



IN THE MATTER OF:

PHILLIP C. BAKER,

ARB CASE NO. 17-034

COMPLAINANT,

ALJ CASE NO. 2016-FRS-079

v.

DATE: MAY 19 2017

UNION PACIFIC RAILROAD
CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Phillip C. Baker, *pro se*, West Valley, Utah

For the Respondent:

Steven T. Densley, Esq.; *Union Pacific Railroad Company*, Salt Lake City, Utah

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge* and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DISMISSING UNTIMELY APPEAL

On January 11, 2017, Complainant Phillip C. Baker attempted to file¹ a Petition requesting the Administrative Review Board to review a Department of Labor Administrative

¹ Baker attempted to file a Petition for Review using the Administrative Review Board's Electronic File and Service Request (EFSR) System. He did not successfully complete the process at that time. Baker alerted the Board to this fact on March 24, 2017, when he called the Board to request the status of his appeal. Given Complainant's *pro se* status and his unfamiliarity with the Board's electronic filing system, we will consider his petition to have been filed on February 11, 2017, when he first attempted, but did not successfully complete, the filing process.

Law Judge's Decision and Order Granting Summary Decision (D. & O.), issued December 23, 2016. The Secretary of Labor has delegated authority to issue final agency decisions under the whistleblower protection provisions of the Federal Railroad Safety Act to the Administrative Review Board.² Pursuant to 29 C.F.R. § 1982.110(a) "a petition [for 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."³

Fourteen days of the date of the ALJ's D. & O. was January 6, 2017. Complainant did not initially attempt to file his petition for review until January 11, 2017, five days past the due date. Accordingly, there is a question regarding the timeliness of Complainant's petition for review.

Nevertheless, the period for filing a petition for review with the ARB is not jurisdictional and therefore is subject to equitable modification.⁴ 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 defendant's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.⁵ But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Baker's claim.⁶

Baker bears the burden of justifying the application of equitable tolling principles.⁷ Accordingly, we ordered him to show cause why the petition should not be dismissed as untimely. In response to this order, Baker did not address any of the tolling grounds as they

² 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).

³ 29 C.F.R. § 1982.110(a).

⁴ *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).

⁵ *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

⁶ *Id.* at 4.

⁷ *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).

relate to the filing of his petition for review with the Board.⁸ Instead, he stated that he “did file appeal to ARB within 14 day allowable time. Clarification of that fact by [an ARB paralegal] and IT administrator of the efile Department of Labor—ARB ‘states that appeal was in system within the allowable time and a delay occurred with system in processing appeal.’” The paralegal did inform Baker, when he contacted her in March 2017, that if the petition for review had been filed on January 11, 2017, it would be considered timely. In so stating, the paralegal made an error in counting the number of days between December 23, 2016, and January 11, 2017.⁹ This error was harmless, however, because Baker did not rely on this information to his detriment—he had already missed the due date when he spoke to the paralegal.

Baker has filed an untimely petition for review and has failed to show cause why the limitations period should be tolled. Accordingly, his petition is **DENIED** and this case is closed.

SO ORDERED.



PAUL M. IGASAKI
Chief Administrative Appeals Judge



LEONARD J. HOWIE III
Administrative Appeals Judge

⁸ Baker did address the tolling grounds as he believed they should be applied to the filing of his initial complaint with the Occupational Safety and Health Administration. But his arguments regarding the timeliness of his filing of his complaint are not relevant to the subject of the show cause order, which was limited to whether he had filed a timely petition for review with the ARB.

⁹ Prior to the amendment of 20 C.F.R. § 1982.110(a) in 2015, the petition for review was due within 10 business days of the date of an ALJ’s decision. When calculating business days, week-ends and holidays were not counted. After the regulation was amended to change the due date from 10 business days to 14 days, week-ends and holidays were no longer omitted from the total number of days to be counted. The paralegal erroneously calculated the due date using the inapplicable 10-business day-rule. The ALJ had correctly informed Baker in his D. & O. that he had 14 days in which to file his petition for review.