



In the Matter of:

PHILIP M. FOSTER

ARB CASE NO. 08-044

COMPLAINANT,

ALJ CASE NO. 07-STA-040

v.

DATE: February 18, 2009

TALYN EXPRESS, INCORPORATED.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Philip M. Foster, *pro se*, Sparks, Nevada.

For the Respondent:

Talyn Express, Inc., *pro se*, Sun Valley, Nevada.

FINAL ORDER OF DISMISSAL

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended.¹ Philip M. Foster filed a complaint with the Department of Labor's Occupational Safety and Health Administration

¹ 49 U.S.C.A. § 31105 (West 2008). Congress has amended the STAA since Foster filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide here whether the amendments would apply to this case, because even if the amendments applied, the amended provisions are not at issue in this case and thus the amendments would not affect our decision.

(OSHA) alleging that Talyn Express, Incorporated, fired him in violation of the STAA. On January 30, 2008, an Administrative Law Judge (ALJ) issued an Order recommending dismissal of Foster's complaint. We accept the ALJ's recommendation and dismiss the complaint.

Foster filed his complaint on August 14, 2006, alleging that Talyn fired him for refusing to drive when doing so would violate the DOT regulation governing hours of service.² After an investigation, OSHA dismissed the complaint on June 22, 2007. On July 5, 2007, Foster objected to OSHA's findings and requested a hearing.

The ALJ issued a Notice of Trial on July 26, 2007, setting the hearing date for August 21, 2007. Foster called the ALJ's office on August 17, 2007, to inquire when the hearing would be held and then requested a continuance, claiming that he had never received the trial notice. The ALJ granted his request, noting that the notice to Foster had been addressed correctly. The ALJ stated that he would reset a trial date after he received the parties' pre-trial statements and other documents as noted in his initial Notice of Trial. He warned that "[s]hould a party fail to make the required filings, the claim may be dismissed for failure to prosecute[.]"

Foster did not respond to the ALJ's order. Talyn's owner, Niko Vogziatis, responded by letter dated September 6, 2007, stating that his companies were "out of business not making a profit" and that he was "taking the final steps of failing business."

On September 25, 2007, the ALJ sent a copy of Vogziatis's letter to Foster and ordered him to show cause within 30 days why the case should not be dismissed as moot. The ALJ noted the current record showed no purpose in going forward with the trial because if Foster prevailed, no useful relief was possible, and if Talyn prevailed, no relief was due. Foster did not respond to this order.

On January 30, 2008, the ALJ issued a Recommended Order of Dismissal. He referred to his September 25, 2007 order requiring Foster to show why his complaint should not be dismissed as moot. The ALJ found that no party had responded to the show cause order and stated: "I treat this silence as a withdrawal of [Foster's] request for a hearing, which has the effect of reinstating the Secretary's dismissal of the complaint."

Foster's complaint is now before the ARB pursuant to the automatic review provisions of the STAA.³ The ARB is bound by the ALJ's factual findings if supported by

² 49 U.S.C.A. § 31105(a)(1)(B)(i); 49 C.F.R. § 395.3.

³ 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1) (2007). This regulation provides: "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

substantial evidence on the record considered as a whole.⁴ The ARB reviews questions of law de novo.⁵ The ARB issued a Notice of Review and Briefing Schedule on February 7, 2008. Talyn did not respond, but Foster filed a letter on February 12, 2008.

The ALJ issued a lawful order on August 17, 2007, granting Foster's request for a continuance of the hearing and instructing him to submit a prehearing statement and witness list and to exchange exhibits with Talyn. Although warned that failure to file could result in dismissal of his complaint, Foster did not submit any prehearing materials or explain his failure to do so. In addition, Foster did not respond to the ALJ's show cause order issued on September 25, 2007. Finally, Foster's February 12, 2008 letter to the ARB did not explain why he had not submitted any documents to the ALJ or responded to his show cause order.

Substantial evidence in the record before us supports the ALJ's decision to dismiss Foster's complaint for his failure to show cause why his claim should not be dismissed.⁶ Accordingly, the ARB **AFFIRMS** the ALJ's Recommended Order of Dismissal and **DISMISSES** Foster's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

⁴ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. 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).

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

⁶ *See Dickson v. Lakefront Lines, Inc.*, ARB No. 02-029, ALJ No. 01-STA-62, slip op. at 4 (July 24, 2003)(ALJ "was acting within his discretion to recommend dismissal").