



Issue Date: 02 September 2014

In the Matter of
DAVID BREWER
Complainant

v.

Case No. **2014 FRS 00001**

BNSF RAILROAD COMPANY
Respondent

ORDER OF DISMISSAL

This case comes 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"), and had been scheduled for hearing in Helena, Montana, on August 26, 2014. On August 28, 2014, I was advised that Complainant no longer will proceed in this forum and therefore the hearing was cancelled.

Under §20109(d)(3) of the FRSA a de novo review of a complaint is permitted in the appropriate U.S. District Court if a final decision on the filed complaint has not been issued within 210 days after the complaint was filed, provided delay is not the result of bad faith of the complainant. As there is no evidence of bad faith on Complainant's part which would have delayed a final decision, I find that jurisdiction for further action on the complaint under the FRSA has been removed to the U.S. District Court for Montana. I find further that Complainant's complaint must be dismissed.

Although Respondent objects, I find that there is no basis for the objection. In *Gunderson v. BNSF Railway Co.*, No. 14-cv-223 (D.Minn. June 30, 2014) (2014 WL 2945762) (case below 2011-FRS-1), a plaintiff filed an FRSA lawsuit in federal district court nine business days after the ALJ issued his 14-page opinion. The Defendant filed a motion to dismiss (which the court converted to a motion for summary judgment) arguing that although the Plaintiff "acquired the right to file a federal lawsuit on the 211th day [pursuant to 49 U.S.C. § 20109(d)(3)], he thereafter waived that right by continuing to participate in the administrative process." Slip op. at 5 (emphasis as in original). Although the court had sympathy for the Defendant's argument, it found that the plain language of the statute, and the weight of the case law interpreting that provision, left the court with no choice but to hold that the Plaintiff did not waive his right to bring the FRSA lawsuit. The court noted that the Defendant's framing of the issue as one of waiver was unique, but found that no matter how the issue was framed "courts have repeatedly and unanimously rejected the idea that Congress did not intend for litigants to be able to file a lawsuit even after obtaining a merits decision from an ALJ." Id. at 7.

Based on the foregoing, it is hereby **ORDERED** that Complainant's complaint is **DISMISSED**.

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address:
ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).