



In the Matter of:

DANIEL S. SOMERSON,

ARB CASE NO. 02-057

COMPLAINANT,

**ALJ CASE NOS. 02-STA-18
02-STA-19**

v.

DATE: November 25, 2003

MAIL CONTRACTORS OF AMERICA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances¹:

For the Complainant:

Daniel S. Somerson, pro se, Jacksonville, Florida

FINAL DECISION AND ORDER

Daniel S. Somerson, a commercial truck driver, filed two complaints with the United States Department of Labor. He alleged that his employer, Mail Contractors of America, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or the Act).² A United States Department of Labor Administrative Law Judge (ALJ) recommended that the complaints be dismissed due to Somerson's misconduct. We agree with the ALJ's recommendation and dismiss the complaints.

¹ Mail Contractors informed the Administrative Review Board by voice mail that it would not file a brief.

² 49 U.S.C.A. § 31105 (West 1997). Section 31105 protects covered employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles when to do so would violate these rules. Somerson's specific allegations were that Mail Contractors: (1) discriminatorily forced him to drive an unsafe vehicle and sign a Notice of Injury form in retaliation for reporting potential STAA violations; and (2) discriminatorily threatened him with discipline and required him to be medically evaluated. ALJ Exhibit (ALJ Ex.) 1, 2.

BACKGROUND

The ALJ's findings concerning Somerson's conduct throughout the course of the proceedings provide the background for our decision that Somerson's complaints must be dismissed.³ We summarize those findings as follows.

Somerson's Pre-Hearing Activity

Before Somerson's complaints were assigned to an ALJ or scheduled for formal hearing, he made abusive telephone calls to personnel at the Office of Administrative Law Judges (OALJ), United States Department of Labor, in Washington, D.C. On December 19, 2001, Chief Administrative Law Judge John Vittone rebuked Somerson and ordered him not to communicate with that office by telephone or fax unless he had permission from the judge assigned to his case.⁴ By a December 21 Pre-Hearing Order, ALJ Richard E. Huddleston, now assigned to the case, advised Somerson that though previously faxed documents had been accepted, further facsimile submissions would not be considered because neither the Act nor its implementing regulations explicitly permit filing by facsimile.⁵ Somerson quickly responded, again by facsimile, that, "I am disregarding your order" concerning facsimile filings. Somerson informed Judge Huddleston that he did not "intend to try and 'imitate'...your silly rules of practice" because to do so would be "ridiculous." "Therefore," Somerson concluded, "I invite you Judge, to quell my complaint by refusals to accept my faxed documents and effectively disable my case and undermine my civil rights."⁶

In Judge Huddleston's next pre-hearing order, he found that Somerson's defiant response constituted willful failure to comply with the order concerning facsimile filings. Nevertheless, he merely warned Somerson that "similar future conduct may result in the . . . dismissal of [the] complaint."⁷ Somerson's faxed reply to Judge Huddleston, who he described as "Vittone's henchman," began, "You obviously can't read." Somerson continued, "Forgive me Judge Huddleston, but you look *most foolish* in your attempts to quell case evidence" He concluded, "I intend to continue full steam ahead. You and Vittone are welcome to pursue OALJ's *vendetta* with the 11th Circuit in attempts to obtain a *bogus contempt charge*. How preposterous you all are!"⁸

³ Somerson was not represented by council at any stage of these proceedings.

⁴ ALJ Ex. 7.

⁵ ALJ Ex. 10. *See* 29 C.F.R. § 18.3(f)(1) (2002). The regulations implementing the Act are found at 29 C.F.R. Part 1978.

⁶ ALJ Ex. 11, p. 2.

⁷ ALJ Ex. 13, p. 2.

⁸ ALJ Ex. 15.

The Hearing

At Somerson's request, ALJ Huddleston scheduled a hearing that began on February 6, 2002, in Jacksonville, Florida.⁹ The ALJ opened the hearing by noting that some of Somerson's facsimiles had requested that his complaints be amended to add additional issues. The ALJ was concerned that Mail Contractors had not received these facsimiles and therefore might not be prepared to respond to them. Thus, he began to try to determine which issues Mail Contractors was prepared to litigate.¹⁰ But Somerson requested to be heard and demanded that the court reporter transcribe the proceedings in a certain format. Judge Huddleston twice attempted to interrupt Somerson's unwarranted instructions to the court reporter. He then warned Somerson, saying, "If you do not stop talking when I indicate that you're to stop talking, I will terminate this proceeding and I will dismiss your complaint."¹¹

The ALJ continued to determine the issues. Somerson made an objection. Judge Huddleston overruled it, but Somerson continued to argue and interrupt him. ALJ Huddleston again began to admonish Somerson who threatened to appeal to the ARB and the courts. Somerson informed the ALJ, "[Y]ou are denying me my civil rights," "violating the Constitution," and "silencing me."¹²

After Somerson stopped arguing, the ALJ and Mail Contractors' counsel continued to discuss the various facsimiles Somerson had submitted. When Judge Huddleston mentioned Chief Judge John Vittone's order that Somerson not call or fax the OALJ, Somerson interrupted: "I called him [Vittone] last week. I'll call him tomorrow. I'll call him now. Should I go out to the car and get the cell phone and call him and ask if Johnny's having a nice day up in Washington?"¹³ The ALJ tried to continue, but Somerson kept up his insolent interruptions. Judge Huddleston then explained to Somerson that his behavior was preventing him from getting a fair hearing, yet Somerson persisted. He accused the ALJ of bias and "serving the needs of the American Trucking Association."¹⁴ This prompted the ALJ to warn Somerson again: "I'm going to give you a final opportunity One more outburst like that in which you refuse to stop when I indicate, I will dismiss this whole case." He also told Somerson that he was

⁹ Either party to a STAA proceeding may request a hearing on the record. *See* 29 C.F.R. § 1978.105.

¹⁰ Transcript (TR) 6-7.

¹¹ *Id.* at 8.

¹² *Id.* at 10-11.

¹³ TR 15.

¹⁴ *Id.* at 18.

interfering with the conduct of the hearing and obstructing justice.¹⁵

Still attempting to determine the issues to be litigated, and despite Somerson's snide comments, the ALJ continued to review Somerson's faxed requests with Mail Contractors' counsel. And though not properly served with Somerson's filings, counsel assured the ALJ that he was prepared to proceed.¹⁶

Judge Huddleston then informed Somerson that he was "not going to give [Somerson] much more in terms of obstructing the course of this hearing." He cautioned Somerson that "all of what is occurring in this case may accumulate to the point of requiring me, to preserve the integrity of this process, to refer this matter to the U.S. District Court for contempt charges."¹⁷ Somerson interrupted and complained that he wanted to ask the ALJ questions but had not been permitted to talk. When Judge Huddleston permitted a question, Somerson demanded to know whether the ALJ had just said that he would refer the matter to the District Court. He then demanded to know whether the ALJ had the authority to find him in contempt. ALJ Huddleston answered Somerson's questions, but Somerson, again repeatedly interrupting, kept insisting that he had further questions. The ALJ gave Somerson a "last warning," but Somerson persisted, saying he had "questions about this procedure which you are not answering."¹⁸

Therefore, Judge Huddleston began to explain to Somerson that the relevant issues in adjudicating his STAA complaints are whether he engaged in protected activity and, if so, whether Mail Contractors retaliated because of that activity. The Judge then asked counsel if he would stipulate that the Act covers Mail Contractors and that Somerson had made safety complaints. As counsel began to respond to the ALJ, Somerson interrupted with an objection. The ALJ overruled the objection, but Somerson continued shouting frivolous objections.¹⁹

ALJ Huddleston then stopped the hearing and informed Somerson that his complaints would be dismissed because he had "obstructed the course of this hearing to the point that it's going to be impossible to try this case." The ALJ asked Somerson to leave the courtroom, but he refused. At Judge Huddleston's request, United States Marshals escorted Somerson out of the courtroom while he "continued to rave about matters unknown to this Judge and apparently with no connection to this case."²⁰ After briefly conferring about identifying and marking exhibits, the ALJ told Mail Contractors' counsel that, "The complaint will be dismissed due to his

¹⁵ *Id.* at 19.

¹⁶ *Id.* at 19-22.

¹⁷ *Id.* at 23.

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 27-29.

²⁰ Recommended Decision and Order (R. D. & O.) at 6.

obstruction of the hearing.”²¹

Somerson’s Post-Hearing Conduct

The next day, February 7, 2002, Somerson telephoned ALJ Huddleston’s office. He spoke to Judge Huddleston’s law clerk. She summarized the call in a memorandum:

On February 7, 2002, Daniel Somerson called the Newport News Office of Administrative Law Judges and was transferred to me. Before the call was transferred, the Legal Technician who answered the phone . . . advised me that the call was being recorded. Upon answering the call, Mr. Somerson asked for my title. I replied, “law clerk.” He asked “to Huddleston?” and I replied “Yes, to Judge Huddleston.” He then said: “I want you to give him a message for me. He’s an asshole.” He then hung up the telephone. All of this transpired around 2:20 in the afternoon.²²

On February 12, 2002, pursuant to 29 C.F.R. § 18.29(b), Judge Huddleston issued an Order Certifying Facts To The United States District Court for The Middle District Of Florida. In this Order, ALJ Huddleston detailed Somerson’s misconduct and requested appropriate remedies.²³ By order dated February 14, 2002, the District Court ordered Somerson to show cause why he should not be held in contempt.²⁴

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor’s jurisdiction to decide this matter under 49 U.S.C.A. § 31105(b)(2)(C) has been delegated to the ARB.²⁵

When reviewing STAA cases, the ARB is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole.²⁶

²¹ TR 29-32.

²² ALJ Ex. 29.

²³ *Id.* at 31.

²⁴ *Id.* at 32.

²⁵ See Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). See also 29 C.F.R. § 1978.109(c)(2003).

²⁶ 29 C.F.R. § 1978.109(c)(3). See *BSP Trans, Inc. v. United States Dep’t of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995).

Substantial evidence is that which is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁷ In reviewing the ALJ’s conclusions of law, the Board, as the designee of the Secretary, acts with “all the powers [the Secretary] would have in making the initial decision”²⁸ Therefore, the Board reviews the ALJ’s conclusions of law de novo.²⁹

DISCUSSION

We adopt the ALJ’s findings of fact pertaining to Somerson’s behavior because substantial evidence on the record as a whole supports them.³⁰ The record also fully supports the ALJ’s finding that Somerson “willfully and intentionally violated court orders, abused personnel during telephone calls, and finally, so disrupted the conduct of the formal hearing that it had to be terminated.”³¹ The ALJ concluded that sections 18.36 and 18.6(d) of 29 C.F.R. authorized him to dismiss Somerson’s complaints.³²

The pertinent portion of section 18.36 is:

(a) All persons appearing in proceedings before an administrative law judge are expected to act with integrity, and in an ethical manner.

(b) *The administrative law judge may exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act*

²⁷ *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

²⁸ 5 U.S.C.A. § 557(b) (West 1996).

²⁹ *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

³⁰ The ALJ’s findings about Somerson’s conduct are uncontroverted. After Judge Huddleston certified facts concerning Somerson’s disobedience and misbehavior to the District Court and the Court ordered him to show cause, Somerson acknowledged that he “engaged in unacceptable conduct” and “acted in non-compliance with certain orders and directives” in these proceedings. *See In Re: Daniel S. Somerson*, Case No. 3:02-cv-121-J-20-TEM, United States District Court, Middle District of Florida, Jacksonville Division (Consent Order, April 8, 2002).

³¹ R. D. & O. at 8.

³² The regulations governing adjudicatory proceedings before Department of Labor ALJs are found at 29 C.F.R. Part 18 that is entitled “Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.”

in good faith, or violation of the prohibition against ex parte communications.³³

But this regulation does not authorize an ALJ to dismiss a complaint even when, as here, the complainant demonstrates egregious and contumacious behavior. ALJ Huddleston did not exclude Somerson although he did request the marshals to escort Somerson out of the courtroom. The ALJ certainly could have *excluded* Somerson from further participation in the proceedings by virtue of section 18.36 because Somerson unquestionably refused to comply with Judge Huddleston's directions that he stop disrupting the hearing. Or Somerson could have been excluded because he did not demonstrate "orderly and ethical conduct." Thus, section 18.36 plainly authorizes an ALJ to exclude a party but not to dismiss the complaint.³⁴

Likewise, section 18.6(d) does not warrant dismissing Somerson's complaints. It reads in part:

Motion for order compelling answer: sanctions. (1) A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his or her burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of these rules, he or she may order either that the matter is admitted or that an amended answer be served.

(2) If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or *any other order of the administrative law judge*, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

....

³³ 29 C.F.R. § 18.36 (emphasis supplied).

³⁴ See *Somerson v. Yellow Freight System, Inc.*, 1998-STA-9, 11, slip op. at 2 (ALJ Oct. 21, 1998).

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that *a decision of the proceeding be rendered against the non-complying party*, or both.³⁵

This regulation pertains to requirements for motions and requests, answers to motions, oral arguments, briefs, motions to compel answers, and sanctions for non-compliance with discovery requests.³⁶ And while subsection (d)(2)(v), quoted above, permits an ALJ to render “a decision of the proceeding” against “a party who fails to comply . . . with an order . . . for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge . . .,” we hold that the “or any other order of the administrative law judge” language implicitly refers to orders concerning discovery, not orders or warnings the ALJ gives to a party disobeying pre-trial orders or misbehaving at a hearing. Therefore, Somerson’s complaints may not be dismissed on the basis of section 18.6(d)(2)(v). In fact, neither the Act nor any of the Part 18 regulations governing adjudicatory proceedings grant ALJs, or the ARB, specific authority to dismiss complaints because of a party’s misconduct.³⁷

Nevertheless, as we recently noted, federal judges have an “‘inherent power,’ governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”³⁸ ALJs possess this same inherent power.³⁹ Thus, we held that, despite the lack of specific statutory or regulatory authority, ALJs have “inherent power” to dismiss whistleblower complaints for a complainant’s failure to prosecute.⁴⁰ Furthermore, courts are “universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and

³⁵ 29 C.F.R. § 18.6(d)(2)(v)(emphasis supplied).

³⁶ See 29 C.F.R. § 18.6.

³⁷ See *Somerson v. Yellow Freight System, Inc.*, ARB Nos. 99-005, 99-036, ALJ Nos. 98-STA-9, 98-STA-11, slip op. at 21 (ARB Feb. 18, 1999).

³⁸ See *Reid v. Niagara Mohawk Power Corp.*, ARB No. 00-082, ALJ No. 2000-ERA-23, slip op. at 7 (ARB August 30, 2002) citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-631 (1962) (citations omitted).

³⁹ See *Butz v. Economou*, 438 U.S. 478, 514 (1978) (administrative law judge is “functionally comparable” to a [federal] judge).

⁴⁰ See *Bacon v. Con-Way Western Express*, ARB No. 01-058, ALJ No. 01-STA-7, slip op. at 4 (ARB April 30, 2003); *Reid v. Niagara Mohawk Power Corp.*, slip op. at 7.

submission to their lawful mandates.”⁴¹ Indeed, a court’s inherent power includes “the ability to do whatever is reasonably necessary to deter abuse of the judicial process,”⁴² including the power to dismiss actions or enter default judgments for abusive litigation practices or willful misconduct.⁴³ We hold, therefore, that Department of Labor ALJs have inherent power to dismiss whistleblower complaints when they find that the complainant’s conduct is egregious.

But an ALJ must exercise inherent power discreetly, being careful to “fashion an appropriate sanction for conduct which abuses the judicial process.”⁴⁴

In determining the appropriate sanction, the ALJ should “carefully balance the policy favoring adjudication on the merits with competing policies such as the need to maintain institutional integrity and the desirability of deterring future misconduct.”⁴⁵ Therefore, since dismissal is perhaps the severest sanction and because it sounds “‘the death knell of the lawsuit,’ [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious.”⁴⁶

The ALJ described Somerson’s behavior as “abusive” and “disruptive.”⁴⁷ And, as we noted, the record fully supports this appraisal. However, our examination of this record compels us to judge Somerson’s conduct more harshly.⁴⁸ Somerson’s insolent facsimile responses to ALJ

⁴¹ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citations omitted) (holding that District Court has inherent power to assess attorney’s fees and related expenses for litigant’s bad-faith conduct).

⁴² *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119, 1121 (1st Cir. 1989) (citations omitted)(affirming District Court’s dismissal because plaintiff’s gross misbehavior constituted fraud, and court, “jealous of its integrity and concerned about deterrence, was entitled to send a message, loud and clear”).

⁴³ *See Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987); *United States v. Moss-American, Inc.*, 78 F.R.D. 214, 216 (E.D. Wis. 1978).

⁴⁴ *Chambers v. NASCO, Inc.*, 501 U.S. at 44-45.

⁴⁵ *Aoude v. Mobile Oil Corp.*, 892 F.2d at 1118.

⁴⁶ *Id.* *Cf. Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985) (dismissal under F.R.C.P. 41(b) for failure to prosecute is a sanction applicable only in extreme circumstances); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (dismissal under F.R.C.P. 37(b)(2) must, at a minimum, be based on the sanctioned party’s “willfulness, bad faith, or fault in failing to comply with a discovery order”).

⁴⁷ R. D. & O. at 2.

⁴⁸ ALJ Ex. 33 is the court reporter’s audiotape of the hearing. We find this recording is more fully illustrative of Somerson’s behavior than what the transcript reveals.

Continued . . .

Huddleston's pre-hearing orders constituted sneering defiance of the ALJ's lawful orders and authority. Somerson continued his flagrant disdain at the hearing by interrupting the ALJ, mocking Chief Judge Vittone, and accusing Judge Huddleston of colluding with the American Trucking Association. Somerson ignored the ALJ's warnings that his complaints would be dismissed if he persisted. Instead, he continued to interrupt with taunting juvenile asides and insistent demands that the ALJ answer him.

Thus, we find that Somerson's pre-hearing conduct, his courtroom behavior, and the insulting "message" he left for the ALJ the day after the hearing, constitute blatantly contemptuous, egregious misconduct that threatened the integrity of the judicial process. Furthermore, since the record shows that ALJ Huddleston warned Somerson four times that further misconduct could result in dismissal of the complaints,⁴⁹ we find that the ALJ's patient attempts to adjudicate Somerson's case had become futile. Therefore, Somerson's complaints are **DISMISSED**.⁵⁰

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁴⁹ See ALJ Ex. 13; TR 8, 19, 23.

⁵⁰ The ALJ granted Mail Contractors leave to file a post-hearing motion for attorney's fees. However, attorney's fees and costs may not be assessed against a STAA complainant. See *Abrams v. Roadway Express, Inc.*, 84-STA-2, slip op. at 1-2 (Sec'y May 23, 1985).