



In the Matter of:

THOMAS P. CONNER,

ARB CASE NO. 09-087

COMPLAINANT,

ALJ CASE NO. 2008-SOX-071

v.

DATE: September 11, 2009

**ITT CORP., ITT INDUSTRIES,
and ITT SPACE SYSTEMS DIVISIONS,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Thomas P. Conner, *pro se*, Sayre, Pennsylvania

For the Respondent:

**Stephen W. Robinson, Esq., David L. Greenspan, Esq., *McGUIREWOODS LLP*,
McLean, Virginia**

FINAL DECISION AND ORDER

Thomas P. Conner filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that ITT Corporation, ITT Industries, and ITT Space Systems Divisions demoted him and ultimately terminated his employment in violation of Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX),¹ and its implementing regulations.² The Board must determine whether to dismiss Conner's

¹ 18 U.S.C.A. § 1514A (West Supp. 2003).

² 29 C.F.R. Part 1980 (2006).

appeal since he failed to file an initial brief with the Administrative Review Board in support of his petition for review and failed to respond to the Board's Order to Show Cause why he had failed to timely file his brief. Because Conner has not complied with the Board's orders either by timely filing a brief or explaining his failure to do so, we conclude that he has failed to prosecute his case.

BACKGROUND

ITT employed Conner as an Assistant Controller, Financial Reporting, Planning and Analysis.³ In early 2007, Conner questioned accounting figures proposed to be included in an accounting report as raising compliance problems related to the Financial and Accounting Standards Board and discussed his concerns with one of his supervisors.⁴ On February 6, 2007, ITT demoted Conner to a position that did not include supervisory responsibilities, but his compensation and grade remained the same.⁵ On January 21, 2008, ITT informed Conner that ITT was laying him off.⁶ January 21, 2008, was his last day of employment, although he continued to receive his pay for 60 days.⁷

By correspondence dated April 23, 2008, and facsimile date-stamped the same day, Conner filed his complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA).⁸ OSHA's Regional Administrator dismissed the complaint as untimely.⁹ Conner requested a de novo hearing before a Department of Labor Administrative Law Judge (ALJ).¹⁰

The Complainant and the Respondent filed cross motions for summary judgment.¹¹ The ALJ subsequently issued his Summary Decision and Order finding that the complaint should be dismissed because Conner had failed to file it within ninety days

³ *Conner v. ITT Corp.*, ALJ No. 2008-SOX-071, slip op. at 2 (ALJ Apr. 10, 2009)(Summary Decision and Order (D. & O.)).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See* 29 C.F.R. § 1980.106.

¹¹ D. & O. at 2.

of the date of ITT's alleged unlawful retaliation and viewing the evidence in the light most favorable to the Complainant, he failed to satisfy any of the grounds for equitable tolling.¹² Conner filed a Petition for Review of the D. & O. with the Administrative Review Board.¹³

On May 13, 2009, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule, pursuant to which Conner's opening brief was due on or before June 11, 2009. Conner filed neither his brief, nor a request for an extension of time in which to file it. Accordingly, the Board issued an Order to Show Cause requiring Conner to explain to the Board no later than July 27, 2009, why the Board should not dismiss his appeal because he had failed to prosecute it.

Conner has not filed a response to the Show Cause Order explaining why the Board should excuse his failure to timely file an opening brief with the Board. Therefore, the Board must determine whether it should dismiss Conner's appeal because he has failed to file an initial brief in support of the appeal as provided in the Board's Notice of Appeal and Briefing Order and failed to reply to the Board's Show Cause Order requiring him to explain why he failed to timely file his brief.

DISCUSSION

The Board's authority to effectively manage its affairs, including the authority to require compliance with Board briefing orders, is necessary to "achieve orderly and expeditious disposition of cases."¹⁴ This Board has authority to issue sanctions, including dismissal, for a party's failure to comply with the Board's orders and briefing requirements.¹⁵

Considering that Conner is proceeding in this appeal without representation by counsel, this Board is willing to extend to him a degree of latitude in complying with the

¹² *Id.* at 4.

¹³ *See* 29 C.F.R. § 1980.110(a). The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002).

¹⁴ *Link v. Wabash*, 370 U.S. 626, 630-31 (1962).

¹⁵ *See Mastrianna v. Northeast Utils. Corp.*, ARB No. 99-012, ALJ No. 1998-ERA-033, (ARB Sept. 13, 2000)(complaint dismissed because complainant failed to adequately explain his failure to comply with the Board's briefing schedule); *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).

Board's procedural requirements.¹⁶ This latitude, however, is not without bounds. Recognizing that dismissal of an appeal for failure to file a conforming brief is a very serious sanction and one not to be taken lightly, the Board cautioned Conner in its Show Cause Order that if he failed to explain his failure to timely file a brief as indicated in the Order, the Board could dismiss his appeal without further notice. Nevertheless, Conner failed to respond as ordered. Regardless of Conner's pro se status, we must remain impartial, and we may not litigate his appeal for him.¹⁷

Because Conner has failed to file an opening brief in response to our briefing order, and he has failed to respond to our order to explain his failure to timely file, we conclude that Conner has failed to prosecute his case. Accordingly, we **DISMISS** his appeal.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹⁶ See *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 9 (ARB Feb. 28, 2003).

¹⁷ Accord *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983) (“At least where a litigant is seeking a monetary award, we do not believe pro se status necessarily justifies special consideration. . . . While such a pro se litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance.”).