U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 August 2018

CASE NO.: 2018-STA-1

In the Matter of

ANTHONY NORMAN,
Pro-se Complainant

v.

SOUTHGATE CONSTRUCTORS,
Respondent

ORDER OF DISMISSAL

This proceeding arises under the Surface Transportation Assistance Act[1] (the "Act") and the regulations promulgated thereunder.[2] The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to the terms and conditions of employment because they refused to operate a vehicle when it would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

Background

Complainant filed his initial complaint with the Occupational Safety and Health Administration (OSHA) on 30 Aug 17. OSHA dismissed that complaint on 12 Sep 17 and on 3 Oct 17 Complainant objected to the dismissal and requested a hearing before the Office of Administrative Law Judges (OALJ). Following initial scheduling conference calls, I directed the parties to file their initial disclosures no later than 14 Dec 17. On 27 Dec 17, Respondent filed a Motion to Compel, citing Complainant's failure to respond to its requests for production of documents and interrogatories. On 4 Jan 18, Complainant responded by telephone, indicating he would fax the required documents to Respondent. On 10 Jan 18, Respondent called to say while it had received some responses, they were incomplete and insufficient.

On 16 Jan 18, Respondent filed a Second Motion to Compel, again citing the failure to provide documents or interrogatory answers, but also adding that Complainant had failed to provide initial disclosures as required by the regulation. On 29 Jan 18, Respondent filed a Motion to Dismiss the complaint, citing Complainant's continued failure to respond to interrogatories and

[1] 49 U.S.C. § 31105.
[2] 29 C.F.R. § 1978.

request for production, to provide initial disclosures, and to appear at a properly noticed deposition scheduled more than 3 weeks in advance.

On 5 Feb 18, I conducted a conference call with both parties. Complainant maintained he never received the Notice of Deposition and was only under the impression that Respondent was merely seeking to engage in a conference call. He also stated that he did not see the relevance of any post termination job search or employment records and objected to providing them to Respondent. I explained the relevance of that information and he responded that he understood he was required to provide it.

I denied the Motion to Dismiss, but specifically ordered that in addition to the initial disclosures previously ordered, Complainant respond to Interrogatories 2 and 3, along with Requests for Production 4, 5, 13, 14, and 18. I further ordered Complainant to respond by either 1) providing the requested information or documents, 2) affirming he does not have the requested information or documents, or 3) seeking a protective order that excuses him from providing the requested information or documents. I ordered Complainant to do so no later than 15 Mar 18 and warned him that if he failed to comply with the order, he may have his claim dismissed or be prohibited from offering certain types of evidence. I also cancelled the hearing date of 24 Apr 18 and continued it until 31 Jul 18.

On 28 Feb 18, Complainant filed a response to interrogatory number 2, 3, and 4. He denied having any responsive documents for request for production number 4, 13, and 14. He provided one document in response to request for production number 18 and cited, but did not provide, a document in response to request for production 14.

On 4 Apr 18, Respondent filed a Second Motion to Dismiss, citing Complainant's failing to attend the previously scheduled deposition and provide initial disclosures, initially refusing to respond to any of its interrogatories and request for production of documents, providing incomplete and nonresponsive answers, refusing to disclose his pay from an interim employer, failing to respond to a request for a deposition date, and failing to appear for a second noticed deposition on 2 Apr 18.

On 6 Apr 18, Complainant filed a response to the Motion to Dismiss. He indicated that he is on the road all the time and may be away from postal delivery of documents for up to 29 days. He added that his cell phone would not receive documents in many areas and that he has realized he should attempt to reach a financial settlement with Respondent. Complainant argued that it would be unfair to expect him to participate in discovery while he was in settlement negotiations over the phone, since Respondent's attorney never indicated that discovery was ongoing.

My staff then contacted both Complainant and Respondent's Counsel, who agreed to discuss the Motion to Dismiss by way of a telephone conference call that would be held at 3:30 PM central time on 13 Apr 18. At the appointed time, Respondent's Counsel appeared by phone, but Complainant failed to appear or answer when his phone was called.

On 26 Apr 18, I issued an order cancelling the hearing set for 31 Jul 18 and warning Complainant that his complaint would be dismissed unless he responded in writing and explained why he failed to comply with my orders, what efforts he has made to communicate with opposing counsel, and why he failed to either appear at the 13 Apr 18 conference call or attempt to contact either opposing counsel or my staff in advance to explain his absence.

On 25 May 18, in the absence of any response from Complainant, I made one final phone call to his number and left a message. He returned the call and I was able to contact Respondent's Counsel and conduct a telephone conference with both sides. Complainant stated that he never received my 26 Apr 18 show cause order,[3] but had been repeatedly calling my office for an extended period, only to be unable to reach anyone and having to leave a message.[4]

When we discussed his failure to provide answers to discovery, Complainant objected that it was not necessary or fair and when I reminded him that we had covered that issue and I had determined that he was required to respond, Complainant answered, "Yeah, that's what you say."

Since my previous show cause order had been misaddressed, I informed Complainant that I would reissue it so that he could fully review it and respond. I then sent him a new order explicitly informing him that

> **The hearing previously set for 31 Jul 18 remains cancelled. This complaint will be dismissed unless Complainant shows cause within 21 days of service of this order at his correct address. Complainant must respond in writing and explain why he has failed to comply with my orders, what efforts he has made to communicate with opposing counsel, and why he failed to either appear at the 13 Apr 18 conference call[5] or attempt to contact either opposing counsel or my staff in advance to explain his absence.**

The order was delivered to the address Complainant provided at the last conference call. It appears to have been delivered on or about 6 Jun 18, and remained at that address until on or about 21 Jun 18, when it was returned as unclaimed. When contacted by phone, Respondent indicated that it has not been able to depose Complainant and has received no discovery from him since February.

Discussion

"If a party … fails to obey an order to provide or permit discovery … the judge may issue further just orders. They may include … [d]ismissing the proceeding in whole or in part… ." [6] Dismissal of a complaint for failure to comply with the Administrative Law Judge's orders is a very severe penalty to be assessed in only the most extreme cases, after due consideration of the

[3] The order was addressed incorrectly and eventually returned as undeliverable. Complainant confirmed his most recent and correct address during the conference call.

[4] The only voice mail message received by my staff was one received by my clerk after I called Complainant earlier that day.

[5] Given that the conference was arranged during a conference call, an incorrect mailing address would not suffice to excuse his absence.

[6] 29 C.F.R. § 18.57(b).

following factors: (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that failure to cooperate or noncompliance could result in dismissal of the action, and (5) whether the efficacy of lesser sanctions were considered.[7]

Although he was the one to initiate this litigation, Complainant has failed to participate in any meaningful fashion in the discovery process that is designed to give both parties a full opportunity to develop a complete evidentiary record and enable me to reach a fair adjudication. Complainant has responded with indifference bordering on contempt to my orders and appears to believe that he has no obligation to make himself available or respond at all, much less in a timely fashion.

In considering the most appropriate remedy to Complainant's misconduct, I note that his refusal to submit to deposition and provide discovery significantly prejudices Respondent, since it effectively renders Respondent unable to prepare for hearing. He has also repeatedly interfered with the judicial process, forcing a number of what would otherwise be unnecessary conference calls and interim orders. Although I considered the possibility that his schedule makes it difficult for him to communicate at times, he appears to have concluded that as a pro se complainant, he is entitled to wait until it is convenient for him to take an action, without regard for the other parties' equally busy schedules or even attempting to explain his situation and ask for more time. Moreover, his specific responses to the decisions I made during our conference calls (e.g., "that's what you say….") shows a lack of respect for the process and is consistent with his failure to comply with my orders. Thus, I conclude that his conduct in this matter is far more likely a consequence of his contempt for the rules, rather than circumstances beyond his control. As a result, I have no reason to believe lesser sanctions would be effective in achieving compliance. Finally, I repeatedly cautioned Complainant that his persistence in ignoring my orders could result in the dismissal of his complaint.

Consequently, the complaint is dismissed.

ORDERED this 2nd day of August, 2018 at Covington, Louisiana**.**

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative

[7] *Howick v. Campbell-Ewald Co.*, ARB Nos. 03-156 and 04-065, ALJ Nos. 2003-STA-6 and 2004-STA-7 (ARB Nov. 30, 2004).

Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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 for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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. §§ 1978.109(e) and 1978.110(b). 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. § 1978.110(b).