration:

- (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.
- Id.*

Much of Barboza's reconsideration motion reiterates arguments the ARB rejected when it affirmed the ALJ's finding that Barboza suffered no adverse action within the limitations period. He appears to argue that the ARB and ALJ erred and his claims are timely because the notices postponing the investigatory hearing and the cancellation of the investigatory hearing (which took place during the limitations period) were adverse actions against him because of the effects those events had on him. But this argument was considered and rejected by the ALJ and considered and rejected by the Board. Complainant further argues that his therapy notes "will outline the adverse effects that stemmed from the 2 investigation notices filed November 9th 2016 and January 6th 2017. On January 12th, I received a letter stating that the investigation was cancelled with no apparent reason, leaving me in emotional duress and compounded all the symptoms that I just went through. There was no reason given for the cancellation, and this reflects a retaliatory, malicious act directed towards me by BNSF as I was out on a medical leave under doctor's care during this time."

Complainant's argument does not fulfill any of the recognized reasons for granting reconsideration. As sympathetic as Complainant and his situation may be, his response and reaction to Respondent's postponement and cancellation of the investigatory hearing because of his health concerns, do not make these acts into adverse ones for purposes of the FRSA and the issue of timeliness. Considering all of Complainant's arguments, we conclude that none of the factors supporting reconsideration are satisfied and that the motion should be denied.

CONCLUSION

Accordingly, Complainant's Motion for Reconsideration is **DENIED**.

SO ORDERED.