



Issue Date: 25 November 2013

CASE NO.: 2013-FRS-00029

In the Matter of:

**MICHAEL J. KOZIARA,
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 April 15, 2011; it was found to lack merit by OSHA in a letter of January 4, 2013, setting forth the Secretary's findings; and Complainant objected to the Secretary's Findings and filed a hearing request on February 5, 2013. A hearing scheduled to be held before the undersigned administrative law judge from November 12 to 15, 2013 in Madison, Wisconsin was canceled by joint motion of the parties, to be reset at a mutually convenient time.

On November 8, 2013, Complainant, through counsel, filed a Notice of Intention to File Original Action in United States District Court, in accordance with "49 U.S.C. 20109(d)(3)(sic)." In support, Complainant stated the following:

The Complainant's FRSA Complaint was filed more than 210 days ago; Complainant has fully participated, cooperated, and furthered his Complaint in good faith; and as of this date the Secretary of Labor has not issued a final decision.

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 complaint filed by Complainant Michael J. Koziara 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.