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

Issue Date: 01 November 2023

OALJ No.: 2023-STA-00028

In the Matter of:

BRENT BUSCH,
Complainant,

v.

EVO TRANSPORTATION,
Respondent.

ORDER OF DISMISSAL WITH PREJUDICE

This proceeding arises from a complaint filed under the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or the "Act"), and the procedural regulations found at 29 C.F.R. Part 1978. As set forth below, this proceeding will be dismissed with prejudice, because of Complainant's repeated misconduct, including his failure to comply with orders, his unexcused failure to attend multiple status conferences, his failure to make his initial disclosures, his abusive conduct, and other misconduct as detailed below. Complainant's misconduct has made it impossible for this proceeding even to get started, and it further demonstrates that Complainant has abandoned his case.

I. THE ORDER TO SHOW CAUSE

On August 24, 2023, I issued an Order to Show Cause ("OSC") which detailed the history of the case – as set forth in greater detail below – which ordered Complainant to show cause, in writing within fourteen (14) days, why the case should not be dismissed. The OSC permitted Respondent to file a brief setting forth its views on whether the matter should be dismissed. Respondent timely filed its Response to the Order to Show Cause ("Response") on September 7, 2023.

Complainant never filed a response.

II. THE LAW REGARDING DISMISSAL AS A SANCTION[1]

I am vested, by statute, rule, and case authority, with the powers needed to conduct "fair and impartial proceedings."[2] I am further directed to regulate and manage the course of the proceedings,[3] so as to achieve their "orderly and expeditious disposition." *Manoharan v. HCL America, Inc.*, ARB No. 2021-0060, 2022 WL 1469017 at *9 (Apr. 14, 2022) (per curiam).

To those ends, I am also vested with the authority to, when appropriate, dismiss a complaint as a sanction for misconduct, especially when that misconduct hinders my ability to carry out my responsibility to conduct the proceeding fairly and expeditiously:

> If an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissal or default judgments must be available when parties flagrantly fail to comply. To hold otherwise would … vitiate an ALJ's duty to conclude cases fairly and expeditiously.

Sisfontes v. Kuchana, ARB No. 07-107 & 07-114, 2009 WL 2844812 at *5 (Aug. 31, 2009). Of the misconduct that can warrant a dismissal are three that are most pertinent here: (1) failure to prosecute;[4] (2) failure to comply with orders, including discovery orders;[5] and (3) failure to attend

[1] Documents in the record indicate that Complainant resides in Iowa (*see* LS-18). Also, Employer's primary address is listed as Wisconsin (*see* OSHA Case Summary), and Employer's contact person is listed at a Missouri address (*see* OSHA Case Summary). Accordingly, the law of the Seventh or Eighth Circuit will likely govern here. *See* 29 C.F.R. § 1978.112 ("Judicial review") (appeal of final order is to "the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the person resided on the date of the violation").

[2] *See* 29 C.F.R. § 18.12(b) (ALJ has "all powers necessary to conduct fair and impartial proceedings").

[3] *See* 5 U.S.C. § 556(c)(5) (ALJ has authority to "regulate the course of the proceeding").

[4] *See Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 13-002, 2013 WL 2146741 at *2 (Apr. 30, 2013) ("ALJs also have the inherent discretion to dismiss a complaint for failing to prosecute."); *Mara v. Sempra Energy Trading, LLC*, ARB No. 12-090, 2013 WL 1182320 at *2 (Feb. 22, 2013) (An ALJ "has discretion to dismiss a case for lack of prosecution").

[5] *See* 29 C.F.R. § 18.57(b)(1)(v) ("If a party … fails to obey an order to provide … discovery … the judge may issue further just orders. They may include … [d]ismissing the proceeding in whole or in part.").

scheduled conferences.[6]

However, since dismissal sounds the "death knell" of the case, it is properly considered an "extreme sanction" reserved for instances where the misconduct is particularly egregious. *See Pfeifer v. AM Retail Group, Inc.,* ARB No. 2023-0009, 2023 WL 3042622 at *3 (Mar. 22, 2023); *Newport v. Florida Power & Light Co.*, ARB No. 06-110, 2008 WL 592809 at *2 (Feb. 29, 2008).[7]

In determining whether dismissal is warranted, I may consider several factors, including:

> (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 dismissal of the action could be ordered for failure to cooperate or noncompliance; and (5) whether the efficacy of lesser sanctions were considered.

Ho v. Air Wisconsin Airlines, ARB No. 2020-0027, 2021 WL 2935806 at *3 (June 30, 2021) (same).

III. CHRONOLOGY

As detailed below, Complainant has made it impossible for this proceeding to move forward.

Near the outset of the proceeding, Complaint, who is unrepresented, made clear that he did not know how to litigate, and asked for help in doing so. However, Complainant has, over and over again, failed to attend properly noticed telephone status conferences, and disrupted the scheduling of others, making it impossible to give him any help. He provided no notice or explanation for this conduct, other than to claim, contrary to the facts, that he did not know about the conferences.

Complainant has failed to provide his "initial disclosures"[8] even after he was ordered to do so, and even after the procedure was explained to him. Complainant also refused to include

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[6] *See* 29 C.F.R. § 18.21(c) ("When a party … fails to appear at a scheduled … conference, the judge may, after notice and an opportunity to be heard, dismiss the proceeding … if the party fails to establish good cause for its failure to appear.")

[7] *Accord*, *Woods v. Union Pacific R. Co.*, 957 F.2d 548, 550 (8th Cir.), *cert. denied*, 506 U.S. 865 (1992) ("Although dismissing a case with prejudice is a severe sanction that should be taken sparingly, it is well within the District Court's discretion to dismiss a case with prejudice if there is a clear record of delay"); *Webber v. Eye Corp.*, 721 F.2d 1067, 1069 (7th Cir. 1983) ("A dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing.").

[8] *See* 29 C.F.R. § 18.50(c)(1) ("Initial disclosure").

Respondent on many of his emails to the court, despite repeated admonitions that he should include Respondent.

1. COMPLAINANT CAUSES CANCELLATION OF THE MARCH 31, 2023 PRELIMINARY STATUS CONFERENCE.

On March 15, 2023, my office emailed the parties advising them that I wished to set up a preliminary conference call "to discuss procedures and scheduling." The email offered four (4) date and time slots for the conference, including "Friday, March 31 at 10:00 A.M. Eastern Time." On March 16, 2023 Complainant emailed responded by an email – but not copied to Respondent ("*ex parte*") – electing the March 31st slot, stating "Friday, March 31 at 10:00 Am [*sic*] would work best for me." On March 17, 2023, my office emailed the parties that the conference was "set for **Friday, March 31 at 10:00 A.M. Eastern Time**" (emphasis in text).

Complainant then waited ten (10) days, until March 27, 2023, to send an *ex parte* email to my office that he was no longer available for the conference.

2. COMPLAINANT FAILS TO ATTEND THE APRIL 25, 2023 STATUS CONFERENCE.

Accordingly, on March 27, 2023, my office emailed the parties asking for their availability for five (5) different date and time slots, including Tuesday, April 25, at either "10:00 A.M. Eastern Time" or "01:00 P.M. Eastern Time." The email requested Complainant to "please make sure to include Respondents on further communication."

The next day, Complainant sent an *ex parte* email response to my office, stating "I'd prefer Tuesday 25th if possible," without specifying a time slot. Accordingly, on March 29, 2023, the conference was continued, by email to the parties, "to **Tuesday, April 25 at 1:00 P.M. Eastern Time**" (emphasis in text).

Complainant was a no-show at the April 25, 2023 Status Conference.

Respondent attended the conference, and waited on the line while my office called Complainant and emailed him. Because of Complainant's absence, nothing was accomplished at the conference, which was called after a fifteen-minute wait.

Via formal order dated April 27, 2023, I rescheduled the conference once again, this time for May 26, 2023. After the April 25th conference ended, Complainant called my office to say that he missed it because he mistakenly thought the conference time was 1:00 PM *Central* Time. In light of the clear scheduling of the conference for "Eastern Time," and also in light of Complainant's later conduct – especially his failure to appear at subsequent status conferences even after the time zone issue was cleared up – I find this explanation to be *not credible*.

3. COMPLAINANT ATTENDS THE MAY 26, 2023 STATUS CONFERENCE AND THE LITIGATION PROCESS IS EXPLAINED TO HIM.

Complainant attended the May 26, 2023 status conference. I acknowledged Complainant's status as an unrepresented litigant, and advised him that he was entitled to use a non-lawyer representative if he wished. I explained to him that the Rules of Practice would govern this proceeding, and how he could access them. I explained to him what discovery is, discussed his obligation to make initial disclosures, and explained how he could get help with technical matters.

I set pretrial deadlines, including a June 12, 2023 deadline for filing his Complaint, after explaining to Complainant what a Complaint is.[9] I also set a December 6, 2023 date for the Formal Hearing.

4. Complainant Causes Cancellation of the June 21, 2023 Status Conference.

In the lead-up to the June 12, 2023 deadline for filing his Complaint, Complainant sent abusive and profanity-laced communications[10] – two (2) *ex parte* emails and several telephone calls – to my staff, principally complaining that he did not understand how to file his Complaint. Accordingly, on June 13, 2023, my office emailed both parties trying to schedule a telephonic status conference, and offering four (4) options for the date and time of the conference. My office once again advised Complainant: "please make sure to copy opposing counsel on any emails or filings

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[9] "It should be very short, very short. It's not required to include any actual evidence. You don't have to tell me this person said this and then that person said that and so forth. Just give me a general outline of what happened and why you think it's wrong, why you think it violates the law, why you think you're entitled to relief." May 26, 2023 Conference Call Transcript 11.

[10] On June 6, 2023 at or about 11:47 AM, Complainant spoke separately to my office and to my paralegal. Complainant stated that he did not receive information about how to file his complaint. He then threatened self-harm, and threatened to get a gun to carry that out.

On June 12, 2023, Complainant sent an *ex parte* email to my office. The email acknowledged that he had received the Notice of Assignment sent to him as an email PDF attachment on June 6, 2023, but complained that "I have no idea what the hell any of this crap means," that he doesn't "understand all of this legalese bullshit," and that "[t]his is a joke, and you all obviously want me to fail."

My office then emailed Complainant explaining how to file his complaint, emphasized that he "**must**" serve it on opposing counsel, and that he must maintain a "respectful tone without the use of expletives."

Complainant responded with an *ex parte* email back to my office. This email complained that he still did not understand how to file his complaint, and that the advice he was given did not help any.

Complainant then left a voicemail for my office. He again complained that he did not understand how to proceed. He stated that he does not "understand this shit," that it "seems like you guys just want to set me up to fucking fail," and that "the [unintelligible] was fucking ridiculous."

I note that Complainant's abusive and profane language when speaking with my staff differed markedly from the restrained and respectful language he used when I was on the line.

with the court."

Complainant did not respond to the request. Employer opted for June 21, 2023 at 2:00 PM (ET). My office then emailed Complainant on June 15, 2023, asking if he was available for the June 21st conference. Complainant still did not respond.

Therefore, on June 16, 2023, I issued an email order[11] setting the conference for June 21, 2023 at 2:00 PM. Soon afterward, Complainant sent an *ex parte* email to my office stating, "No, the 21st is not a good time for me." Later, even though Complainant had been asked for input on the date, Complainant sent another *ex parte* email stating, "I did not agree to this date and time, and I wasn't asked if it was okay for me. How come one side gets to pick and I'm steamrolled over?"

5. Complainant Fails To Attend The July 6, 2023 Status Conference.

I tried again. My office emailed the parties on June 16, 2023, asking for their availability for a call on July 5 or July 6, 2023. The email again reminded Complainant to copy Employer on emails. When Complainant complained that he did not know Employer's email, my office provided it, and again asked for Complainant's availability on July 5 or 6, 2023. Complainant did not respond.

My office emailed Complainant again on June 20, 2023, explaining what the call was to be about, reminding Complainant to copy Employer on emails, and asking again for his availability on July 5 or 6, 2023. Complainant responded by email, this time copied to Respondent, stating "It seems I really don't have much of a choice, do I? Schedule it for now, but I can't guarantee something might change before then."

Therefore, on June 21, 2023, I issued a formal order[12] setting the status conference for July 6, 2023 at 11:00 AM (ET). The order was served on Complainant at his email address, bebusch@gmail.com. It was also served on Complainant at his physical address by United Parcel Service ("UPS"). However, the UPS was returned to my office with the notation "Package Not Picked Up."

Complainant was a no-show at the July 6, 2023 conference.

Respondent attended the conference, and once again waited on the line while my office called Complainant and emailed him, to no avail. Because of Complainant's absence, no progress was made in the litigation. If anything, the litigation regressed, as it became clear that neither Respondent nor the court understood what the basis of Complainant's case was. Specifically, his appeal papers indicated that he was complaining about being terminated, while the document he

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[11] In an "email order," the text of the order is included in the email itself.

[12] In a "formal order," the text of the email is included in a PDF document attached to the email.

said was his Complaint asserted only that he had been "written up." The conference was called after twenty-five minutes, with no appearance by Complainant.

6. Complainant Fails To Attend the August 16, 2023 Status Conference

I tried yet again. On July 10, 2023, I issued a formal order which, among other things,[13] scheduled another status conference for August 16, 2023 at 2:00 PM (ET). The order required all parties to attend, and warned that "[f]ailure to attend the call may result in sanctions including dismissal of the claim." The order was served on Complainant at his email address, bebusch@gmail.com. To avoid the problem of his not picking up the prior UPS delivery, this order was also served on Complainant's at his physical address by regular mail.

Complainant was a no-show at the August 16, 2023 conference.

During the conference, while Respondent waited on the line, my staff called Complainant and emailed him, reminding him of the conference, to no avail. That evening, long after the conference, Complainant sent an *ex parte* email to my office indicating that – assertedly like the July 6, 2023 conference – "I also wasn't notified of the date and time beforehand. Seems to be a pattern, doesn't it?"

7. Complainant Fails To Make His Initial Disclosures.

In the July 10, 2023 formal order (and previously, in the May 31, 2023 Notice of Assignment), the parties were ordered to make their initial disclosures by July 31, 2023.[14] At the August 16, 2023 status conference, Respondent advised that it had made its initial disclosures to Complainant. However, Respondent never received any initial disclosures from Complainant.

When previously asked if he had made his initial disclosures, Complainant demurred, saying he had "no legal experience whatsoever," and that the court was "going to have to hold my hand, if that's possible." May 26, 2023 Transcript 7-8. I explained that I would not hold his hand – my obligation, as described above, is to be fair and impartial – but in consideration of his unrepresented status, I provided him with the information he needed to comply:

> Okay. So, Mr. Busch, you will see when I send you this order, you will be directed to a website that will tell you about the rules of practice. And those are the rules that will govern this proceeding.

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[13] As discussed below, the order also ordered Complainant to make his initial disclosures.

[14] The parties were initial ordered by Chief Administrative Law Judge Stephen R. Henley to make their initial disclosures by March 16, 2023 (within 21 days of the February 23, 2023 Notice of Docketing). Neither party complied with this order. However, Respondent explained that at that point it did not know the basis of the appeal, not having been served with the appeal papers or the complaint. Realistically, therefore, it could not comply.

> One of those rules deals with what are called initial disclosures, and I'm not going to explain it to you now, but you're going to – it's going to be your obligation to go take a look, go to that website, read through those rules, and specifically look at the section that talks about initial disclosures and they will tell you what you have to do, and it will be your obligation to do it.
>
> I'm not going to give you a deadline now, but there will be a deadline in the order that I send to you as to when you must complete the initial disclosures. You will be – you might – I hope you will be helped by the initial disclosures that you will receive from Ms. Ramchandani-Raj because she's at a law firm that certainly knows how to do it and that may help. I mean, it's independently your responsibility to do it, but when you get the initial disclosures from the Employer, that should help you understand what it is you're obligated to do. So just pay very careful attention when you get the order from me after this telephone call.

May 26, 2023 Transcript 9-10.

Complainant never made his initial disclosures.[15]

8. Complainant Fails To Respond to the Order To Show Cause.

As noted above, an Order To Show Cause was served on the parties on August 24, 2023, requiring Complainant to serve his response no later than September 7, 2023 (fourteen (14) days from the date of the OSC). The OSC was served on Complainant by email and by regular mail. A few hours later, Complainant sent an *ex parte* email to the OALJ mailbox and to my staff, stating the following:

> Can somebody explain to me why when this all began, I was told that if I chose email instead of e- service, that everything going forward was supposed to be by email, and now I got an e-service email today. When you tell me that everything will be done through email, I'm obviously expecting emails, not the idiotic e-service website. This is beyond ridiculous that you guys can't even follow what you told me months ago when I was forced to pick one or the other.

I instructed my staff to not answer *ex parte* emails, and again instructed them not to engage in telephonic correspondence with Complainant, so that they would not be subjected to Complainant's

[15] I rely on Respondent's counsel's representation. Complainant has never indicated otherwise, and has not attended status conferences where these matters could be addressed.

abuse and profanities.

Complainant then left a voicemail with my office on August 31, 2023. In the voicemail, Complainant states that he had not received any correspondence from my office since May, and that he did not know about the July or August status conferences. He stated in a profanity-laced[16] message, that his case was "not being handled properly."

On September 1, 2023, Complainant called the direct line of one of my staff members,[17] acknowledging that he had notice of the July 6, 2023 status conference, but that he did not receive any additional information on this phone call. Further, he stated that he did not know of the August 14, 2023 status conference until receiving a voicemail from my office on August 14.[18] Again, I instructed my staff to not respond, as I am unwilling to have them subjected to Complainant's abuse and profanities.

On September 7, 2023, the same day Respondent filed its response to the OSC, Complainant emailed, with a copy to Respondent:

> I don't know what is going on with all of you people, but we agreed that this would be handled by email. Since April or May, I have received exactly one email, and that was back in August to let me know a phone hearing was already in progress! How in the hell am I supposed to be involved when I'm continually left out of all communications? I've left at least two voicemails over the past two weeks for Greta,[19] along with at least two emails, none of which has gotten a response I also called the main OALJ office and left yet another voicemail; the result was the same: crickets.

On September 8, 2023, Complainant called my office and spoke to one of my staff members. He again used profane language.

Complainant did not otherwise respond to the OSC.

Respondent timely filed a response to the OSC. In it, Respondent urges me to dismiss the case due to Complainant's failure to follow my orders, failure to serve any document on Respondent, failure to appear on the status conferences, and for failure to provide initial

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[16] Specifically, Complainant characterized his case as a "big giant clusterfuck."

[17] The May 31, 2023 Notice of Assignment specifically provides that calls are to be made to the main office line at 617-223-9355.

[18] Complainant concluded that he was "frustrated beyond belief" and that he was ready to say "fuck it and be done with it because you guys are not helping me one single bit."

[19] One of the staff members in my office.

disclosures. Response 5. Respondent argues that Complainant's "delay tactics, abrasive and non-conforming conduct shows bad faith and are directly causing interference with the judicial process and Respondent's ability to defend its position."

9. COMPLAINANT REBUFFS MY EFFORT TO BRING HIM INTO THE LITIGATION.

Instead of dismissing the case in light of Complainant's conduct and his failure to respond properly to the OSC, I determined to give Complainant an opportunity to address the OSC in a telephone conference. Accordingly, on September 25, 2023, my office emailed the parties with three (3) time and date slots for a status conference "to discuss the Order To Show Cause," and requesting a response by September 28, 2023. Respondent quickly responded that it was available on October 25, 2023.

On September 27, 2023, Complainant responded with an email, copied to Respondent. Complainant complained that he has not been included on emails, and therefore was not notified about "the hearing on 7/6/23, or 8/16/23." Complainant then advised, "I will be working at the time of all three times/dates listed, so I'm not sure how I'm supposed to proceed." Complainant did not suggest any alternative dates or times, nor did he provide a work schedule or any other information that might make it possible to hold a status conference amenable to his schedule.

10. COMPLAINANT REBUFFS MY EFFORT TO ACCOMMODATE HIM.

In order to accommodate Complainant's schedule, I issued an email order on September 28, 2023, proposing four (4) different dates for the conference. Since Complainant stated he was unavailable on the previous dates I had proposed, I further accommodated him by allowing him to choose his own dates for the conference if the proposed dates were not good for him:

> You must advise as to your availability on the above dates and times by no later than **seven days from today**.
>
> If you are unavailable on the above dates and times, then no later than seven days from today, **you must propose four dates and times that you are available**.
>
> **Failure to timely respond to this order, or to attend this conference, once scheduled, will be grounds for sanctions, including dismissal of the case.**

September 28, 20213 Order (emphases in text). Respondent quickly responded with its available dates.

This order also detailed why I was giving Complainant another chance to get back into the litigation. Specifically, I thought I had detected a pattern that might explain Complainant's lack of

participation in the litigation:

> Having reviewed all the emails and filings in this case, it appears that Complainant consistently responds to emails and email orders, even if he does not always maintain a civil tone in doing so. However, he consistently does not respond to formal orders delivered to him as PDF attachments to emails. In addition, after such PDF formal orders are emailed to Complainant, he consistently complains that he did not receive the formal order. This pattern leaves open the possibility that Complainant's failure to respond to the PDF formal orders (including those notifying him of upcoming status conferences) may be a technical or technological issue, rather than a deliberate refusal on his part to litigate this case.

September 28, 2023 Email Order 1-2. Accordingly, the September 28, 2023 email order was contained entirely in the email itself, avoiding the need for Complainant to have to open a PDF document.[20]

Complainant did not respond.

IV. COMPLAINANT'S CONDUCT WARRANTS DISMISSAL

As discussed above, since dismissal is such an extreme sanction, I will consider the pertinent factors that will inform whether that sanction should be imposed:

1. PREJUDICE TO THE OTHER PARTY

Respondent argues that it has been prejudiced by Complainant's "unnecessarily creating delays and not allowing Respondent to timely and adequately defend his ambiguous claims." Response 5. I agree that Respondent has been prejudiced by Complainant's conduct.

Complainant's failure to make clear what his Complaint is, combined with his failure to provide initial disclosures, has made it impossible for Respondent to prepare a defense or consider settlement possibilities.[21] The initial Complaint that was sent to OALJ from OSHA indicated that the alleged violation involved Complainant getting a "written warning," and "later terminated."

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[20] It appears, however, that there was no technological impediment. Complainant acknowledged that he received and opened the Notice of Docketing, and the Notice of Appearance, which were both sent as PDF attachments to emails.

[21] Respondent was initially prejudiced by Complainant's failure to serve Respondent with his Objections to the Secretary's Findings. See 29 C.F.R. § 1978.106(a) ("copies of the objections must be served … on the other parties of record"). However, I am satisfied that this was remedied when my office forwarded the appeal documents to Respondent.

However, the Complaint submitted to the court via email by Complainant only complained of being "written up." Complainant then failed to appear at status conferences, detailed above, where the confusion could have been resolved, leaving Respondent confused about what it was supposed to defend against.

Respondent was further prejudiced by Complainant's failure to include it on many emails he sent to the court. These *ex parte* emails left Respondent in the dark, however temporarily,[22] about what Complainant was doing in regard to the proceeding.

Respondent was further prejudiced by Complainant's repeated failures to attend status conferences. This caused Respondent (and the court) to expend valuable resources needlessly, in scheduling the conferences, re-scheduling them, and then sitting around waiting, in vain, for Complainant to join the conference.

I find that Respondent has been prejudiced by Complainant's failure to provide initial disclosures, failure to attend status conferences, *ex parte* communications, and failure to clarify what this proceeding is about.

2. Interference with the Judicial Process[23]

As detailed above, Complainant's failures to participate in status conferences, and in the scheduling of status conferences interfered with an essential tool of case management – the status conference. Such conferences are particularly important here, where Complainant is unrepresented, and has made it clear that he needs guidance in how to participate. The status conference is sufficiently important to the judicial process, that failure to attend subjects the party to dismissal of his case. *See* 29 C.F.R. § 18.21(c) ("When a party … fails to appear at a scheduled … conference, the judge may, after notice and an opportunity to be heard, dismiss the proceeding … if the party fails to establish good cause for its failure to appear.")

In addition to simply not participating in his own case, Complainant has engaged in outright abusive conduct. Complainant has used profane language in telephone calls with my staff, and in voicemails left with my office. His emails are often laced with profanity.[24] He has advised that he may get a gun, and may use it on himself. My office was advised that on September 11, 2023, Complainant called another District Office and proceeded to use "colorful" language when speaking with that office's court staff regarding the status of the case, for thirty minutes. This

[22] My office forwarded Complainant's emails to Respondents. However, Complainant's *ex parte* phone calls to my staff could not be forwarded to Respondents.

[23] The power to dismiss as a sanction is to be exercised "discreetly," including "fashioning an appropriate sanction for conduct which abuses the judicial process." *Newport v. Florida Power & Light Co*., ARB No. 06-110, 2008 WL 592809 at *2 (Feb. 29, 2008).

[24] This conduct is detailed in the OSC. OSC 3-5.

conduct has caused me to end my office's practice of informal communication as needed to discuss non-substantive matters with the parties – such as providing them with phone numbers and Teams log-in information. I have taken this action to avoid subjecting my staff to Complainant's abusive conduct and profane language.

Communication with the Complainant, given his lack of appearance on status conference and continued abusive and profane treatment of court staff, has been impossible and has greatly interfered with the judicial process. I find that Complainant has thereby interfered with the judicial process, and indeed has abused the process.

3. Bad Faith and Culpability of Complainant

Complainant's behavior during this proceeding points convincingly to bad faith on his part. Complainant's early failures – his disruption of the scheduling of the very first status conference, and his failure to attend that conference once scheduled – could arguably be explained by his unrepresented status, his unfamiliarity with the Rules, even his residence in a different time zone from the court's. However, his repeated failures, especially coupled with his contrary-to-fact excuses and his abusive and profane communications, and all point to bad faith.

As detailed above, Complainant failed to appear at, or disrupted the scheduling of, multiple status conferences, despite receiving proper notice of their dates and times. Complainant repeatedly asserted that he was not given notice of these conferences. However, as detailed above, my office provided early prior notice of each status conference by email sent to Complainant's email address.

For example, as detailed above, Complainant failed to participate in the scheduling of a June 21, 2023 status conference. He then waited until *after* it had been scheduled to state in an *ex parte* email, that no, that date "is not good for me." *See* § III(4), above.

In an effort to accommodate Complainant, to give him a chance to explain why I should not dismiss the case, and to bring him into his own litigation, I tried to schedule a final status conference, as discussed above. *See* § III(9), (10), above. With the first email, Complainant asserted that none of the three (3) proffered dates were good for him. But when I offered four (4) different dates, and asked Complainant to provide more if those four were no good, the offer was met with complete silence.

I have considered whether Complainant really was not receiving notice of status conferences, as he repeatedly claimed. I find that Complainant did receive notice of these conferences. All communications from my office – emails, email orders and formal orders – were sent to Complainant's email address, bebusch@gmail.com. Complainant confirmed that he was receiving emails at that address by, on several occasions, replying to my office's emails *from that address*. Complainant also confirmed that he was able to open the PDFs which contained the

formal orders sent to him.[25]

Finally, Complainant's excuses for not attending status conferences were untruthful. For example, there was a robust back-and-forth email correspondence between my office and Complainant, that involved setting up the July 6, 2023 status conference.[26] However, after Complainant failed to show up at the conference, he sent an *ex parte* email to my office complaining that he "wasn't notified of the date and time beforehand."

As another example, on September 7, 2023, the day his response to the OSC was due, Complainant instead emailed my office stating:

> Since April or May, I have received exactly one email, and that was back in August to let me know a phone hearing was already in progress! How in the hell am I supposed to be involved when I'm continually left out of all communications?

This email is untruthful, and appears to be an attempt to explain all of Complainant's past failures to participate in this proceeding.

In fact, Complainant received multiple emails from my office in June. More importantly, he *responded to some of them by return email*, showing that he received them.[27] Complainant's demonstrably false assertion about why he could not "be involved" is further evidence of bad faith on his part.

Given all the opportunities Complainant had to participate, and his willful failure to participate – other than with abuse and profanities – I find that Complainant acted in bad faith. Despite his untruthful excuses for his failure to participate – shifting the blame on an asserted lack of communication – I find that Complainant was solely culpable for his misconduct.[28]

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[25] For example, in responding to the Notice of Assignment – which was sent as a PDF attachment to an email – Complainant complained that he did not "understand all of this legal bullshit." Also, the only status conference Complainant attended was scheduled via a formal order – a PDF document – emailed to Complainant.

[26] The June emails started with my office emailing the parties on June 13, 2023, asking for available dates for status conference, after Complainant indicated he needed "meaningful direction as to proper procedure." Following silence from Complainant, and after June 21, 2023 was set, Complainant emailed back that the date was "not good for me," and complained about being "steamrolled." My office then emailed the parties asking for availability on July 5 or 6, 2023. After some prompting, Complainant eventually gave the go-ahead, in a way, saying "I guess schedule it for now, but I can't guarantee something might change before then." On June 21, 2023, my office therefore set the conference for July 6, 2023 at 11:00 AM Eastern Time, notifying both parties via formal order. Complainant did not show.

[27] My office emailed Complainant twice on June 12, 2023, and Complainant responded to both by email. On June 13, 2023, my office emailed Complainant asking for dates for a status conference. On June 16, 2023,

[28] *See Bacon v. Con-Way Western Express*, ARB No. 01 058, 2003 WL 2001933 at *4 (Apr. 30, 2003) (Complainant culpable where he was "solely responsible for his refusal to proceed.").

4. DISMISSAL WARNINGS

I warned Complainant multiple times that his conduct could lead to dismissal of his case:[29]

(1) On June 21, 2023, my order setting the July 6, 2023 status conference – at which Complainant was a no-show – warned that "[f]ailure to attend the call may result in sanctions including dismissal of the claim."[30]

(2) On July 10, 2023, my order setting the August 16, 2023 status conference – at which Complainant was a no-show – again warned that "[f]ailure to attend the call may result in sanctions including dismissal of the claim."

(3) On August 24, 2023, I issued an Order To Show Cause in which I ordered Complainant to "**SHOW CAUSE**, in writing, why this matter should not be **dismissed**" (emphasis in text), to which Complainant did not file a response.

(4) On September 28, 2023, I ordered the parties to provide available dates for a status conference so that we could sort out whether Complainant's non-participation "may be a technical or technological issue, rather than a deliberate refusal on his part to litigate this case."

    The order warned that "[f]ailure to timely respond to this order, or to attend this conference, once scheduled, will be grounds for sanctions, including dismissal of the case." Complainant did not respond.

5. EFFICACY OF LESSER SANCTIONS

Finally, I consider the efficacy of lesser sanctions. I issued the NOA on May 31, 2023. Nearly four months later, there has been no substantive progress in this case. I have considered alternative sanctions such as continuing the case. However, Complainant has not given me any reason to believe that a continuance would cure his refusal to follow court orders, to cooperate with Respondent in conducting discovery, or to end his abusive conduct. *See Bacon*, 2003 WL 2001933 at *4 ("Finally, as Bacon has given neither the ALJ, nor the Board, any indication whatsoever that he is either willing or able to conduct himself appropriately, if offered the opportunity to proceed with this case, we do not believe that a lesser sanction would be efficacious.").

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[29] I am aware that the warnings did not specify whether the dismissal would be with or without prejudice. However, I do not believe that Complainant is entitled to rely on any belief he might have that he is entitled to abuse the judicial process and engage in the other behavior detailed in this order, because he can always re-file later.

[30] I am not counting the warning in the Notice of Assignment that failure to comply with its provisions could lead to dismissal, as Complainant at the early stages of this proceeding credibly stated that he did not know what was going on.

I have considered a dismissal without prejudice, so that Complainant could re-file his claim when he was better able to pursue it. However, I have concluded that this would be profoundly unfair and prejudicial to Respondent. Respondent has several times had to attend status conferences where counsel sat waiting for Complainant, to no avail. Respondent has made its initial disclosures to Complainant, but received nothing from him in return.

In short, Complainant has engaged in conduct that amounts to harassment, whereby Respondent has had to: respond to my orders attempting to accommodate Complainant; engage in futile communications over status conference scheduling; wait on the line needlessly when Complainant was a no-show at the status conferences; engage in discovery; and file a response to the OSC. While I have made Respondent jump through these hoops – needlessly, as it turns out – Complainant has done nothing. I believe it would be unfair to allow Complainant to re-file his claim and make Respondent go through all this again.

I find no lesser sanction that dismissal, with prejudice, is appropriate.

V. CONCLUSION

Considering the factors pertinent to dismissal as a sanction, I find that a dismissal with prejudice is fully warranted by Complainant's unexcused failures to: comply with my orders; attend multiple status conferences; cooperate in scheduling conferences; make his initial disclosures; and file a response to the OSC. I also find that his falsehoods, abusive and profane conduct against my staff, and general appearance of having abandoned this lawsuit, provide additional grounds for dismissal with prejudice.

VI. ORDER

Accordingly, **IT IS HEREBY ORDERED** that Complainant's complaint of discrimination against EVO Transportation, together with this proceeding, is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

NORAN J. CAMP
Administrative Law Judge

Boston, Massachusetts

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 the administrative law judge's decision.
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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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).

FILING AND SERVICE OF AN APPEAL

1. **Use of EFS System:** The Board's Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to https://efile.dol.gov. All filers are required to comply with the Board's rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at https://www.ecfr.gov/current/title-29/subtitle-A/part-26.

A. **Attorneys and Lay Representatives:** Use of the EFS system is **mandatory for all attorneys and lay representatives** for all filings and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown. 29 C.F.R Part § 26.3(a)(1), (2).

B. **Self-Represented Parties: Use of the EFS system is strongly encouraged for all self-represented parties** with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party.

Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

Administrative Review Board
Clerk of the Appellate Boards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board's EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to https://efile.dol.gov, select the button to "Create Account," and proceed through the registration process. If the party already has an account, they may simply use the option to "Sign In."

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting "eFile & eService with the Administrative Review Board" from the main dashboard, and selecting the button "File a New Appeal - ARB." In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFS System, select "eFile & eService with the Administrative Review Board," select the button "Request Access to Appeals," search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button "Submit to DOL."

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at https://efile.dol.gov.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

- **Service on Registered EFS Users:** Service upon registered EFS users is accomplished automatically by the EFS system.

- **Service on Other Parties or Participants:** Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.