

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PAUL BOROVAC,

Plaintiff,

vs.

NATIONAL RAILROAD PASSENGER
CORPORATION; NATIONAL
MEDIATION BOARD; PUBLIC LAW
BOARD 7680; SMART,
INTERNATIONAL ASSOCIATION OF
SHEET METAL, AIR, RAIL AND
TRANSPORTATION WORKERS; and
BEN COLEMAN,

Defendants.

8:17CV110

ORDER

This matter is before the Court on a Motion to Dismiss (Filing No. 9) filed by defendant National Railroad Passenger Corporation, doing business as Amtrak (“Amtrak”). Amtrak argues the Court should dismiss Counts I and II for “failure to state a claim upon which relief can be granted,” Fed. R. Civ. P. 12(b)(6), and should dismiss Count III against Amtrak for “lack of subject-matter jurisdiction,” Fed. R. Civ. P. 12(b)(1).

Also pending before the Court is plaintiff Paul Borovac’s (“Borovac”) Motion to Amend Complaint and Petition (Filing No. 13) filed pursuant to Federal Rule of Civil Procedure 15(a)(2). When a plaintiff moves for leave to amend a complaint in response to a motion to dismiss, the Court must address the motion for leave to amend. *See Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 956 (8th Cir. 2002). Indeed, such a motion often renders moot a pending motion to dismiss. *Id.*

Under Rule 15(a)(2), courts “should freely give leave” to amend a complaint “when justice so requires.” “A district court can refuse to grant leave to amend a pleading only where it will result in ‘undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.’” *Dennis v. Dillard Dep’t Stores, Inc.*, 207 F.3d 523, 525 (8th Cir. 2000) (alteration in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Amtrak contends Borovac’s motion should be denied because his proposed amendments would be futile. Borovac denies amendment is futile and opposes dismissal but concedes Amtrak’s Motion to Dismiss and “well written” supporting brief have merit. As grounds for seeking leave to amend, Borovac admits his “original Complaint was filed in haste and before” his counsel received the information and documents Borovac possessed. Attaching a copy of his proposed pleading, *see* NECivR15.1(a), Borovac asserts his amended pleading addresses many of the deficiencies identified in Amtrak’s Motion to Dismiss. In particular, Borovac explains he has (1) added “factual assertions to support his claims that the District Court may review the Public Law Boards [sic] three decisions,” (2) deleted the wrongful-termination claim Amtrak asked the Court to dismiss (Count II), and (3) removed the National Mediation Board, Public Law Board 7680, and Ben Coleman as defendants. Borovac also deleted his Labor Management Relations Act Claim against Amtrak (Count III), mooting Amtrak’s jurisdictional challenge.

The Court is troubled by Borovac’s admittedly hasty and faulty initial pleading, and Amtrak has raised a number of salient issues and ultimately may prevail on some or all of them. But, at this point, the Court finds the interests of justice and judicial economy are best served in this case by granting Borovac leave to file his Amended Petition for Review and Complaint and allowing the remaining defendants to answer or otherwise respond to Borovac’s remaining claims as they deem appropriate. Based on the foregoing,

IT IS ORDERED:

1. Plaintiff Paul Borovac's Motion to Amend Complaint and Petition (Filing No. 13) is granted.
2. Borovac shall file the proposed Amended Petition for Review and Complaint on or before August 1, 2017.
3. Defendant National Railroad Passenger Corporation's Motion to Dismiss (Filing No. 9) is denied as moot, without prejudice to its right to refile.
4. The defendants shall answer or otherwise respond to the Amended Petition for Review and Complaint on or before August 28, 2017.

Dated this 27th day of July, 2017.

BY THE COURT:

s/ Robert F. Rossiter, Jr.
United States District Judge