



**In the Matter of:**

**CHARLES LEE,**

**ARB CASE NO. 17-015**

**COMPLAINANT,**

**ALJ CASE NO. 2014-FRS-024**

**v.**

**DATE: May 25, 2018**

**NORFOLK SOUTHERN  
RAILWAY, CO.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Charles Lee; *pro se*; Asheville, North Carolina**

**Before: Joanne Royce, *Administrative Appeals Judge*, and Leonard J. Howie III,  
*Administrative Appeals Judge***

### **FINAL DECISION AND ORDER**

This case arises under the Federal Rail Safety Act of 1982 (FRSA).<sup>1</sup> Complainant Charles Lee filed a complaint alleging that Norfolk Southern Railway (NSR) retaliated against him in violation of FRSA's whistleblower protection provisions for reporting an injury. Lee appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law

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<sup>1</sup> 49 U.S.C.A. § 20109 (Thomson Reuters 2016), as implemented by federal regulations at 29 C.F.R. Part 1982 (2017) and 29 C.F.R. Part 18, Subpart A (2017).

Judge (ALJ) on December 16, 2016, dismissing Lee's complaint because Lee failed to respond to an order to show cause why the claim should not be dismissed. We summarily affirm.

## BACKGROUND

Lee alleged that NSR suspended him for ninety days because he filed an FRSA whistleblower claim and reported that NSR was in violation of several FRA rules.<sup>2</sup> Lee filed a FRSA complaint, not at issue here, alleging that NSR suspended him for ninety days in retaliation for raising various safety concerns to NSR. Lee pursued his allegations through the Equal Employment Opportunity Commission and notified OSHA on May 29, 2013, that he wished to withdraw his OSHA complaint. OSHA sent a letter to Lee confirming his request to withdraw his FRSA complaint.

Subsequently Lee filed a second FRSA complaint, the instant claim. OSHA dismissed it without investigation because the complaint offered no new or additional allegations than OSHA investigated in Lee's previous FRSA complaint. Through counsel, Lee objected to the OSHA findings and requested a hearing. After an ALJ was assigned to the case, Lee terminated his relationship with his counsel, and his counsel filed a motion to withdraw in this matter.

On February 16, 2016, Lee wrote a letter to the ALJ with a status report on a civil case he had against NSR in the United States District Court for the Western District of North Carolina. The Office of Administrative Law Judges received the letter via fax on February 17, 2016. This sixty page document primarily concerned settlement negotiations in Lee's district court case.

Also on February 17, 2016, the ALJ issued an order granting Lee's counsel's motion to withdraw and ordering Lee to advise her regarding representation. In her order, the ALJ stated that **"[t]he Complainant is hereby directed to advise the court and Respondent's counsel within 14 days of receipt of this notice as to whether he will proceed with the claim without a representative. Failure to respond, may result in an Order to Show Cause why this matter should not be dismissed."**<sup>3</sup>

On November 30, 2016, the ALJ issued an order to show cause referencing her prior order to Lee ordering him to advise her regarding representation. The ALJ stated that Lee had not responded to the previous order and ordered that Lee show cause within seven days why the claim should not be dismissed. Lee did not respond, and the ALJ issued a decision and order dismissing Lee's complaint with prejudice on December 16, 2016. Lee appealed the ALJ's order to the Board.

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<sup>2</sup> OSHA Findings, November 6, 2013.

<sup>3</sup> Emphasis in original.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under the FRSA.<sup>4</sup> The Board reviews the ALJ's factual determinations under the substantial evidence standard.<sup>5</sup> The Board reviews an ALJ's conclusions of law de novo.<sup>6</sup>

## DISCUSSION

On appeal, Lee argues that in her orders, the ALJ did not mention Lee's February 16, 2016 letter to the ALJ or his February 17, 2016 fax to the ALJ. He also argues that he tried to respond to the show cause order but that his faxes did not go through. He asserts that the reason for delay in his response was that on November 21, 2016, the Fourth Circuit Court of Appeals issued a notice of judgment in his civil case. He further asserts that he had to submit a petition for rehearing and petition for rehearing en banc in that matter.

An ALJ's inherent power to dismiss a case for lack of prosecution arises from the control necessarily vested in courts to manage their affairs so as to achieve the orderly and expeditious disposition of cases.<sup>7</sup> ALJs must exercise their discretion regarding this power discreetly, fashioning appropriate sanctions for conduct that abuses the judicial process.<sup>8</sup>

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<sup>4</sup> 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); see 29 C.F.R. § 1982.110(a).

<sup>5</sup> 29 C.F.R. § 1982.110(b).

<sup>6</sup> *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-AIR-025, slip op. at 2 (ARB Apr. 30, 2013) (citations omitted).

<sup>7</sup> *James v. Suburban Disposal Inc.*, ARB No. 10-037, ALJ No. 2009-STA-071, slip op. at 5 (ARB Mar. 12, 2010) (citing *Dorman v. Chinook Charter Servs.*, ARB No. 08-011, ALJ No. 2007-STA-028, slip op. at 2 (ARB Feb. 19, 2009) (citing *Link v. Wabash R. R. Co.*, 370 U.S. 626, 629-30 (1962))).

<sup>8</sup> *Id.* (citing *Dorman*, ARB No. 08-011, slip op. at 2).

The ALJ did not abuse her discretion in not mentioning Lee's letter or 60-page fax in deciding that neither was responsive to her order directing Lee to advise whether he intended to proceed with the claim without a representative. Given that Lee's submissions were dated a day before the ALJ's order and did not indicate whether Lee intended to proceed without representation but were styled as a status report in a civil case, the ALJ had discretion to decline to consider them responsive to her order. Additionally, the ALJ did not abuse her discretion in dismissing the complaint when Lee failed to respond to her order to show cause, irrespective of any fax problems Lee may have experienced. Having to respond to issues in other matters before the Fourth Circuit does not excuse the failure to respond.

For these reasons, the ALJ did not abuse her discretion in recommending that Lee's claim be dismissed for failure to respond to her orders.

### **CONCLUSION**

The ALJ acted within her discretion in dismissing Lee's complaint because Lee failed to respond to her orders. Accordingly, we accept her recommendation that this complaint be **DISMISSED**.

**SO ORDERED.**

**LEONARD J. HOWIE III**  
**Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**