

**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



**In the Matter of:**

**STEPHEN THORSTENSON,**  
**COMPLAINANT,**  
**v.**  
**BNSF RAILWAY COMPANY,**  
**RESPONDENT.**

**ARB CASE NOS. 2018-0059**  
**2018-0060**

**ALJ CASE NO. 2015-FRS-00052**

**DATE: January 3, 2022**

**Appearances:**

**For the Complainant:**

**Paul Bovarnick, Esq.; *Rose Senders & Bovarnick LLC*; Portland, Oregon; Shenoa L. Payne, Esq.; *Shenoa Payne Attorney at Law PC*; Portland, Oregon**

**For the Respondent:**

**Jacqueline M. Holmes, Esq.; *Jones Day*; Washington, District of Columbia; Autumn Hamit Patterson, Esq.; *Jones Day*; Dallas, Texas**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges***

**ORDER DENYING MOTION TO EXTEND TIME TO FILE  
PETITION FOR SECRETARIAL REVIEW**

EN BANC. This case arises under the employee protection provision of the Federal Railroad Safety Act of 1982 (FRSA), as amended.<sup>1</sup> Stephen Thorstenson filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) in which he alleged that his former employer, BNSF Railway Company, retaliated against him for engaging in FRSA-protected activity.

On July 31, 2018, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) in which he concluded that BNSF established by clear and convincing evidence that it would have discharged Thorstenson even if he had not engaged in protected activity. On November 25, 2019, we issued a Final Decision and Order (F. D. & O.) affirming the D. & O.<sup>2</sup> Thorstenson appealed our ruling to the U.S. Court of Appeals for the Ninth Circuit. On December 21, 2020, the Court issued an unpublished Memorandum and remanded the case to the Board.<sup>3</sup>

On December 21, 2021, the Board issued a Decision and Order on Remand affirming the ALJ's finding that BNSF established by clear and convincing evidence that it would have imposed violations and terminated Thorstenson's employment in the absence of the Complainant's protected activity.

On December 30, 2021, the Office of the Solicitor filed a Motion to Extend Time to File Petition for Secretarial Review of the Board's December 21, 2021 Decision and Order on Remand.

We hereby **DENY** the motion because it exceeds the Board's jurisdictional authority as set forth in the Secretary's Delegation of Authority and Assignment of Responsibility to the Administrative Review Board.<sup>4</sup> The Delegation specifies at (6)(b)(1) that "[a]t any point during the first 14 calendar days after the date on

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<sup>1</sup> 49 U.S.C. § 20109 (2008), as implemented at 29 C.F.R. Part 1982 (2018) and 29 C.F.R. Part 18, Subpart A (2018).

<sup>2</sup> *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019).

<sup>3</sup> *Thorstenson v. U.S. Dep't of Labor*, 831 F. App'x 842, 843 (9th Cir. 2020) (unpublished).

<sup>4</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

which a decision of the Board was issued, a party to the case may file a petition with the Board for further review by the Secretary.” The Delegation establishes the entire authority and responsibility the Secretary has delegated and assigned to the Board. We may not exceed this delegation by extending the time periods for filing set forth or otherwise.

However, a petition for Secretarial review under the Delegation may be timely filed with the Board on or before 11:59 p.m., on January 4, 2022. In the event such a petition for further review is filed, the Board will determine whether to refer the matter to the Secretary for further review pursuant to the terms of the Delegation.<sup>5</sup>

**SO ORDERED.**

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<sup>5</sup> Specifically, the Board will determine whether “the petition presents a question of law that is of exceptional importance and warrants review by the Secretary,” and if so, “the Board shall advise the Secretary of such determination in writing and explain why the Board believes review by the Secretary is warranted.” Delegation at (6)(b)(1).