



In the Matter of:

JIM SOUTHERLIN,

ARB CASE NO. 09-122

COMPLAINANT,

ALJ CASE NO. 2009-CAA-033

v.

DATE: November 23, 2009

**NESTLE PREPARED FOODS
COMPANY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

T. Ryan Langley, Esq., *Hodge Law Firm*, Spartanburg, South Carolina

For the Respondents:

Andreas Satterfield, Esq., *Jackson Lewis, LLP*, Greenville, South Carolina

FINAL DECISION AND ORDER DISMISSING APPEAL

The Respondent, Nestle Prepared Foods, Co., employed the Complainant, Jim Southerlin, as Head of Facility Safety at its Gaffney South Carolina factory. Nestle suspended Southerlin with pay on April 3, 2008, and subsequently terminated his employment effective April 30, 2008. In mid-October 2008, Southerlin filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Nestle had retaliated against him in violation of the employee protection

provision of the Clean Air Act.¹ OSHA issued the Secretary's Findings which stated that there was no reasonable cause to believe that Nestle had violated the law and that in any event, Southerlin did not timely file his complaint.

Southerlin objected to the Secretary's Findings and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).² In early March 2009, the ALJ held a conference call and he gave the parties time to file briefs on the issue of the timeliness of the original complaint. On July 10, 2009, the ALJ issued a Recommended Decision and Order Dismissing the Claim as Being Untimely Filed (R. D. & O.). Southerlin appealed the R. D. & O. to the Administrative Review Board.³ In response, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule, pursuant to which, Southerlin's brief was due at the Board on or before August 28, 2009. Southerlin did not file a brief by the August 28th deadline.

On September 14th, the Board received the Respondent's Motion to Dismiss Appeal for Failure to Timely File Initial Brief. In this motion, Nestle averred that the Board should dismiss Southerlin's appeal because he had failed to timely file a brief in compliance with the briefing order.

On September 14th, the Board also received Southerlin's initial brief, delivered by FedEx. A review of the FedEx tracking report showed that Southerlin's counsel deposited the brief with FedEx on August 27, 2009, for next day delivery. Had the brief been delivered as anticipated it would have been timely. But the tracking report shows that although FedEx attempted to deliver the brief on August 28, it was unable to do so. FedEx waited nine days before it again unsuccessfully attempted to deliver the brief. It then waited five more days before it successfully delivered the brief. Although Southerlin's counsel failed to ascertain whether FedEx had timely delivered the brief, we are cognizant that dismissal is a very serious penalty and we concluded that dismissal was not appropriate in this case.⁴

Nevertheless we did not accept Southerlin's brief for filing because it failed to comply with the Board's Notice of Appeal and Order Establishing Briefing Schedule, in that it was single rather than double-spaced as the Board's briefing order required. Although by failing to comply with the Board's notice, Southerlin's counsel placed his client's case in jeopardy of dismissal, we gave Southerlin one more opportunity to file a conforming brief. The Board ordered that Southerlin file a conforming brief that must be

¹ 42 U.S.C.A. § 7622 (West 2003).

² See 29 C.F.R. § 24.106(a)(2009).

³ See 29 C.F.R. § 24.110(a).

⁴ Order Denying Motion to Dismiss and Returning Petitioner's Non-conforming Brief and Resetting the Briefing Schedule (ARB Sept. 25, 2009).

received by the Board by October 10, 2009. We cautioned Southerlin that if he failed to file a conforming brief, the Board could dismiss his appeal without further notice. Southerlin did not file a brief in response to the Board's order.⁵

The Board's authority to effectively manage its docket, including authority to require compliance with Board briefing orders, is necessary to "achieve orderly and expeditious disposition of cases."⁶ This Board has authority to issue sanctions, including dismissal, for a party's continued failure to comply with the Board's orders and briefing requirements.⁷

The Board specifically and explicitly warned Southerlin in both its Notice of Appeal and Order Establishing Briefing Schedule and its September 25, 2009 Order requiring Southerlin to file a conforming brief that it could dismiss his appeal if he failed to file a conforming brief. Nevertheless, he failed to file a brief as ordered, even after he was offered a second opportunity to do so. Accordingly, because Southerlin has failed to file an opening brief in compliance with the Board's briefing order, we **DISMISS** his appeal.⁸

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

⁵ *Id.*

⁶ *Link v. Wabash*, 370 U.S. 626, 630-31 (1962).

⁷ *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ-AIR-006 (ARB Dec. 30, 2004, Reissued Jan. 5, 2005), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006); *Blodgett v. TVEC*, ARB No. 03-043, ALJ No. 2003-CAA-007 (ARB Mar. 19, 2003) (dismissing complaint for failure to comply with briefing order); *cf.* Fed. R. App. P. 31(c) (allowing dismissal as sanction for failure to file a conforming brief); Fed R. App. P. 41(b) (permitting courts to dismiss a complaint for failure to comply with court orders).

⁸ On October 21, 2009, the Board received a letter from Southerlin indicating that this matter "had been resolved" and that he wished to dismiss this action. However, at that time Southerlin was already in default because he had failed to timely file his brief in compliance with the Board's order.