



**Issue Date: 13 January 2014**

**CASE NO.: 2013-FRS-00022**

**In the Matter of:**

**CHAD DAFOE,  
Complainant,**

**v.**

**BNSF RAILWAY COMPANY,  
Respondent.**

**ORDER OF DISMISSAL**

The above-captioned matter arises under the employee protection provisions of the Federal Rail Safety Act (FRSA), as amended, 49 U.S.C. §20109. The complaint was filed on or about February 14, 2012; it was found to lack merit by OSHA in a letter of November 7, 2012, setting forth the Secretary's findings; and Complainant objected to the Secretary's Findings and filed a hearing request on December 10, 2012. A hearing was tentatively scheduled to be held before the undersigned administrative law judge from February 25 to 28, 2014 in Minneapolis or St. Paul, Minnesota, at a time and location to be determined, in accordance with a Modified Scheduling Order and Protective Order of September 6, 2013. On December 16, 2013, Respondent filed a motion to quash and for protective order, which was opposed. That motion requested that Complainant's late discovery and expert designation be quashed.

On December 26, 2013, Complainant, through counsel, filed a Notice of Intention to File a Complaint in District Court, in accordance with "49 U.S.C. 20109(d)(3)(sic)." In support, Complainant stated the following:

. . . Mr. Defoe filed his complaint in the above-named action on or about February 14, 2012. The Secretary of Labor has not issued a final decision within 210 days of that date. . . .

Section 20109(c)(3) provides:

(3) DE NOVO REVIEW.—With respect to a complaint under paragraph (1), 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, which shall have jurisdiction

over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

49 U.S.C. §20109(c)(3). *See also* 29 C.F.R. § 1982.114; *Pfeifer v. Union Pacific Railroad Co.*, ARB No. 12-087, ALJ No. 2011-FRS-38 (ARB Nov. 19, 2012). Inasmuch as there has not been bad faith and no decision was issued within 210 days after the filing of the complaint, and as Complainant has indicated his intention to file an original action in U.S. district court, this case will be dismissed without prejudice. In the event that the Complainant fails to file an action in federal district court, any party may move to set aside this Order of Dismissal and reopen these proceedings.

### **ORDER**

**IT IS HEREBY ORDERED** the hearing tentatively set for February 25 to 28, 2014 is **CANCELED**; Respondent's motion to quash is **DENIED AS MOOT**; and the complaint filed by Complainant Chad Defoe under the Federal Rail Safety Act is **DISMISSED WITHOUT PREJUDICE** to its reinstatement if an action is not filed in federal district court.

PAMELA J. LAKES  
Administrative Law Judge

Washington, D.C.