



**In the Matter of:**

**STEPHEN P. DURHAM,**

**ARB CASE NO. 11-044**

**COMPLAINANT,**

**ALJ CASE NO. 2010-CAA-004**

**v.**

**DATE: September 27, 2011**

**TENNESSEE VALLEY AUTHORITY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearance:**

*For the Complainant:*

**Michael D. J. Eisenberg, Esq., Washington, District of Columbia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge* and Luis Corchado, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER DISMISSING APPEAL**

**BACKGROUND**

The Complainant, Stephen P. Durham, filed a complaint alleging that the Respondent, Tennessee Valley Authority (TVA), retaliated against him in violation of the whistleblower protection provisions of the Clean Air Act<sup>1</sup> and its implementing regulations.<sup>2</sup> On March 23, 2011, a Department of Labor Administrative Law Judge,

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<sup>1</sup> 42 U.S.C.A. § 7622 (West 2003).

<sup>2</sup> 29 C.F.R. Part 24 (2011).

(ALJ) issued a Decision and Order Dismissing Complainant's Claim (D. & O.). Durham petitioned the Administrative Review Board to review the Decision and Order.<sup>3</sup>

On April 28, 2011, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule in his case. The Board's order required Durham to file an opening brief, not to exceed thirty (30) double-spaced typed pages, on or before May 4, 2011. The Board cautioned Durham that if he failed to timely file his brief, the Board could dismiss his petition for review or impose other sanctions.<sup>4</sup>

Durham failed to file a brief in compliance with the Board's order. Accordingly, we ordered Durham to show cause no later than August 17, 2011, why the Board should not dismiss his petition for review because he had failed to prosecute his appeal in accordance with the Board's briefing order. The Board informed Durham that if it did not receive his response to the show cause order on or before August 17th, the Board could dismiss the appeal without further notice. We suspended the briefing schedule pending resolution of the show cause order.

Durham filed a reply to the show cause order on August 15, 2011, and on August 17th Durham filed "Complainant's Unopposed [sic] for 30-Day Extension to File his Opening Brief." On September 8, 2011, Durham attempted to file a brief by e-mail, although the Board had previously cautioned his counsel that the Board only accepts e-mail filing of petitions for review. Accordingly, the Board informed Durham that it would not accept the brief. The Board received the brief on September 19, 2011, 4½ months after it was due.

## DISCUSSION

The Board's authority to effectively manage its docket, including the authority to require compliance with Board briefing orders, is necessary to "achieve orderly and expeditious disposition of cases."<sup>5</sup> This Board has authority to issue sanctions, including dismissal, for a party's failure to comply with the Board's orders and briefing

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<sup>3</sup> See 29 C.F.R. § 24.110(a); Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

<sup>4</sup> The Board had previously dismissed Durham's appeal of another Administrative Law Judge's decision in *Durham v. Tennessee Valley Auth.*, ARB No. 06-036, ALJ No. 2006-CAA-001 (ARB Feb. 27, 2006) because he failed to timely file his petition for review. Slip op. at 5.

<sup>5</sup> *Link v. Wabash*, 370 U.S. 626, 630-31 (1962).

requirements.<sup>6</sup> Durham failed to file a brief in compliance with the Board's briefing order. When given the opportunity to explain his failure to timely file, Durham responded:

On April 22, 2011, Counsel faxed the following. Counsel was unaware of any issue until the Board sent the aforementioned Order. Counsel apologizes for any error he may have made. Counsel moves on behalf of Mr. Durhm [sic] that as a matter of justice this Reply be Accepted. No parties would be harmed by this filing.

Attached to this e-mail, i.e., "the following," was a copy of a facsimile that Durham's counsel had sent to ALJ Malamphy dated April 22, 2011, which forwarded a copy of "Complainant's Reply to Respondent's Reply in Support of Tennessee Valley Authority's Motion for Summary Decision."

On August 17, 2011, Durham filed a motion for enlargement to file the opening brief. In this motion directed to Judge Malamphy, not the Board, he averred:

Counsel for the Complainant, Stephen Durham, apologizes to his Honor. Between his surreply and the Scheduling Order issued by his Honor, counsel was still waiting for an actual "decision" to grant Complainant's affirmance against the Respondent's Motion for Summary Judgment. This issue had been correct [sic] and steps have been taken to assure that it does not happen again.

Durham's reply to the Board's show cause order offers no comprehensible explanation for his failure to timely file his opening brief. When counsel filed "Complainant's Reply to Respondent's Reply in Support of Tennessee Valley Authority's Motion for Summary Decision" with the ALJ, the ALJ had already filed his final Decision & Order, and Durham had already filed a petition with the Board

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<sup>6</sup> *Bohn v. JetBlue Airways Corp.*, ARB No. 10-029, ALJ No. 2009-AIR-023, slip op. at 3 (ARB Oct. 28, 2010); *Blodgett v. TVEC*, ARB No. 03-043, ALJ No. 2003-CAA-007 (ARB Mar. 19, 2003). See also *Ellison v. Washington Demilitarization Co.*, ARB No. 08-119, ALJ No. 2005-CAA-009 (ARB Mar. 16, 2009), *aff'd sub nom. Ellison v. U.S. Dep't of Labor*, 09-13054 (11th Cir. June 17, 2010); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-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); *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).

requesting the Board to review that Decision. Therefore, any suggestion that Durham was awaiting another decision from the ALJ is simply not credible. Furthermore after receiving the ALJ's D. & O., filing a petition for review, and receiving the Board's briefing order, Durham offers no explanation whatsoever for ignoring the Board's briefing order and failing to file a brief as ordered. Even if, as he appears to suggest, he was awaiting another order from the ALJ, any mistaken belief that the ALJ had not issued a final order was belied by the fact that he filed a petition for review with the Board. In any event, any such belief certainly did not justify his decision to ignore the Board's briefing order issued in response to the petition for review that he himself had filed. At the very least, **if** he was operating under the assumption that he had no obligation to file a brief in accordance with the Board's briefing order, exercising due diligence, he should have inquired of the Board whether his assumption was correct.

While we recognize that Durham is not personally responsible for his counsel's failure to timely file the brief, parties are ultimately responsible for the acts and omissions of their freely chosen representatives.<sup>7</sup> As the Supreme Court held in *Link v. Wabash Railroad Co.*, "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all fact, notice of which can be charged upon the attorney.'"<sup>8</sup>

Accordingly, because Durham has failed to establish, any comprehensible cause, much less good cause, for his failure to timely file his opening brief, we **DISMISS** his appeal.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

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<sup>7</sup> *Ellison*, ARB No. 08-119, slip op. at 9; *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-006, slip op. at 5 (ARB Aug 27, 2002).

<sup>8</sup> 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)). The Court in *Link* did note, however, that "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.