

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 18 December 2015

CASE NO.: 2015-FRS-00067

In the Matter of:

GARY L. DESPAIN,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

**ORDER DISMISSING COMPLAINT BASED ON LACK OF JURISDICTION,
BECAUSE COMPLAINANT HAS FILED ACTION IN DISTRICT COURT**

This proceeding arises from a complaint of discrimination filed under the Federal Rail Safety Act (“the FRSA”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (the “9/11 Act”), Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007).

By submission dated November 17, 2015, through counsel, Complainant notified me that he intended to file an original action in United States District Court, pursuant to 49 U.S.C. § 20109(d)(3) and 29 C.F.R. § 1982.114. On December 15, 2015, through counsel, Complainant submitted a copy of his docketed District Court complaint as required by 29 C.F.R. § 1982.114(b). His action was filed in the United States District Court, District of Arizona, on December 10, 2015 (Despain v. BNSF Railway Company (No. CV-15-08294-PCT-NVW)).

As the Complainant has filed a complaint in District Court based on the same facts that constituted his action before the Office of Administrative Law Judges, jurisdiction in the latter has been divested.¹ *See Stone v. Duke Energy Corp*, 432 F.3d 320 (5th Cir. 2005); *see also Kelly v. Sonic Automotive, Inc.*, ARB No. 08-027 (Dec. 17, 2008).

¹ On December 16, 2015, Respondent filed an Objection to Complainant’s Notice of Intention to File Original Action in United States District Court. Respondent’s objection is overruled as I find that the Complainant has not waived his right to remove the case to federal district court and the delay in issuing a final decision in this matter is not due to bad faith of the Complainant. *See* 49 U.S.C. § 20109(d)(3); 29 C.F.R. § 1982.114.

Because I no longer have jurisdiction over the instant matter, the claim is hereby **DISMISSED**, and the hearing previously scheduled for December 16, 2015 is **CANCELED**.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts