



Issue Date: 26 September 2016

Case No.: **2016-STA-00050**

In the Matter of:

TIMOTHY BACK
Complainant,

v.

MIDWEST TRANSPORT, INC.,
Respondent.

ORDER OF DISMISSAL

This matter arises under the Surface Transportation Assistance Act (“STAA”), as amended by Section 1536 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”), Pub. L. No. 110-53. (Aug. 3, 2007) and the applicable regulations issued thereunder at 29 C.F.R. Part 1978. The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (“OALJ”) found at 29 C.F.R. Part 18 also apply to this matter.

On May 24, 2016, the United States Department of Labor, Office of Administrative Law Judges (“OALJ”) received correspondence dated May 1, 2016 from Timothy Back (“Complainant”) seeking a hearing before an administrative law judge with regard to the Occupational Safety and Health Administration’s (“OSHA”) dismissal of his retaliation complaint. According to the record before me, Complainant was terminated on July 8, 2015 by his former employer, Midwest Transport, Inc. (“Respondent”). Complainant filed a whistleblower complaint with OSHA on February 19, 2016 against Respondent. After investigating, OSHA dismissed the complaint on April 20, 2016, finding that: (1) Complainant failed to file his complaint with OSHA within the 180-day filing period required by the STAA;¹ and (2) Complainant failed to provide justification for tolling the statutory time period, as his complaint with the Federal Motor Carrier Safety Administration (“FMCSA”) was not filed until February 23, 2016.

Complainant appealed OSHA’s findings with this Office on May 19, 2016. In this filing, Complainant stated that he “called the FMCSA in July [2015] to file a report (they have a record of it) however no report was filed by the department.” Complainant further stated that he filed

¹ See 29 C.F.R. § 1978.103(d).

“an FMLA complaint with an attorney within 60 days.” Complainant did not provide evidence of these dates, nor did he provide argument as to why the time for filing his OSHA complaint should be equitably tolled.

On July 15, 2016, this Office issued a Notice of Docketing and Order to Show Cause (“Notice”). The Notice instructed the parties to submit briefs by August 2, 2016 addressing the question of whether Complainant’s STAA complaint was timely filed with OSHA, or alternatively, whether the time for filing should be equitably tolled. The parties were expressly warned that failure to show cause as to why the complaint should be deemed timely filed with OSHA would result in dismissal of the complaint.² Neither submitted a responsive filing to this Order.

On August 19, 2016, I issued a Second Order to Show Cause, providing one final opportunity for the parties to respond to the July 15, 2016 Order. The parties were instructed to submit responsive filings by September 12, 2016. The parties were again warned that failure to show cause as to why the complaint should be deemed timely filed would result in dismissal of the complaint. To date, neither party has submitted a brief or any other filing with this Office.

The regulations at 29 C.F.R. § 18.57(b) provide that:

If a party . . . fails to obey an order to provide or permit discovery . . . the judge may issue further just orders. They may include the following: (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims; (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) Striking claims or defenses in whole or in part; (iv) Staying further proceedings until the order is obeyed; (v) Dismissing the proceeding in whole or in part; or (vi) Rendering a default decision and order against the disobedient party.

In this case, the parties were twice ordered to file briefs on the question of whether the complaint was timely filed with OSHA or whether the time for filing should be equitably tolled. The Complainant was twice warned that his failure to respond would result in the dismissal of this matter. To date, OALJ has no record of a brief filed by any party to this matter, nor do I find any indication that the parties did not receive my prior Orders. Accordingly, I find that the Complainant has abandoned his request for a hearing. Furthermore, I find that the Complainant has failed to establish that he timely filed an OSHA complaint alleging retaliation in violation of the STAA, and he has therefore failed to show cause as to why the case should not be dismissed.

Based on the foregoing, **IT IS ORDERED** that the above captioned matter is hereby **DISMISSED**.

² See *Dickson v. Butler Motor Transit*, ARB No. 02-098, ALJ No. 01-STA-039, slip op. at 4 (ARB July 25, 2003) (ALJ acted within range of his discretion in dismissing STAA complaints after complainant repeatedly ignored the ALJ’s discovery and other orders.).

SO ORDERED.

CARRIE BLAND

Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This Order of Dismissal will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., 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.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant

Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.