

**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



**IN THE MATTER OF:**

**FITZ KNIBB,**

**ARB CASE NO. 2023-0011**

**COMPLAINANT,**

**ALJ CASE NO. 2020-FRS-00078**

**v.**

**DATE: February 3, 2023**

**NEW JERSEY TRANSIT RAIL  
OPERATIONS, INC.,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Fitz Knibb; *pro se*; Orange, New Jersey**

***For the Respondent:***

**Paul T. Szypiotko, Esq.; *State of New Jersey, Office of the Attorney  
General, Dep't of Law and Public Safety Division of Law, New Jersey  
Transit Section; Newark, New Jersey***

**BEFORE: HARTHILL, Chief Administrative Appeals Judge, and WARREN  
Administrative Appeals Judge**

### **ORDER OF DISMISSAL**

**PER CURIAM:**

This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).<sup>1</sup> On December 13, 2019, Fitz Knibb (Complainant) filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA) against the New Jersey Transit Rail Operations,

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<sup>1</sup> 49 U.S.C. § 20109, as implemented by 29 C.F.R. Part 1982 (2022) and 29 C.F.R. Part 18, Subpart A (2022).

Inc. (Respondent) for alleged retaliation.<sup>2</sup> On June 3, 2020, OSHA found no reasonable cause to believe Respondent violated the FRSA and dismissed the complaint.<sup>3</sup>

Complainant appealed the dismissal to the Office of Administrative Law Judges and requested a hearing before an Administrative Law Judge (ALJ).<sup>4</sup> On December 6, 2021, the ALJ ordered Complainant to appear at a teleconference.<sup>5</sup> Complainant did not appear, and the ALJ issued an order to show cause as to why this matter should not be dismissed.<sup>6</sup> Complainant explained that he was traveling, and the ALJ rescheduled the hearing.<sup>7</sup> On April 13, 2022, Respondent filed a motion to compel initial disclosures and discovery responses from Complainant.<sup>8</sup> After Complainant failed to comply, the ALJ granted Respondent's motion and cautioned Complainant that she would dismiss this matter if he did not comply.<sup>9</sup> On May 27, 2022, Respondent filed a motion to dismiss because Complainant had not complied with the discovery requests.<sup>10</sup> On June 13, 2022, the ALJ convened a teleconference with both parties and explained to Complainant that he must respond to the outstanding discovery requests, and that his case would be dismissed if he did not comply.<sup>11</sup> On August 17, 2022, Respondent filed another motion to dismiss because Complainant had not provided a calculation of the damages he sought.<sup>12</sup> The ALJ convened a teleconference for September 27, 2022, but neither party appeared.<sup>13</sup> The ALJ rescheduled the teleconference for October 12, 2022, and denied Respondent's motion to dismiss because Complainant had made a good faith effort to comply with the discovery requests.<sup>14</sup>

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<sup>2</sup> Order Dismissing Complaint (Order) at 1 (Nov. 14, 2022).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1-2.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

The ALJ convened another teleconference on October 14, 2022, during which confusion arose over the scope of the proceedings.<sup>15</sup> The ALJ directed Complainant to file an amended complaint no later than October 28, 2022 and provided detailed instructions on what information to include.<sup>16</sup> Complainant failed to amend his complaint as directed, and on November 4, 2022, the ALJ issued an order to show cause as to why this matter should not be dismissed.<sup>17</sup> In response, Complainant filed a document that contained “five one-sentence bullet points” relating to the substance of his complaint.<sup>18</sup> On November 14, 2022, the ALJ dismissed the complaint with prejudice because Complainant failed to comply with the ALJ’s order to show cause and failed to follow the ALJ’s instructions.<sup>19</sup>

On November 28, 2022, Complainant appealed the ALJ’s decision to the Administrative Review Board (Board).<sup>20</sup> On November 29, 2022, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule (Briefing Order). The Briefing Order required Complainant to file an opening brief by December 27, 2022. Complainant did not submit an opening brief as ordered.

On December 28, 2022, Respondent filed a Motion to Dismiss for failure to file an opening brief and failure to comply with the Board’s Briefing Order.<sup>21</sup> Complainant filed a response on January 5, 2023, requesting that the Board not dismiss his complaint because he is a pro se litigant and has done his best to comply with the requirements of the Board.<sup>22</sup> Complainant did not explain why he failed to file an opening brief nor did he file an opening brief.<sup>23</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 8.

<sup>20</sup> Complainant’s Petition for Review.

<sup>21</sup> Respondent’s Motion to Dismiss. In addition, Respondent contends that Complainant did not serve Respondent with his petition for review. *Id.* However, in response to Respondent’s counsels’ November 29, 2022 email to the Board, copying Complainant regarding lack of service, Complainant purported to serve Respondent with his petition for review via email on November 29, 2022. Complainant’s Petition for Review and Certificate of Service; E-mail from Luke Knibb, Complainant, to Paul Szypiotko, Respondent’s counsel (Nov. 29, 2022, 9:32 EST). Thus, whether the email constituted proper service or not (i.e., whether Respondent impliedly consented to email service pursuant to 29 C.F.R. § 26.4(a)(1)), it is clear Respondent received a copy of Complainant’s petition for review on the day after Complainant filed it with the Board.

<sup>22</sup> Complainant’s Response to Motion to Dismiss.


<sup>23</sup> *Id.*

Consequently, on January 9, 2023, the Board issued an Order to Show Cause ordering Complainant to explain why the Board should not dismiss his appeal for failing to timely file his opening brief.<sup>24</sup> The Board cautioned Complainant that if the Board did not receive his response on or before January 23, 2023, the Board may dismiss the appeal without further notice.<sup>25</sup> Nevertheless, Complainant did not file a response as ordered.

The Board has the inherent power to dismiss a case for failure to prosecute in an effort to control its docket and to promote the efficient disposition of its cases.<sup>26</sup> Pursuant to this authority, the Board may dismiss a complaint in a case in which the complainant has failed to comply with the Board's briefing schedule.<sup>27</sup>

Complainant failed to file an opening brief as ordered by the Board. The Board then gave Complainant the opportunity to explain why he failed to file his opening brief, and explicitly warned him that failure to do so could result in dismissal of his appeal. Again, Complainant did not file a response to the Order to Show Cause. In addition, Complainant's response to Respondent's Motion to Dismiss does not address why he failed to timely file his opening brief. Further, this is not the first time Complainant has failed to meet a filing deadline. Given Complainant's failure to respond to, and comply with, the Board's orders, we **DISMISS** Complainant's appeal.<sup>28</sup>

**SO ORDERED.**

  
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**SUSAN HARTHILL**  
 Chief Administrative Appeals Judge

  
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**IVEY S. WARREN**  
 Administrative Appeals Judge

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<sup>24</sup> Order to Show Cause at 2 (Jan. 9, 2023).

<sup>25</sup> *Id.*

<sup>26</sup> *Jessen v. BNSF Ry. Co.*, ARB No. 2012-0107, ALJ No. 2010-FRS-00022, slip op. at 2 (ARB July 26, 2013) (citing *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630-31 (1962)).

<sup>27</sup> *Jessen*, ARB No. 2012-0107, slip op. at 2 (citations omitted).

<sup>28</sup> In any appeal of this Order of Dismissal that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.