IN THE MATTER OF:

SHANNON PHILLIPS,

COMPLAINANT,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

RESPONDENT.

ARB CASE NO. 15-059

ALJ CASE NO. 2014-FRS-133

DATE: August 11, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:
Shannon Phillips, *pro se,* Charleston, West Virginia

For the Respondent:
Samuel J. Webster, Esq., *Wilcox Savage,* Norfolk, Virginia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; and E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*

FINAL DECISION AND ORDER DISMISSING APPEAL

On June 2, 2015, the Administrative Review Board issued a Notice of Appeal and Order Establishing Briefing Schedule in this case arising under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] Under the terms

[1] 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2015), as implemented by 29 C.F.R. Part 1982 (2014) and 29 C.F.R. Part 18, Subpart A (2014). The Secretary of Labor has

of the Order, Complainant Shannon Phillips's opening brief was due on or before June 10, 2015. The Board cautioned Phillips that if he failed to timely file his opening brief, the Board could dismiss his petition for review or impose other sanctions.

Phillips did not file an opening brief as ordered. 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."[2] This Board has authority to issue sanctions, including dismissal, for a party's failure to comply with the Board's orders and briefing requirements.[3]

Accordingly, the Board ordered Phillips to Show Cause no later than July 31, 2015, why we should not dismiss his appeal. The Show Cause Order noted that it was possible that Phillips intended his petition for review to be his opening brief in this matter. The Board instructed him that if he intended his petition for review to be his brief, he should so state. If not, the Board stated that he should explain why he did not timely file his opening brief. The Board cautioned Phillips that if the Board did not receive his response to this order on or before July 31, 2015, the Board may dismiss the appeal without further notice to the parties.

In response to the Board's Order, Phillips filed a document entitled "Petitioner's Brief." The document does not state that Phillips intended to rely on his petition for review as his opening brief. It also does not explain, as the Board ordered, why he did not timely file his opening brief[4]. Accordingly, because Phillips has failed to show cause

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delegated authority to the Administrative Review Board to render final decisions on administrative appeals under the FRSA. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

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

[3] *Jessen v. BNSF Railway Co.*, ARB No. 12-107, ALJ No. 2010-FRS-022 (ARB July 26, 2013). *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).

[4] Instead the document addresses the merits of his complaint against Respondent Norfolk Southern Railway. However, the ALJ in dismissing Phillips's complaint did not consider the merits; the ALJ dismissed the complaint because he found that Phillips's request for a hearing was untimely pursuant to 29 C.F.R. § 1982.106(a) and because Phillips had filed a complaint on the same matter in federal district court pursuant to 29 C.F.R. § 1982.114, thus divesting the Department of Labor of jurisdiction to hear his complaint. *Phillips v. Norfolk Southern Ry. Co.*, ALJ No. 2014-FRS-133 (Apr. 23, 2015)(D. & O.).

why he failed to timely file an opening brief and because the document he filed as an untimely opening brief is not responsive to the basis for the ALJ's dismissal of his complaint, we **DISMISS** his appeal.[5]

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

[5] Given Phillips's pro se status, we reviewed his petition for review to determine if it raised issues that would justify the requirement of a response from Respondent. In his petition for review, Phillips did address the timeliness issue, but not the basis for the ALJ's finding that his hearing request was untimely. Instead he argued for the first time that he was mentally and physically unable to file a timely request for hearing. He attached medical records that had not previously been part of record before the ALJ. Further, these medical records did not address his mental or physical ability to file a hearing request. One record reported that he had been treated for a low back strain on March 14, 2012, more than two years before he was required to file his request for a hearing and the other was an admissions form from the Charleston Area Medical Center that stated he was admitted complaining of back pain on June 19, 2014, which was subsequent to the date on which the request was due and does not indicate that Phillips was mentally or physically incapacitated from filing the hearing request. Phillips also asserts for the first time that the complaint he filed in Federal District Court was under the FELA rather than the FRSA. In the complaint filed in district court, Phillips did not identify the statutory basis for the complaint. But the district court complaint is the same in every allegation to Petitioner's Brief belatedly filed in this FRSA case, including the relief sought. The Board does not generally consider arguments raised for the first time on appeal, *Rollins v. American Airlines,* ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Mar. 29, 2007); nor evidence submitted for the first time on appeal, *Zinn v. American Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 14 (ARB Mar. 28, 2012). We find no reason to depart from those practices here, nor to require Respondent to respond to this appeal.