UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Newport News District Office

Issue Date: 06 June 2024

In the Matter of

RICO MITCHELL,
Complainant,

v.

WARREN PAVING, INC.,
Respondent.

OALJ Case No. 2023-STA-00055
OSHA Case No. 4-1220-21-057

ORDER OF DISMISSAL

This case arises under the employee protection provisions of the Surface Transportation Assistance Act ("STAA") at 49 U.S.C. § 31105 ("Section 405") and the implementing regulations at 29 C.F.R. Part 1978. Section 405 of the STAA prohibits an employer from discharging an employee or otherwise disciplining or discriminating against an employee with respect to compensation, terms, or privileges of employment because the employee engaged in, or is perceived to have engaged in, protected activity pertaining to commercial motor vehicle safety, health, or security matters.

BACKGROUND

Complainant Rico Mitchell, who is self-represented, worked for Respondent Warren Paving, Inc. as a commercial truck driver from July 14, 2021, until he was terminated on August 25, 2021. On the same date of his termination, Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging he was dismissed in retaliation for raising transportation safety and security concerns about his assigned vehicle. OSHA dismissed the complaint, finding that a violation under Section 405 of the STAA had not occurred. Complainant timely filed objections and a request for hearing before the Office of Administrative Law Judges ("OALJ").

On July 19, 2023, I issued a *Notice of Hearing and Prehearing Order* ("*Prehearing Order*") directing the parties to, *inter alia*, commence and conduct discovery pursuant to 29 C.F.R. §§ 18.50-18.65, and warning that failure to comply with the provisions of the *Prehearing Order* may result in the imposition of sanctions, including dismissal of the case.

On September 28, 2023, Respondent served Complainant with interrogatories, requests for admission, and requests for production. It also requested that Complainant make himself available for a deposition. Complainant provided responses to the interrogatories and requests for admission but did not provide responses to the requests for production. Complainant objected to the deposition because it would be "burdensome and annoying." Therefore, on November 20, 2023, Respondent filed a motion to compel seeking an order compelling Complainant to provide responses to the requests for production, make himself available for deposition, and cure deficiencies associated with several responses to interrogatories and requests for admission. Complainant did not respond to the motion to compel.[1]

On November 28, 2023, Complainant filed "the following for hearing," labeled as Exhibits A thru F: Respondent's Harassment, Discrimination, and Retaliation Prevention policy; Respondent's letter to OSHA; Mississippi Department of Employment Security Board of Review ("MDES") Decision; MDES Fact Finding Questionnaire; photographs of a "Mack" truck steering column; and a recording of a MDES hearing.[2]

On December 21, 2023, I issued an *Order: Denying Complainant's Motion to Compel, Granting Respondent's Motion to Compel, Extending Discovery, Cancelling Hearing, and Vacating Deadlines* ("*Discovery Order I*"). Among other things, I granted Respondent's motion to compel and warned that failure to comply may result in the imposition of sanctions, including the dismissal of the case.[3] Complainant was directed to make himself available for deposition, respond to the requests for production, and supplement his responses to interrogatories 1-8, 14, 16-19, 21 and requests for admission 3-5, 8.[4] Addressing the deficiencies associated with

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[1] *See Order: Denying Complainant's Motion to Compel, Granting Respondent's Motion to Compel, Extending Discovery, Cancelling Hearing, and Vacating Deadlines Discovery Order*, at 2-3.

[2] Complainant also filed an accompanying *Motion to Submit*. Because no such motion is needed to submit proposed exhibits, *see Prehearing Order Sec. 4.3.*, a ruling on the motion was unnecessary.

[3] *Discovery Order I* at 5-6.

[4] *Id.* at 4-5.

Complainant's responses to the foregoing interrogatories and requests for admission, I stated as follows:

> Complainant's responses are improper and unresponsive, and his objections lack merit. For instance, Complainant responded "N/A" to [interrogatories] 1, 2, 19 and [requests for admission] 3, 4, 5, 8. In response to an interrogatory asking for the identity of experts, Complainant responded: "Samsung Galaxy 20 ultra. The whole truth." He also responded simply with an "Okay" when asked for the basis of a denial or qualified response to any request for admission. Similarly, Complainant merely stated "Objection" to certain interrogatories and did not specify the nature of the objection or provide any additional detail. … Therefore, Complainant's responses to the [interrogatories] and [requests for admission] are deficient.[5]

On January 3, 2024, Complainant provided Respondent with responses to requests for production and supplemental responses to interrogatories and requests for admission.[6] On February 13, 2024, Respondent's counsel deposed Complainant.[7]

On May 2, 2024, Respondent filed a *Motion to Dismiss and for Sanctions* ("*Motion to Dismiss*") requesting that this matter be dismissed with prejudice or, alternatively, that Complainant be required to supplement his deficient discovery responses and sit for another deposition, with the costs associated with said deposition (including Respondent's attorney fees) to be paid by Complainant. Respondent contended that Complainant failed to obey *Discovery Order I* or otherwise comply with his discovery obligations, arguing as follows:

> *First*, despite [*Discovery Order I*] expressly stating that Complainant must 'fully respond' to the subject discovery requests or risk having this action dismissed, Complainant provided many of the ***same exact*** responses. Moreover, as to Complainant's remaining 'supplemental' responses, they are either, again, ***clearly unresponsive*** on their face or ***essentially identical*** to his initial responses.
>
> *Second*, considering Complainant's responses to [requests for production], Complainant did not produce a ***single document*** and answered ***every request*** with the ***same exact (unresponsive) response***, namely: … 'Any and all communications have been provided either through investigation or administrative and Complainant requests the right to debunk any fraudulent testimony.' …
>
> *Finally*, Complainant refused to provide substantive answers regarding several relevant topics and also failed to provide candid testimony. To be sure, Complainant refused to answer questions related to (1) trucking companies he went to work for after he left Warren Paving—two of which he claims terminated him for

[5] *Id.*

[6] *Motion to Dismiss and for Sanctions*, Ex. 5.

[7] *Id.*, Ex. 6.

reporting alleged "safety issues"; (2) his Driver's Vehicle Inspection reports related to the subject truck; and (3) the identity of his family members and others with possible relevant information. Moreover, Complainant failed to provide candid testimony during his deposition regarding multiple lawsuits or charges/claims against other employers.[8]

Respondent provided the following specific examples in the *Motion to Dismiss* to illustrate Complainant's failure to comply with *Discovery Order I* as it relates to the interrogatories:

> **INTERROGATORY NO. 3**: Identify all documents, which in any way support, pertain to, or relate to the subject matter of this case or the claims asserted in your Complaint.
>
> **INITIAL RESPONSE**: Objection, as the employer has all, or will receive any and all documents.
>
> ***SUPPLEMENTAL* RESPONSE**: Objection, as the employer has all, or will receive any and all documents.
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> ***
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> **INTERROGATORY NO. 6**: Identify each employer with whom you have sought employment, or by whom you have been contacted concerning employment since your termination from Warren Paving on or about August 25, 2021.
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> **INITIAL RESPONSE**: Objection employer needs to keep its questions within the scope of the employment dates with Warren Paving.
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> ***SUPPLEMENTAL* RESPONSE**: Objection employer needs to keep its questions within the scope of the employment dates with Warren Paving.
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> **INTERROGATORY NO. 7**: State the names and addresses of each employer, other than Warren Paving, by whom you have been employed during your working life, and for each such employer state: (a) Date employment commenced; (b) All job titles or job categories held by you; (c) The rate of pay received by you for each job title or job category; (d) The number of hours worked by you each week or each month; (e) Date employment terminated; and (f) The reason for termination.
>
> **INITIAL RESPONSE**: Objection.
>
> ***SUPPLEMENTAL* RESPONSE**: Objection, the question has no findings on this claim.
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> ***
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> **INTERROGATORY NO. 8**: If you have ever been a party to a lawsuit or filed any administrative charges or claims/complaints, including, but not limited to, claims for unemployment compensation, workers' compensation benefits, or charges/complaints with the Department of Labor or Equal Employment Opportunity Commission, against any other employer, please identify the employer by name and address, the court or administrative forum in which the lawsuit, charge or claim/complaint was filed, the nature of the suit, charge or claim/complaint.

[8] *Id.* at 17 (emphasis in original).

INITIAL RESPONSE: Objection.

***SUPPLEMENTAL* RESPONSE**: Objection, the question has no findings on this claim.

***

INTERROGATORY NO. 16: If you denied or qualified any response to Warren Paving's first set of requests for admission, provide all facts that you allege support your denial or qualification.

INITIAL RESPONSE: Okay.

***SUPPLEMENTAL* RESPONSE**: Okay, the truth and facts have been submitted to you.[9]

On May 9, 2024, Complainant filed an *In response to Defendants Motion* ("*Response*"). In the *Response*, Complainant quotes 29 C.F.R. § 18.51(b)(4) and states as follows:

> The complainant objects to the defendant's motion to dismiss. The defendant's questions were all answered but were not the answers they wanted. The complainant's objections were based on privilege and relevancy that would only lead to speculation. Furthermore Butler & Snow followed the complainant into district court to poach one of the cases mentioned. One of the attorneys on another case has already begun using rhetoric used by the defendants. The defendants claim that everything is public record which brings us to … 29 CFR § 18.51 …
>
> The complainant has information and must be allowed to see if the courts or agency is illegally aiding the defendants. Furthermore, exhibits A and B are the defendant's responses to the complainant's request for discovery. As a pro se litigant I tend to mirror some of counsel's ideas.
>
> After a review of the evidence alone, should be grounds for denial of the defendant's request. The complainant respectfully requests that the motion to expedite be granted.[10]

On May 23, 2024, I issued an *Order Deferring Ruling on Motion to Dismiss and Directing Complainant to Supplement Responses to Discovery Requests* ("*Discovery Order II*"), finding that Complainant's testimony and discovery responses remained

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[9] *Id.* at 3-7 (emphasis in original); *see id.*, Exs. 3, 5. In addition to the examples provided in the *Motion to Dismiss*, Complainant's supplemental responses to the requests for admission were similarly deficient. For instance, Complainant's initial responses to requests for admission nos. 3 and 5 was "N/A," and his supplemental responses to those same requests was a statement that "the information is not reliable." *Id.*, Exs. 3, 5.

[10] *Response* at 1-2. Complainant filed a motion to expedite on March 25, 2024, which is now moot. Respondent filed a reply in support of the *Motion to Dismiss* on May 21, 2024, which has not been considered. *See* 29 C.F.R. § 18.33(d) ("Unless the judge directs otherwise, no further reply is permitted").

deficient and noncompliant with *Discovery Order I*. However, I provided Complainant with another opportunity to remedy the written discovery deficiencies. Specifically, I stated in pertinent part:

> Based on my review of Complainant's deposition transcript and responses to the discovery requests, the *Motion to Dismiss* has merit. Complainant did not provide substantive answers to several relevant questions during his deposition, offered the same or nearly identical unresponsive, evasive and/or incomplete answers to the interrogatories and requests for admission at issue, and did not substantively respond to the requests for production by failing to produce any documents and merely stating the same vague and ambiguous response to each of the requests. His objections and assertions of privilege were also baseless and inapposite. Therefore, Complainant's testimony and discovery responses are deficient and noncompliant with [*Discovery Order I*].
>
> Notwithstanding the deficient nature of his testimony and discovery responses, I recognize that Complainant did timely act pursuant to [*Discovery Order I*] by making himself available for deposition and providing responses to the discovery requests. While pro se complainants are bound to follow the rules of practice and procedure, given Complainant's self-represented status, I will provide him with one more opportunity. To that end, Complainant shall supplement his responses to all requests for production, interrogatories 1-8, 14, 16-19, 21, and requests for admission 3-5, 8. Complainant's responses must be substantive in nature. An objection to relevancy or on any other grounds is not a substantive response. There is also no applicable privilege that Complainant can invoke based on the information requested in the discovery requests. Once again, Complainant is warned that his failure to comply with this Order may result in the dismissal of the case.
>
> Accordingly, a ruling on the Motion to Dismiss is **DEFERRED** and, on or before **May 31, 2024**, Complainant is **DIRECTED** to file with the undersigned and serve Respondent with supplemental discovery responses consistent with the foregoing.[11]

On May 24 & 26, 2024, Complainant filed the same documents and recording he previously filed on November 28, 2023, along with the following commentary:

> The court issued a show cause order due to the fact they didn't Docket a motion. The alj has not responded to any of the Complainant's filings. I don't have my computer at the moment, so this email will have to suffice. The defendant asked question multiple times for example: the driver inspection reports. When asked about the inspection reports. The defendant was informed of Complainant's intentions to object, the inspection reports came from a untrustworthy source. The inspection report from the date the truck was shut down and Complainant moved to another truck is very much so a moot point. The complainant answered all questions involving employment but did not disclose any information involving evidence intended to be use for hearings. Some of the information requested by the ALJ was sent a month after it was requested by the defendants. Which again leads to why is this office not Docketing or reviewing

[11] *Discovery Order II* at 4-5 (citations omitted).

> any motions bought forth by the complainant, also why is the discovery process one sided? Is the complainant not entitled to discovery in the administrative process?
> 1 ALJ disregard motions
> 2 ALJ issues ruling for discovery only for the defendant
> 3 ALJ is transferring case (No Objections) without cause but continues to rule against complainant. (Motion to Expedite)
> 4 ALJ mistakenly doesn't Docket complainant response
> 5 ALJ order set for May 31, 2024 complainant is confused and ask that the ALJ send a list of demands since the case is being held hostage.
>
> In every other matter pending the complainant has touched bases with the judge, ALJ. This is the only one where contact hasn't been made and problems continue to exist. Below is a motion to submit which is the discovery request I believe you were looking for, which was sent November 28, 2023. If this is not it, can you please explain. The recording sent on May 24th is a part of this discovery.

Complainant made no additional filings on or before the deadline of May 31, 2024.[12]

DISCUSSION

In STAA cases before the OALJ, "the judge has all powers necessary to conduct fair and impartial proceedings," including the power to regulate the course of proceedings, terminate proceedings through dismissal, and take any appropriate action authorized by the Federal Rules of Civil Procedure ("FRCP").[13] If a party fails to obey an order to provide or permit discovery, the judge may issue further just orders, including an order dismissing the proceeding in whole.[14] The FRCP likewise permits a judge to dismiss a case if "the plaintiff fails to prosecute or to comply with these rules or a court order[.]"[15]

Several factors may be considered in determining whether dismissal is warranted, including: "(1) prejudice to the other party; (2) the amount of interference

[12] Complainant filed "Exhibit G: recording of day of termination" and "Exhibit H: message to HR" on June 3, 2024.

[13] 29 C.F.R. § 18.12; *see* 29 C.F.R. § 1978.107(a) (STAA "proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title."); *Mansell v. Tenn. Valley Auth.*, ARB No. 2020-0060, ALJ No. 2019-ERA-00010, slip op. at 4 (ARB May 12, 2022) ("The Board has long recognized that ALJs have an inherent authority to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.") (internal quotation marks omitted).

[14] 29 C.F.R. § 18.57(b)(1)(v).

[15] Fed. R. Civ. Proc. 41(b); *see* 29 C.F.R. § 18.10(a) ("Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.").

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 could be ordered for failure to cooperate or noncompliance; and (5) whether the efficacy of lesser sanctions were considered."[16]

Though self-represented litigants are at times afforded "additional considerations" and "certain latitudes," they are "equally bound to follow the rules of practice and procedure" and "bear the same burdens and obligations as litigants represented by counsel."[17]

Complainant has frustrated the discovery process since the outset of this case and despite the latitude and additional consideration he has been afforded, continues to remain uncooperative and unwilling to comply with that process and the undersigned's directives. Initially, Complainant refused to make himself available for deposition because it would be "burdensome and annoying," he failed to respond to requests for production, and he provided deficient responses to interrogatories and requests for admission.[18] When *Discovery Order I* directed Complainant to cure those deficiencies, he responded by offering the same or nearly identical unresponsive, evasive, and/or incomplete answers to the interrogatories and requests for admission. Complainant also did not substantively respond to the requests for production and merely stated the same vague and ambiguous response to each of the requests.[19] When given another opportunity by virtue of *Discovery Order II*, Complainant simply submitted the same documents he previously filed and altogether failed to provide any responses to the discovery requests that were explicitly identified in the Order. Instead, Complainant remains steadfast that he will "not disclose any information involving evidence intended to be use for hearings." Complainant cannot pick and choose what he wants to respond to and unilaterally decide what is relevant. And his contentions that the "agency is illegally aiding the defendants" and that this "case is being held hostage," are baseless and without merit.

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[16] *Manoharan v. HCL America, Inc.*, ARB Case No. 2021-0060, ALJ Case Nos. 2018-LCA-00029 and 2021-LCA-00009, slip op. at 14-15 (ARB Apr. 14, 2022).

[17] *Xanthopoulus v. Mercer Investment Consulting*, ARB Case No. 2022-0032, ALJ Case No. 2021-SOX-00017, slip op. at 27 (ARB Sept. 28, 2023); *Jeanty v. Lily Transportation Corp.*, ARB Case No. 2019-0005, ALJ Case No. 2018-STA-00013, slip op. at 12 (ARB May 13, 2020); *Heckman v. M3 Transport, LLC*, ARB No. 2018-0019, ALJ No. 2012-STA-00059, slip op. at 6 (ARB May 5, 2020).

[18] *Discovery Order I* at 2.

[19] *Discovery Order II* at 4.

The issues here do not involve a dispute over a discrete or complex issue but simply involve an opposing party's first set of discovery requests – in other words, the fundamental building block information required to develop a case and move it forward. Respondent's inability to obtain information for which it is entitled, interferes with its ability to mount a meaningful defense and inhibits a fair and efficient process. I have considered lesser sanctions, but the three dismissal warnings Complainant has been provided have evidently had no effect.[20] It is now apparent from Complainant's persistent disregard of the discovery process and my Orders, that no lesser sanction will cure his continued failure to prosecute his case.

Accordingly, pursuant to 29 C.F.R. § 18.57(b)(1)(v) and FRCP 41(b), and for the reasons stated, the *Motion to Dismiss* is **GRANTED** and this case is **DISMISSED**.

SO ORDERED.

THEODORE W. ANNOS
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 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

[20] *See Prehearing Order*, *Discovery Order I*, and *Discovery Order II*.

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. § 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 EFSSystem, 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.