IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

WILLIAM FRANKLIN SUBER,	*	
Plaintiff,	*	
vs.	*	
		CASE NO. 4:15-CV-200 (CDL)
CSX TRANSPORTATION, INC.,	*	
Defendant.	*	
	*	
BRYAN NATHAN JAMES,	*	
Plaintiff,	*	
vs.	*	CASE NO. 4:15-CV-204 (CDL)
CSX TRANSPORTATION, INC.,	*	
Defendant.	*	

O R D E R

William Franklin Suber and Bryan Nathan James (collectively "Plaintiffs") filed separate actions against their employer, CSX Transportation, Inc. ("CSX"), under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109. These actions involve common questions of law and fact; therefore, the Court consolidates them for pretrial purposes pursuant to Federal Rule of Civil Procedure 42(a).[1]

[1] William Franklin Suber v. CSX Transportation, Inc., Case No. 4:15-cv-200, as the first filed action, shall be the lead case for administrative purposes, and all future filings for both cases shall be filed under that case number, unless otherwise ordered by the

CSX filed separate motions to dismiss in each action claiming that this Court does not have subject matter jurisdiction. The arguments in support of and in opposition to the motions to dismiss in each action are identical. CSX maintains that the Secretary of Labor issued a final decision on each Plaintiff's claim, and therefore, Plaintiffs' only recourse was to appeal to the U.S. Court of Appeals. Plaintiffs respond that no final decision was issued by the Secretary of Labor within the period required by statute, and therefore they had the right under the FRSA to file their actions in this Court. For the reasons discussed below, the Court finds that the Secretary of Labor did not issue a final decision within the time required by the FRSA and that each Plaintiff filed his action before the Secretary of Labor issued a final decision. Accordingly, Plaintiffs have the right to have their claims heard in this Court, and CSX's motion to dismiss for lack of subject matter jurisdiction is denied. (ECF No. 10 in both actions).

STANDARD

"Attacks on subject matter jurisdiction under [Federal Rule of Civil Procedure] 12(b)(1) come in two forms: 'facial attacks' and 'factual attacks.'" *Garcia v. Copenhaver, Bell & Assocs.,*

Court. The Court only consolidates these actions for pretrial purposes and may sever them later if appropriate.

M.D.'s, P.A., 104 F.3d 1256, 1260 (11th Cir. 1997) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990) (per curiam)). A facial attack "require[s] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence*, 919 F.2d at 1529 (second alteration in original) (quoting *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)). "'Factual attacks,' on the other hand, challenge 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.'" *Id.* (quoting *Menchaca*, 613 F.2d at 511). With factual attacks, "no presumptive truthfulness attaches to plaintiff's allegations." *Garcia*, 104 F.3d at 1261 (quoting *Lawrence*, 919 F.2d at 1529).

CSX asserts a factual attack on this Court's jurisdiction. With factual attacks, the Court may proceed under Rule 12(b)(1) only if the "facts necessary to sustain jurisdiction do not implicate the merits of plaintiff's cause of action." *Id.* Here, the Court need not reach the merits of Plaintiffs' claims—whether CSX unlawfully retaliated against Plaintiffs for engaging in protected activity—to decide whether it has jurisdiction to hear those claims.

BACKGROUND

Suber is a locomotive engineer. James is a conductor. Both work for CSX. They allege that CSX wrongfully disciplined them in retaliation for Suber reporting a malfunction in a trip optimizer (a cruise control function for locomotives) on a train that Suber and James were operating. After Suber reported the malfunction, CSX suspended Plaintiffs and temporarily revoked their certifications.

The FRSA prohibits railroad carriers from retaliating against employees for reporting "a hazardous safety or security condition." 49 U.S.C. § 20109(b)(1)(A). FRSA employment retaliation claims are adjudicated through the Department of Labor. 49 U.S.C. § 20109(d)(2). The Department of Labor has a three-level process for resolving FRSA claims. First, the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") conducts an investigation and issues findings. The OSHA findings become the final order of the Secretary of Labor unless any party objects to the OSHA findings and seeks review by a Department of Labor Administrative Law Judge ("ALJ"). The ALJ decision becomes the final order of the Secretary of Labor if neither party petitions the Administrative Review Board to review the ALJ's decision or if the Review Board does not accept the petition. Any party may

appeal the Secretary's final order to a federal court of appeals. 49 U.S.C. § 20109(d)(4).

An employee may "kick out" of this administrative review process and seek *de novo* review by a federal district court if (1) the Secretary of Labor has not issued a final decision within 210 days of the filing of the administrative complaint, and (2) the delay is not due to the bad faith of the employee. 49 U.S.C. § 20109(d)(3). The kick-out clause provides:

> [I]f 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, which shall have jurisdiction over such an action without regard to the amount in controversy . . . .

Id. The purpose of the kick-out clause is to help employees receive a prompt decision from the Secretary of Labor.

Here, Plaintiffs followed the administrative review process outlined above. They filed a complaint with OSHA on February 21, 2014. Their complaint alleged that CSX retaliated against Plaintiffs for reporting a malfunction in a trip optimizer. OSHA conducted an investigation and, on December 9, 2014, issued a finding that Suber's protected activity was not sufficiently causally connected to CSX's decision to discipline Plaintiffs. This finding by OSHA would not become the final decision of the

Secretary of Labor unless Plaintiffs declined to seek review by an Administrative Law Judge.

Although it took OSHA more than 210 days to issue its findings and thus Plaintiffs had the option at that time to seek *de novo* review in district court, they chose not to do so. Instead, Plaintiffs decided to continue with the administrative process by timely objecting to OSHA's findings and seeking review by an Administrative Law Judge. After the parties conducted extensive discovery, the ALJ granted CSX's motion for summary judgment and dismissed Plaintiffs' complaint on October 28, 2015.

Plaintiffs then exercised their right to appeal the ALJ's decision to the Administrative Review Board. The Review Board accepted Plaintiffs' petition and set a briefing schedule. Before the Review Board made any ruling, Plaintiffs filed with the Review Board a notice of intent to file an action in federal district court pursuant to the kick-out clause. *See* 29 C.F.R. § 1982.114 (instructing employees to notify the Department of Labor of the filing of their district-court complaint). After receiving Plaintiffs' notice of intent to file an action in district court but before that kick-out action was actually filed, the Review Board issued an order entitled "Final Decision and Order Dismissing Complainants' Complaints and Respondent's Petitions for Review." Mot. To Dismiss Ex. J, Admin. Review Bd.

Final Decision 2, ECF No. 10-11. The five-paragraph order summarizes the procedural background of the dispute, acknowledges the Review Board's receipt of Plaintiffs' notice, and dismisses the dispute so that Plaintiffs could proceed in the district court. The order observes that Plaintiffs claimed that they "filed their FRSA complaints with the Department of Labor more than 210 days prior to filing their Notices [of intent to file an action in district court] and that as of that date, the Secretary of Labor had not issued a final decision in their cases." *Id.* The order concludes: "we DISMISS [Plaintiffs'] complaints, so that they may proceed de novo in district court. As we have dismissed [Plaintiffs'] complaints, we also dismiss [CSX's] petitions for review as [Plaintiffs] have chosen to proceed de novo in district court." *Id.* at 3.

Ten days after the Review Board issued the order of dismissal, Plaintiffs filed their actions against CSX in this Court. It is undisputed that the Secretary did not issue a final order within 210 days of the date that Plaintiffs filed their administrative complaints. It is also undisputed that the delay was not due to the bad faith of Plaintiffs. CSX nevertheless argues that this Court lacks jurisdiction to review Plaintiffs' claims because the Review Board's decision dismissing the Complaint constitutes a final order of the Secretary of Labor and once the Secretary issues a final order,

the aggrieved employee's only recourse is to appeal that order to the U.S. Court of Appeals, even if more than 210 days have elapsed since the filing of Plaintiffs' complaint.

Plaintiffs respond that the Review Board's dismissal decision is not a final order of the Secretary of Labor. Plaintiffs also argue that even if the dismissal by the Review Board was a final decision, they still had the right to file their actions in district court because that dismissal was issued more than 210 days after they filed their complaints and they did not act in bad faith.

DISCUSSION

CSX's motion to dismiss presents two questions that do not appear to have been previously answered by any U.S. Court of Appeals: (1) does the Review Board's dismissal decision constitute a final order of the Secretary? and (2) if the dismissal is deemed a final order, does the FRSA permit an employee to seek *de novo* review in federal district court *after* the Secretary has issued a final order if the final order was not issued within 210 days of the employee filing their administrative complaint and the employee did not act in bad faith? The Court answers the first question "no" and therefore does not reach the second question.

Resolution of the first question requires the Court to interpret two statutory provisions: (1) the "kick-out" section

of the FRSA that allows an employee to file an action in district court if the Secretary does not issue a final decision within 210 days of the filing of the complaint, and (2) the appeal provision that permits the appeal of any final order of the Secretary to the U.S. Court of Appeals. The kick-out clause reads:

> [I]f 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, which shall have jurisdiction over such an action without regard to the amount in controversy . . . .

49 U.S.C. § 20109(d)(3). The appeal clause states:

> [A]ny person adversely affected or aggrieved by an order issued pursuant to the procedures in section 42121(b), may obtain review of the order in the United States court of appeals for the circuit in which the violation . . . allegedly occurred.

49 U.S.C. § 20109(d)(4). Section 42121(b), which is referenced in the appeals clause, makes it clear that the order from which an appeal may be taken is a "final order" of the Secretary of Labor. *See* 49 U.S.C § 42121(b)(3)(A) ("Not later than 120 days after the date of conclusion of a hearing . . . the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered

into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation."). Neither party contends otherwise. Nor does anyone dispute that if the Review Board's dismissal of this action was *not* a final order of the Secretary of Labor, Plaintiffs had the right to file their actions in this Court. The disagreement is over what "final order" means.

In describing the order from which an employee has a right to appeal to the federal appellate court, § 20109(d)(4) specifically incorporates the procedures of § 42121(b). Those procedures clearly provide that the Secretary of Labor shall either "provide[] . . . relief" or "deny[] the complaint." 49 U.S.C § 42121(b)(3)(A). Those procedures also provide the employee with the opportunity to present the alleged violations. 40 U.S.C. § 42121(b)(1)-(2). Here the Review Board did not provide relief. It did deny the complaint but not based on the alleged violations presented by Plaintiffs. The Review Board never reached the merits because it concluded that it did not need to address the merits given that Plaintiffs decided to pursue their claims in district court. While the Review Board order certainly terminated the appeal, it was not a decision, much less a final one, on the merits.

CSX argues that the dismissal of the appeal is a final order of the Secretary because it is titled "Final Decision and

Order." Admin. Review Bd. Final Decision 2. But the substance of the Order indicates otherwise. It contains no substantive analysis of Plaintiffs' claims or the ALJ's decision. The Review Board did not affirm or reverse the ALJ. It made no mention of whether Plaintiffs made out a claim for retaliation or were entitled to relief under the FRSA. The Review Board simply summarized the procedural posture of the dispute and dismissed the administrative proceedings "so that [Plaintiffs] may proceed de novo in district court." *Id.* at 3. Under CSX's argument, a termination of an appeal because the parties reached a settlement while the appeal was pending would be deemed a final order, and if the settlement was not consummated, would prevent the employee from pursuing claims in district court under the kick-out clause. This interpretation of the applicable statutory provisions ignores their plain meaning.

CSX's argument also conflicts with the rationale of the Supreme Court in a recent opinion explaining when an agency decision is "final" under the Administrative Procedure Act. In *United States Army Corps of Engineers v. Hawkes Co.,* No. 15-290, slip op. at 5, 578 U.S. ____ (2016), the Supreme Court explains that generally two conditions must be satisfied for an agency action to be "final" under the Administrative Procedure Act. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or

interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

The Review Board's order here satisfies neither condition. As to the first condition, the Review Board engaged in no decisionmaking process before its dismissal. It never considered the evidence or the administrative record. It simply acknowledged that Plaintiffs intended to opt out of the administrative process and proceed with their claims in district court. While the dismissal may have been the last administrative action in the administrative process and did terminate the administrative appeal, there is a distinction between "termination" and "consummation." "Consummation" contemplates that such action completed the decisionmaking process, which necessarily requires that some decisionmaking was undertaken. "Termination" means that the appeal process has ended. The appeal could end because the decisionmaking was complete, thereby "mark[ing] the consummation of the agency's decisionmaking process," *id.*, or the appeal could end for some other reason such as a settlement, *see* 49 U.S.C. § 42121(b)(3)(A), or a decision by the plaintiff to seek *de novo* review in district court. Because Plaintiffs opted out of the process before any final decisionmaking by the Review Board

occurred, the Court finds that termination of their appeal did not mark the consummation of that process.

The Review Board's order also fails to satisfy the second condition set forth in *Hawkes* and *Bennett*: it made no determination of any rights or obligations. The order never addressed the merits of Plaintiffs' claims. No legal consequences flowed from any merits-based decision by the Review Board because the Review Board never reached the merits of Plaintiffs' claims. Thus, the rationale of the Supreme Court's decision in *Hawkes* strongly supports this Court's conclusion that the Review Board's dismissal was not a final order that prevented Plaintiffs from seeking *de novo* judicial review in district court.[2]

CONCLUSION

The Review Board's decision did not consummate the administrative decisionmaking process; it did not determine any rights or obligations; and no legal consequences flowed from it. It was simply an acknowledgment that Plaintiffs intended to pursue their claims in district court because the Secretary had not issued a final decision within 210 days of the filing of their complaints. Such action by the Review Board does not constitute a final order that deprived Plaintiffs of their right

[2] Given the Court's conclusion that the Review Board's dismissal was not a final order, it is unnecessary to decide whether this Court would have subject matter jurisdiction to hear Plaintiffs' claims even if the Review Board's disposition was a final order.

to pursue their claims in district court pursuant to the statutory kick-out clause. Accordingly, this Court has jurisdiction over Plaintiffs' claims. And CSX's motion to dismiss for lack of subject matter jurisdiction (ECF No. 10) is denied.

IT IS SO ORDERED, this 1st day of June, 2016.

S/Clay D. Land
CLAY D. LAND
CHIEF U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA