U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

JOSEPH CARMACK,

COMPLAINANT,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

RESPONDENT.

ARB CASE NO. 2024-0052

ALJ CASE NO. 2024-FRS-00014
ALJ JERRY R. DeMAIO

DATE: July 10, 2025

For the Complainant:
Joseph Carmack; *Pro Se*; Boston, Massachusetts

Before JOHNSON, Chief Administrative Appeals Judge, and KAPLAN and BURRELL, Administrative Appeals Judges

DECISION AND ORDER AFFIRMING DISMISSAL

Complainant Joseph Carmack filed a complaint on September 14, 2023, with the Occupational Safety and Health Administration (OSHA) against Respondent National Railroad Passenger Corporation (a.k.a. Amtrak) under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, as amended.[1] The Administrative Law Judge (ALJ) assigned to the case, having discovered that Complainant had filed a claim in federal court, dismissed the case on June 14, 2024, for lack of jurisdiction.[2] Complainant appealed the ALJ's dismissal to the Administrative Review Board (ARB or Board). For the reasons set out below, we **AFFIRM** the ALJ's dismissal of Complainant's case.

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[1] 49 U.S.C. § 20109, as implemented by 29 C.F.R. Part 1982 (2025).

[2] Order of Dismissal (D. & O.) at 4.

BACKGROUND

Respondent employed Complainant as an engineer for many years before the complaint in this matter was filed with OSHA. On April 10, 2001, Complainant's supervisor discovered documents on his desk entitled "Letters from Hell."[3] Complainant had prepared these documents in the context of a dispute he was having with his union representatives and Respondent's management. Respondent perceived the letters to be threatening and required Complainant to undergo a psychiatric, fitness-for-duty exam.[4] Complainant refused to undergo the exam. Subsequently, Respondent charged Complainant with insubordination and terminated his employment in 2002.[5] Complainant began litigating his termination. Eventually, through amendments, his claim for slander, libel and defamation, invasion of privacy, disability discrimination and retaliation, violation of his civil rights, violation of the Railway Labor Act (RLA), discrimination on the basis of religion, personal injury under the Federal Employers' Liability Act (FELA), intentional infliction of emotional distress (IIED), and wrongful discharge in violation of public policy ended up in federal court and was dismissed by summary judgment in 2007.[6]

Roughly twenty years after his case against Respondent was dismissed, Complainant attempted to regain employment with Respondent. He applied for a posting and was not rehired in April of 2023.[7] Thereafter, Complainant filed a complaint with OSHA on or about September 14, 2023, alleging Respondent retaliated against him for raising safety concerns during his prior employment. OSHA dismissed the complaint on November 29, 2023.[8] Complainant filed objections with the Office of Administrative Law Judges and requested a hearing with an Administrative Law Judge (ALJ).[9]

In the pre-hearing submissions and responses, the ALJ discovered that Complainant had filed a complaint in United States District Court for the District of

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3 *Carmack v. Nat'l R.R. Passenger Corp.*, 486 F. Supp. 2d 58, 68 (D. Mass. 2007).

4 *Id.* at 69-72.

5 *Id.* at 69-73.

6 *Id.* at 67 (adopting magistrate judge's recommended opinion).

7 D. & O. at 1.

8 *Id.*

9 *Id.*

Massachusetts, *Carmack v. Brotherhood of Locomotive Eng'rs & Trainmen,* 24-CV-10593-LTS, arising out of the same facts as those underlying his case with the ALJ.[10] Specifically, the District Court Complaint had a section on the FRSA, requesting similar remedies as those sought through the complaint before the ALJ.

Examining the District Court Complaint in detail, the ALJ issued an Order to Show Cause on May 23, 2024, asking the parties why he should not dismiss the case under the FRSA's "kick-out" provision. This provision allows a complainant to "remove" or kick out his case to federal district court if the Secretary of Labor has not issued a final agency decision within 210 days of the complainant's filing of the complaint with OSHA.[11]

On May 29, 2024, Complainant responded to the Order, arguing that his complaint with the federal district court only referred to FRSA "as evidence related to allegations in actions pursuant to the Americans with Disabilities Act ('ADA'), the Rehabilitation Act ('RA'), and the Railway Labor Act ('RLA') separate and apart from the FRSA actions . . . ."[12] Complainant urged that none of the counts in the District Court Complaint applied the FRSA against the Respondent. Further, Complainant added his desire to retain his FRSA claim before the ALJ.[13] On May 31, 2024, Respondent filed its response, stating that the District Court Complaint included Complainant's claims under the FRSA.[14] Agreeing with Respondent, the ALJ deemed the federal complaint a kick out of his FRSA complaint and dismissed the case for lack of jurisdiction. Complainant appealed this dismissal to the ARB.

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[10] *Id.* at 2; *see also* Complaint at 10-11, *Carmack v. Brotherhood of Locomotive Eng'rs & Trainmen*, No. 24-CV-10593-LTS, 2024 WL 5236907 (Nov. 21, 2024), hereinafter "Dist. Ct. Compl."

[11] 49 U.S.C. § 20109(d)(3) (" . . . if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States . . ."); 29 C.F.R. § 1982.114(a).

[12] Complainant Joseph Carmack's Response to Order to Show Cause (Compl.'s Resp. to O.S.C.) at 2.

[13] *Id.* at 2-3.

[14] Respondent Amtrak's Response to ALJ's Order to Show Cause (Resp.'s Resp. to O.S.C.) at 1-2.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to hear appeals from ALJ decisions and issue agency decisions in cases arising under the FRSA.[15] We review the ALJ's dismissal de novo.[16]

DISCUSSION

FRSA complaints are governed by the legal burdens of proof set forth in the employee-protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[17] To prevail on an FRSA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel action taken against him.[18] In light of our disposition of this matter, we limit our discussion to the issue of whether the ALJ correctly dismissed the case under the FRSA's kick-out provision.

As noted above, the FRSA contains a kick-out provision whereby a whistleblower may remove the matter to federal district court.[19] Under this provision, if the Secretary has not issued a final decision within 210 days, a complainant may bring an action at law or equity in the appropriate district court, which "shall have jurisdiction over such an action."[20] Complainant filed the OSHA complaint on September 14, 2023; the 210-day period was reached on April 11, 2024.

In February 2024, Complainant moved to add several Respondents to the matter. On April 23, 2024, the ALJ denied Complainant's motion to add

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15 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

16 *Gladden v. Proctor & Gamble Co.*, ARB No. 2022-0012, ALJ No. 2021-SOX-00012, slip op. at 9 (ARB May 9, 2023) (citations omitted); 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.").

17 49 U.S.C. § 20109(d)(2)(A); *see* 49 U.S.C. § 42121(b).

18 49 U.S.C. § 42121(b)(2)(B)(iii).

19 49 U.S.C. § 20109(d)(3); 29 C.F.R. § 1982.114(a).

20 49 U.S.C. § 20109(d)(3); *accord* 29 C.F.R. § 1982.114(a).

Massachusetts Bay Railroad Co. (MBCR) and Keolis Commuter Services (Keolis) as Respondents. The ALJ held in abeyance a ruling on the motion with respect to adding Massachusetts Bay Transportation Authority (MBTA).[21]

In these filings, the ALJ became aware that on March 8, 2024, Complainant had filed a claim in federal district court involving the same Respondent with numerous counts against Respondent, MBCR, Keolis, and MBTA.[22] Reviewing the federal claim, the ALJ observed that the District Court Complaint included FRSA, the matter currently before the ALJ. Accordingly, the ALJ issued an Order to Show Cause on May 23, 2024, asking the parties why he should not dismiss the case for lack of jurisdiction. In the Order, the ALJ identified the overlap between the District Court Complaint and the FRSA claim before him.[23]

Complainant responded to the Order, stating the FRSA language in the claim before the District Court was only background for his ADA, Rehabilitation Act, and Railway Labor Act claims. Complainant summarized "[t]here are three separate violations of law referred to here. They may all share the same facts, evidence and even actors, but they are violations of separate laws for separate reasons."[24] The Complainant observed that the ALJ does not have jurisdiction over the ADA and Rehabilitation Act claims.[25] Complainant further claimed that he followed the FRSA's "election of remedies" provision in choosing to pursue his remedies in different tribunals.[26]

Respondent also responded to the Order, asserting that the "core of all the claims asserted in each of the two Complaints relies on the same allegations—that Respondent allegedly failed to re-hire Complainant in April 2023, more that *two decades* after he was terminated as an employee in 2002 for insubordination."[27]

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21 D. & O. at 1-2.

22 Dist. Ct. Compl.

23 At the time that Complainant filed his complaint in federal court on March 8, 2024, his 210 days had not yet run. However, the 210-day period did run before the ALJ's Order to Show Cause and Dismissal Order.

24 Compl.'s Resp. to O.S.C. at 2.

25 *Id.* at 2-3.

26 *Id.* at 3.

27 Resp.'s Resp. to O.S.C. at 1 (emphasis in original).

Respondent contended the ALJ lacked jurisdiction because the FRSA matter was kicked out.[28]

Agreeing with Respondent, the ALJ dismissed the case for lack of jurisdiction. The ALJ wrote as follows:

> As a matter of law, since 210 days have passed, and Carmack has filed an action in the appropriate U.S. District Court requesting remedies under the FRSA for alleged violations of its provisions, this Tribunal no longer has jurisdiction over this matter under the statute. 49 U.S.C. § 20109(d)(3) (requiring that the District Court "*shall*" have jurisdiction when the prerequisites are met).[29]

Complainant on appeal with the ARB states the ALJ erred in dismissing the case for the same reasons as contained in Complainant's response to the ALJ's show cause order. Complainant relies on *Lee v. Norfolk S. Ry. Co.*[30] for the position that his termination due to disability is not the same as his claim that he was terminated and retaliated against under the FRSA.[31] In *Lee*, the Fourth Circuit clarified that FRSA's "election of remedies" did not preclude both a non-FRSA wrongful discharge claim based on race and an FRSA claim based on retaliation for engaging in protected activity.[32] Rather, the FRSA's "election of remedies" provision was intended to preclude the same FRSA-type of whistleblower claim from being pursued in two different tribunals.[33] Respondent did not file a response brief to Complainant's opening brief to the ARB.

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28 *Id.* at 1-2.

29 D. & O. at 3.

30 802 F.3d 626 (4th Cir. 2015).

31 Complainant Joseph Carmack's Memorandum in Support of Petition for Review of Omnibus Order and Order of Dismissal at 5.

32 802 F.3d at 628.

33 *Id.* at 634 ("Congress did not intend the Election of Remedies provision to require railroad employees to choose between pursuing a rail safety retaliation claim on one hand, and a racial discrimination claim on the other.").

Complainant's argument on *Lee* misses the point. The dispute before the ALJ is not whether Complainant could file different claims (for purposes of FRSA's statutory language) in separate tribunals, but whether his District Court Complaint was a kick out of his FRSA claim before the ALJ. Although Complainant claims he did not pursue his federal court claim formally as a kick out, we agree with the ALJ that his federal complaint was a kick out because it in effect asserted FRSA claims and asked for remedies available under the FRSA.[34] Complainant's District Court Complaint reads as follows:

> Carmack **brings this action** as remedy for major and minor dispute violations of the Railway Labor Act ("RLA") (45 U.S.C. 151 et seq.), **whistleblower protections of the Federal Railway Safety Act,** breach of contract, rights of privacy, slander and libel protections, the Americans with disabilities Act ("ADA"), the Rehabilitation Act ("RA") and wrongful discharge.
>
> The 'actions' in this complaint were applicable as grievances and intended to be applied in various venues including the "National Railroad Adjustment Board" ("NRAB"), the "Federal Railroad Administration" ("FRA") (by petition to the united States "Department of Labor" ("DOL") through the "Occupational Health and Safety Administration" [*sic*] ("OSHA")), the United States "Federal Transit Administration" ("FTA") (also through complaint to the DOL) and United States Courts.[35]

In reference to the FRSA, Complainant included "[t]he plaintiff's FRSA claims are pending in a railroad employee whistleblower case filed with OSHA on or about September 15, 2023."[36]

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34 *See Fuqua v. SVOX AG*, ARB No. 2014-0069, ALJ No. 2014-SOX-00018 (ARB Sept. 2, 2015) (dismissing OSHA Complaint 2 as a derivative of OSHA Complaint 1, which had been kicked out, where both complaints were essentially the same claim stemming from the same background and asserting the same remedies).

35 Dist. Ct. Compl. at 2 (emphasis added).

36 *Id.* at 3.

Elaborating upon his claim, Complainant states "[t]he carriers have discriminated against the Plaintiff and executed a wrongful discharge in violation of: the BLET57 CBA; The ADA; the Rehabilitation Act; **and the FRSA**: in order to permanently extinguish the Plaintiff's independent union activities within the BLET and BLET57."[37] Complainant begins the next paragraph with "**[t]he carriers' violations of the FRSA and other regulations include the following actions . . . .**"[38] Complainant then includes numerous counts spanning over 600 pages. Many of the facts underlying these claims are based on retaliation for engaging in protected activity similar to if not identical to the protected activity alleged under the FRSA. For Count Fifteen of the District Court Complaint, "wrongful discharge in violation of public policy," Complainant included **"Retaliatory Discrimination in violation of the Federal Railroad Safety Act** . . . ."[39] The Complainant then lists over 25 bullet points alleging adverse actions under the FRSA.[40] While the Complainant again notes the charges alleged are part of an ongoing action within the Department of Labor, this explanation is not sufficient for us to disturb the ALJ's finding that Complainant kicked out his complaint. In his prayer for relief before the District Court, he asked for all the remedies a successful whistleblower would be entitled to under the FRSA, including reinstatement, backpay, and compensatory damages.[41] While we are sympathetic to Complainant's desire to retain his FRSA claim with the ALJ, it was Complainant's choice to file a 600-plus-page complaint in federal court specifically incorporating his FRSA claim in express language and in spirit.[42]

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37 *Id.* at 5-6.

38 *Id.* at 6 (emphasis added).

39 *Id.* at 657 (emphasis added).

40 *Id.* at 657-58.

41 *Id.* at 659.

42 *Cf. Jordan v. Sprint Nextel Corp.*, ARB Nos. 2010-0113, 2011-0020, ALJ Nos. 2006-SOX-00098, 2010-SOX-00050 (ARB June 29, 2012) (providing notice of dismissal of *Jordan II* and *Jordan III* where *Jordan I*, the underlying principal case, had been dismissed with intent to remove to district court; explaining that while Jordan should not be compelled to remove his case, it was his decision to remove the principal case and judicial efficiency supported deeming *Jordan II* and *Jordan III* removed as derivative cases that were intertwined with the principal case).

CONCLUSION

For the above reasons, we **AFFIRM** the ALJ's decision and **DISMISS** Complainant's appeal.

SO ORDERED.

THOMAS H. BURRELL
Administrative Appeals Judge

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

ELLIOT M. KAPLAN
Administrative Appeals Judge