



IN THE MATTER OF:

KENNETH HENIN,

ARB CASE NO. 19-0028

COMPLAINANT,

ALJ CASE NO. 2017-FRS-00011

v.

DATE: February 26, 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 RESPONDENT'S MOTION TO DISMISS
COMPLAINANT'S PETITION AS UNTIMELY**

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. Complainant has not responded to the Respondent's motion.

This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA) and its implementing regulations.¹ 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, as the Board has previously noted, in the absence of its own rule, the Board has adopted principles employed by federal courts under the Federal Rules of Appellate Procedure.² Under Rule 26(a)(1) of the Federal Rules of Appellate Procedure, in computing a time period when the period is stated in days, as in this case under 29 C.F.R. § 1982.110(a), the period will:

- (A) exclude the day of the event that triggers the period;
- (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
- (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Fed. R. App. P. 26(a)(1)(A)-(C).

Consequently, under the 14 day time period within which a petition for review of an ALJ's decision must be filed, a petition for review was due on or before January 25, 2019. Complainant filed the petition for review in this case on January 28, 2019. His petition for review was not timely filed. In addition, 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."

Accordingly, Respondent's Motion to Dismiss Complainant's Petition as Untimely is **GRANTED** and Complainant's appeal is **DISMISSED**.

SO ORDERED.

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

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