



Issue Date: 12 March 2014

CASE NO.: 2013-FRS-00089

In the Matter of:

**JOE ORMSBY,
Complainant,**

v.

**BNSF RAILWAY COMPANY,
Respondent.**

**ORDER CANCELING HEARING AND
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 in this matter was filed with OSHA on or about June 3, 2013; however, a written complaint is not of record. Although the Secretary's Findings (dismissing the complaint) were issued on August 5, 2013, they were reportedly returned as undeliverable and not actually received by the complainant until September 10, 2013. Complainant's objections to the Secretary's Findings and hearing request were timely filed by mail on September 13, 2013, and received on September 17, 2013. *See* 29 C.F.R. § 1982.106 (requiring objections to be filed within 30 days of receipt of the findings and order and deeming the date of postmark, facsimile transmittal, or e-mail communication to be the date of filing). By Notice of January 13, 2014, a hearing was scheduled to be held before the undersigned administrative law judge from May 13 to 16, 2014 in Missoula, Montana, at a location to be determined. Subsequently, counsel for Complainant indicated that he had relocated to LaCrescent, Minnesota and provided his new address; however, counsel did not seek a change of venue.

On February 24, 2014, Complainant, through counsel, filed Complainant's Notice of Intention to File a Complaint in District Court. In support, Complainant stated the following:

. . . Mr. Ormsby filed his complaint in the above-named action on or around June 3, 2013. The Secretary of Labor has not issued a final decision and over 210 days have passed. These proceedings have not been delayed due to any alleged bad faith of Mr. Ormsby. . . .

Complainant cited “49 U.S.C. 20109(d)(3)[sic]” and 29 C.F.R. § 1982.114(b). 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, the scheduled hearing will be canceled and 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 set for May 13 to 16, 2014 is **CANCELED**; and

IT IS FURTHER ORDERED that the complaint filed by Complainant Joe Ormsby 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.