

IN THE MATTER OF:

MILTON RAMIREZ,  
COMPLAINANT,

v.

NORFOLK SOUTHERN RAILWAY  
COMPANY,

RESPONDENT.

ARB CASE NO. 17-003

ALJ CASE NO. 2016-FRS-022

DATE: January 12, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant:*

Anthony V. Merrill, Esq.; *Frank & Associates, P.C.*; Farmingdale, New York

*For the Respondent:*

Joseph P. Sirbak, II, Esq.; *Buchanan Ingersoll & Rooney, P.C.*; Philadelphia, Pennsylvania

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

#### FINAL DECISION AND ORDER DISMISSING UNTIMELY APPEAL

On November 14, 2016, Complainant Milton Ramirez filed a Petition requesting the Administrative Review Board to review Administrative Law Judge Theresa C. Timlin's Order Granting Respondent's Motion to Enforce and Approve the Settlement Agreement (ALJ Order), issued October 27, 2016. The Secretary of Labor has delegated authority to issue final agency decisions under the whistleblower protection provisions of the Federal Rail Safety Act to the Administrative Review Board.<sup>1</sup> Pursuant to 29 C.F.R. § 1982.110(a)(2016) "a petition [for

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<sup>1</sup> Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to

review] must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.”

Complainant electronically filed his petition for review on November 14, 2016—more than fourteen days after the ALJ issued her Order. Accordingly, because there is a question regarding the timeliness of Complainant’s petition for review, Complainant was ordered to show cause why the Board should not dismiss it. Complainant filed a timely response to the Board’s order, and Respondent filed a reply to Complainant’s response.

### DISCUSSION

The period for filing a petition for review with the ARB is not jurisdictional and therefore is subject to equitable modification.<sup>2</sup> In determining whether the Board should toll a statute of limitations, we have recognized four principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.<sup>3</sup> But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Ramirez’s claim.<sup>4</sup>

Ramirez bears the burden of justifying the application of equitable tolling principles.<sup>5</sup> In his response to the Show Cause Order, he argues that the Board should toll the limitations period on the grounds that he was in some extraordinary way prevented from filing his action. In support of this ground, Ramirez’s counsel affirms:

6. Complainant received the Order via regular mail on Monday, November 14, 2016, a date already past the fourteen (14)

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the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

<sup>2</sup> *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30, 2001).

<sup>3</sup> *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Accord Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

day deadline to submit an appeal to the Administrative Review Board.

7. Due to the delay caused by United States Postal Service, Complainant was never afforded an opportunity to review and timely appeal Judge Timlin's Order.

Affirmation of Anthony V. Merrill in Support of Complainant's Order to Show Cause at 2.

In reply, Respondent argues that Ramirez has failed to adequately show cause why the Board should toll the limitations period. Counsel for Respondent avers that Complainant has routinely missed deadlines in the litigation of this case and that counsel's explanation that he only received the ALJ's order on November 14th is "utterly implausible." Response of Norfolk Southern Railway Company at 2. Respondent's counsel received his copy of the Settlement Order on November 1, 2016,<sup>6</sup> and urged the Board to take judicial notice that the "usual time"<sup>7</sup> for the delivery of mail between Cherry Hill, New Jersey and Farmingdale, New York is far less than 18 days. He also noted that Complainant filed the petition for review late, with no explanation of the alleged untimely delivery and proffers no explanation for how the delivery came to be late. *Id.* at 2-3.

Even accepting that Complainant did not receive his copy of the decision until November 14 via regular mail, that fact alone would not in this case establish Complainant's right to equitable tolling. As certified in the Service Sheet attached to the ALJ's Order, Complainant Ramirez's copy of the decision was mailed to him in care of Neil M. Frank, Esq. of Frank & Associates. Therefore, if Mr. Frank then forwarded the copy to Ramirez by regular mail, the statement that Ramirez did not receive it until November 14 could be literally true, but not dispositive.

Significantly, however, Ramirez's counsel's declaration fails to mention that a second copy of the ALJ's Order was also mailed to Ramirez's counsel, Anthony Merrill, Esq. at the Frank & Associates law firm. Notice to one's legal representative is deemed notice to the party litigant.<sup>8</sup> Merrill's affirmation does not acknowledge this second copy, nor state when he received this copy of the Order. Accordingly, because Attorney Merrill has not addressed his receipt of the copy of the decision the ALJ served upon him, we necessarily must conclude that that copy was timely served upon him in the absence of any evidence in the record before us indicating otherwise.

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<sup>6</sup> The Board also received a copy of the ALJ's Order on November 1, 2016.

<sup>7</sup> Respondent argues, "It is black letter law that a document placed in the United States mail is presumed to reach its destination in the 'usual time,'" citing *Hagner v. United States*, 285 U.S. 427, 430 (1932). Response of Norfolk Southern Railway Co. at 2.

<sup>8</sup> *Zahara v. SLM Corp.*, ARB No. 08-020, ALJ No. 2006-SOX-130, slip op. at 3 (ARB Mar. 7, 2008); *Lotspeich v. Starke Mem'l Hosp.*, ARB No. 05-072, ALJ No. S005-SOX-014, slip op. at 4 (ARB July 31, 2006).

Ramirez bears the burden of establishing his entitlement to equitable tolling. Whether his counsel's affirmation was simply perfunctory or carefully crafted with an intent to obfuscate, it is insufficient to carry his burden. Accordingly, because Ramirez failed to file a timely petition for review or establish his entitlement to equitable tolling, his appeal is **DISMISSED**.

**SO ORDERED.**

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

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**E. COOPER BROWN**  
**Administrative Appeals Judge**

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**ANUJ C. DESAI**  
**Administrative Appeals Judge**