IN THE MATTER OF:

JOHN F. GUERRA JR.,

COMPLAINANT,

v.

CONSOLIDATED RAIL CORPORATION, (CONRAIL),

RESPONDENT.

ARB CASE NO. 2017-069

ALJ CASE NO. 2017-FRS-047

DATE: June 29, 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Lawrence A. Katz, Esq.; *Coffey, Kaye, Myers & Olle;* **Bala Cynwyd, Pennsylvania**

For the Respondent:

BEFORE: Joanne Royce, *Administrative Appeals Judge* **and Leonard J. Howie III,** *Administrative Appeals Judge*

ORDER DISMISSING APPEAL

On August 23, 2017, John F. Guerra petitioned the Administrative Review Board to review a Department of Labor Administrative Law Judge's Order Dismissing Complainant's Complaint in this case arising under the whistleblower protection provisions of the Federal Rail Safety Act.[1] The Board issued a Notice of Appeal and Order Establishing Briefing Schedule, under which Complainant Guerra's opening brief was due on September 25, 2017. Guerra failed to file his opening brief as ordered.

---

[1] 49 U.S.C.A. § 20109 (Thomson Reuters 2016)(FRSA), and implementing regulations, 29 C.F.R. Part 1982 (2017).

On June 13, 2018, the United States District Court for the District of New Jersey issued an opinion granting Defendant Conrail's motion to dismiss Guerra's whistleblower complaint on the grounds that Guerra failed to timely file it.[2] Recounting the history of the case, the court wrote:

> Plaintiff contends that on May 10, 2016, Plaintiff filed a FRSA complaint with the Secretary of Labor's Region II Occupational Safety and Health Administration ("OSHA") Whistleblower Office via first-class U.S. mail. (*Id.* ¶¶ 35-36). "This was filed within 180 days from the date the [P]laintiff became aware of the [D]efendant railroad's intent to take adverse or unfavorable action against him." (*Id.* ¶ 35). Plaintiff states that on March 7, 2017, however, OSHA dismissed the administrative complaint as having been untimely filed. (*Id.* ¶ 36). On March 27, 2017, Plaintiff filed objections and a request for a hearing before an administrative law judge ("ALJ"). (*Id.* ¶ 37). An ALJ upheld OSHA's decision to dismiss Plaintiff's administrative complaint as untimely on August 18, 2017. (*Id.*¶ 38). Following this, on August 23, 2017, Plaintiff filed a petition for review challenging the ALJ's decision with the Department of Labor's Administrative Review Board ("ARB"). (*Id.* ¶ 39).[3]

The FRSA permits a complainant to file an action in the appropriate federal district court if the Secretary of Labor has not issued a final decision within 210 days of the date of the complaint and if there is no showing that the complainant has acted in bad faith to delay the proceedings.[4]

---

[2] *Guerra v. Consolidated Rail Corp*., No.: 2:17-cv-6497, 2018 WL 2947857.

[3] *Id.* The statutory 180-day period for filing Guerra's administrative complaint expired on October 3, 2016. Conrail claimed that Guerra's FRSA complaint was not timely filed because it was not filed until November 28, 2016, when OSHA acknowledged that it was filed. Guerra claimed that he mailed the complaint on May 10, 2016. OSHA had no record of this alleged filing.

[4] The FRSA provides for de novo review in an appropriate federal district court under specific circumstances:

> 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.A. § 20109(d)(3). The FRSA's regulations provide:

> Within 7 days after filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending

Since Guerra has chosen to proceed in district court, the Department of Labor no longer has jurisdiction over his case. As the statute provides, the "district court of the United States . . . shall have jurisdiction over such an action."[5] We therefore **DISMISS** this case on the ground that Guerra has removed it to district court.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge

> upon where the proceeding is pending, a copy of the file-stamped complaint. In all cases, a copy of the complaint must also be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

29 C.F.R. § 1982.114(c). The Board has no record of the required filing.

[5] *Stone v. Duke Energy Corp.,* 432 F.3d 320, 322 (4th Cir. 2005) (under the Sarbanes-Oxley Act of 2002 (SOX), "when [complainant] filed his first complaint in federal court . . . jurisdiction became lodged in the district court, depriving the ALJ of jurisdiction . . . ."); *Kelly v. Sonic Auto.,* ARB No. 08-027, ALJ No. 2008-SOX-003, slip op. at 4 (ARB Dec. 17, 2008) (the filing of Kelly's SOX complaint in district court deprived the Department of Labor of jurisdiction over his complaint.); *Powers v. Pinnacle Airlines*, ARB No. 05-138, ALJ No. 2005-SOX-065, slip op. at 5 (ARB Oct. 31, 2005) (the district court obtained jurisdiction of the complainant's SOX complaint once she filed suit in district court and thus the ALJ no longer had jurisdiction to enter any order in the case other than one dismissing it on the ground that the complainant had removed the case to district court).