



Issue Date: 03 November 2010

CASE NO.: 2010-FRS-00027

*In the Matter of:*

DUSTIN HOLSCHUH,  
Complainant,

v.

IOWA INTERSTATE RAILROAD, LTD.,  
Respondent.

**DECISION AND ORDER DISMISSING COMPLAINT FOR LACK OF PROSECUTION**

This matter arises out of a claim filed by the Complainant under the employee protection provisions of the Federal Rail Safety Act (FRSA), 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), Pub. L. No. 110-53. The complaint alleged that the Complainant was disciplined in retaliation for reporting an on the job injury. The Occupational Safety and Health Administration (OSHA), as the agent of the Secretary of Labor, investigated the complaint and reported its findings on June 8, 2010. Those findings ordered Respondent to take several actions to correct its violation of the FRSA. On July 1, 2010, Respondent appealed the OSHA determination to the Office of Administrative Law Judges (OALJ).

On July 19, 2010, I issued a notice of trial and pre-trial order that required Complainant to file a pre-trial statement, exhibit list, and witness list within thirty (30) days of receipt of the order which set trial for November 3, 2010 in Cedar Rapids, Iowa. Complainant did not file the required documents as of September 13, 2010.

On September 13, 2010, I issued an order which, among other things, provided the following:

**IT IS FURTHER ORDERED** that Complainant is admonished to comply with my July 19, 2010 pre-trial order and *immediately* file and serve on this Office and opposing counsel his pre-trial statement or risk dismissal of this action for want of prosecution and/or failure to comply with an earlier issued order.

Complainant has not filed his pre-trial statement with this Office.

On September 22, 2010, this Office contacted Complainant by telephone to inquire as to when he would comply with my earlier orders and file a pre-trial statement. He indicated that he had no interest in pursuing this matter and this Office asked him to serve opposing counsel and file a confirmation letter with this Office. No written confirmation letter from Complainant has been filed.

Complainant has failed to file his pre-hearing statement, witness and exhibit lists with Respondent's counsel.

My July 19 and September 13 Orders warned Complainant that if he continued to fail to properly respond to my orders setting various deadlines, his complaint could be dismissed.

On October 14, 2010, I issued an Order to Show Cause (OSC) why his complaint should not be denied and this case should not be dismissed for lack of prosecution due to Complainant's refusal to file pre-hearing documents as ordered in my earlier pre-trial order. Complainant had until October 29, 2010 to respond to the OSC.

The OSC also contained the following warning to Complainant if he continued to fail to timely respond to my orders including the OSC:

**If Complainant fails to adequately respond to this Order to Show Cause by October 29, 2010, his complaint shall be DISMISSED for want of prosecution and failure to comply with my earlier orders.**

On October 18, 2010, Respondent filed its motion for summary decision (MSD) seeking a decision in its favor in place of a trial.

On October 22, 2010, I issued an order continuing trial indefinitely so as to address the MSD and ordered that Complainant's response was due on or before **November 2, 2010**.

As of November 3, 2010, Complainant has not filed any response to the OSC or the MSD.

### **The MSD**

I find the MSD must be denied for two reasons. First, the MSD does not contain supporting evidence containing declarations or certified transcripts where declarants and witnesses take an oath under penalty of perjury that their statements of fact are true and of their own personal knowledge. Secondly, the relief sought by Respondent in its MSD – a finding that OSHA was wrong in its analysis of the facts of this case and that, instead, Respondent acted in good faith and justly in disciplining Complainant on March 2, 2009 - cannot be awarded by me when I adjudicate a case on a *de novo* basis in place of the Secretary's findings. For these reasons, I **DENY** the MSD.

### **The OSC**

The regulations at 29 C.F.R. § 18.6(d)(2)(v) also provide me authority to rule that a decision of the proceeding be rendered against the non-complying party denying the complaint for failure to comply with my July 19, September 13, October 14, and October 22, 2010 orders. This authority to dismiss a case also comes from my "inherent power" to control my docket and prevent undue delays in the disposition of pending cases by dismissing cases for lack of prosecution. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962)(Courts possess the "inherent power" to dismiss a case for lack of prosecution). This power is governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 630-31. In *Mastrianna v. Northeast Utilis. Corp.*, ARB No. 99-012, ALJ No. 1998-ERA-033 (Sept. 13, 2000), the Board dismissed a complaint in a case in which the complainant failed to adequately explain his failure to comply with the Board's briefing schedule. The Board explained that it has the inherent power to dismiss a case for want of prosecution in an effort to control its docket and to promote the efficient disposition of its cases. *Id.*, slip op. at 2. *Accord Muggleston v. EG & G Def. Materials*, ARB No. 04-060, ALJ No.

2002-SDW-004, slip op. at 2 (ARB June 30, 2004); *Blodgett v. Tenn, Dep't of Env't & Conservation*, ARB No. 03-043, ALJ N. 2003-CAA-007, slip op. at 2 (ARB Mar. 19, 2004).

As of November 3, 2010, Complainant has not filed any response to the OSC or any other orders. I find that Complainant has failed to comply with my July 19, September 13, October 14, and October 22, 2010 orders requiring Complainant to serve and file pre-trial statements, witness and exhibit lists, and a response to the OSC and MSD no later than October 29, 2010 and November 2, 2010, respectively, in the form of a filed memorandum of points and authorities, affidavits and other documentary evidence in support of his legal position as to why this matter should not be dismissed.

Finally, I find that any lesser sanction would be inadequate given the repeat orders and warnings ignored by Complainant to file and serve pre-trial documents, and responses to the OSC and MSD. As a result, his complaint shall be denied for lack of prosecution.

### **DECISION AND ORDER**

Complainant has filed no response to the OSC or the MSD. Therefore, he has not attempted to demonstrate by a preponderance of the evidence that any violation of the Federal Rail Safety Act of 1982 (FRSA), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53 and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978, has occurred or that any protected activity was a contributing factor in Respondent's adverse action alleged in his complaint. Consequently, Complainant has failed to establish good cause for his failure to comply with my earlier orders in this case. Accordingly, I **DENY** his complaint and **DISMISS** this action *with prejudice* for lack of prosecution.

A

GERALD M. ETCHINGHAM  
Administrative Law Judge

*San Francisco, California*

**NOTICE OF REVIEW:** Review of this Decision and Order is by the Department of Labor's Administrative Review Board. *See* Secretary's Order, paragraph 5.c.15, 75 Fed. Reg. 3924 (Jan. 25, 2010) (effective Jan. 15, 2010). Review of this Decision and Order is by the Administrative Review Board pursuant to §§ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Federal Railroad Safety Act. Accordingly, this Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.