

**U.S. Department of Labor**

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**Issue Date: 17 September 2013**

CASE NO.: 2013-FRS-00039

*In the Matter of:*

CURT CLIFT,  
Complainant,

v.

BNSF RAILWAY COMPANY,  
Respondent.

**ORDER DISMISSING MATTER**

This claim arises under the Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”), Pub. L. No. 110-53. (Aug. 3, 2007). The hearing is scheduled to begin on November 12, 2013, in Seattle, Washington.

On August 28, 2013, Complainant’s attorney filed a notice of intention to file an original action in the United States District Court pursuant to 49 U.S.C. § 20109(d)(3) and 29 C.F.R. § 1982.114. Those sections provide that if 210 days have passed since the filing of the complaint without a final order from the Secretary, and there is no showing that the delay is due to the bad faith of the complainant, the complainant may bring an action in district court. 49 U.S.C. § 20109(d)(3); 29 C.F.R. § 1982.114(a).

Before the notice of intention was filed, Respondent filed a motion to compel discovery on August 19, 2013, and is currently pending. Respondent also filed a request for sanctions for abuse of discovery on September 13, 2013. Respondent also noted its motion for sanctions and at a conference call that it was not properly served with Complainant’s notice of intention to file in federal court since it was served via email. Complainant’s attorney filed a partial response to the motion to compel on September 3, 2013. When I reviewed Complainant’s partial response, it was unclear if Complainant had changed his mind about filing in federal court.

I held a conference call with the parties on September 16, 2013, to discuss the posture of the case. As discussed at the conference call, it was my intention to grant the dismissal since Complainant had filed the notice to file in federal court unless Complainant’s attorney was withdrawing the notice. Complainant’s attorney stated he intended to file in federal court and was not withdrawing the request. Respondent, however, asserted that the motion for sanctions

would survive and should be ruled upon. Respondent was requesting an order for monetary sanctions pursuant to Federal Rule of Civil Procedure 37 of at least \$2,661 for Complainant's alleged dilatory tactics and unprofessional conduct in the proceeding to date. I indicated I did not believe I had authority to issue monetary sanctions, but I would review the request for sanctions. I have reviewed the thorough and compelling motion filed by Respondent, but having read and considered the motion and authority, I find that I do not have authority to issue monetary sanctions as requested. 29 C.F.R. § 18.6(d) (providing discovery sanctions); *Windhauser v. Trane, An Operating Division of American Std, Inc.*, ARB No. 05-127, slip op. at 3-4 (Oct. 31, 2007). Accordingly, the request for sanctions is denied. Furthermore, because I am dismissing this matter based upon the intention to file in federal court, the pending motion to compel discovery is moot.

Here, Complainant filed his complaint with the Occupational Safety and Health Administration (OSHA) on April 4, 2010. OSHA issued its findings and report on February 27, 2013. The Secretary has not yet issued a final decision. More than 210 days have passed since Complainant filed the complaint, there is no final decision by the Secretary, and there has been no showing that the delay is due to bad faith by Complainant. Further, there is no sanction provided in the statute or regulation for failing to properly serve the notice of intention on Respondent. *Pfeiffer v. Union Pacific Railroad Co.*, ARB No. 12-087, slip op. at 2 (Nov. 19, 2012).

Accordingly, the matter is dismissed pursuant to 29 C.F.R. § 1982.114. All dates are vacated.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge