



**In the Matter of:**

**ROBERT W. SCHWARZMUELLER,**

**ARB CASE NO. 08-055**

**COMPLAINANT,**

**ALJ CASE NO. 2006-STA-00017**

**v.**

**DATE: February 13, 2009**

**YELLOW TRANSPORTATION, INC.**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Robert W. Schwarzmüller, pro se, Pendleton, New York.**

*For the Respondent:*

**Anderson B. Scott, Esq., Fisher and Phillips, LLC, Atlanta, Georgia.**

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended.<sup>1</sup> Robert W. Schwarzmüller filed a complaint with the Department of Labor's Occupational Safety

---

<sup>1</sup> 49 U.S.C.A. § 31105 (West 2008); 49 U.S.C.A. § 31105 (West 2008). Regulations that implement the STAA are found at 29 C.F.R. Part 1978 (2007). Congress has amended the STAA since Schwarzmüller filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary for us to determine whether the amendments are applicable to this case because even if they were, they would not affect our decision since they are not applicable to the issues presented for our review.

and Health Administration (OSHA), alleging that Yellow Transportation, Inc. (Yellow), terminated his employment in violation of the STAA. On February 11, 2008, an Administrative Law Judge (ALJ) issued a “Recommended Decision and Order Dismissing the Case” (R. D. & O.), recommending that the complaint be dismissed. For the following reasons we agree with the ALJ and dismiss the complaint.

#### **BACKGROUND**

Schwarzmueller was employed by Yellow Transportation as a dock worker when he raised safety concerns to Yellow with regard to dock workers and truck drivers using and selling drugs on the job. Yellow discharged Schwarzmueller on November 22, 2005, for falsifying his time card. On December 21, 2005, Schwarzmueller filed his complaint with OSHA. OSHA investigated and found that Yellow did not violate the STAA. Schwarzmueller submitted a request for a hearing to the Office of Administrative Law Judges on March 14, 2006.

After requesting a hearing, Schwarzmueller moved to New York State and filed for bankruptcy. The proceedings before the ALJ, however, were delayed while Schwarzmueller sought permission from the Bankruptcy Court to proceed with his STAA case. Schwarzmueller obtained permission to proceed. On September 10, 2007, the ALJ issued an order compelling Schwarzmueller to appear for a deposition on or before October 31, 2007. On September 28, 2007, Yellow filed a “Notification of Complainant’s Intent to Withdraw Objections and His Intent to Not Appear for Deposition,” informing the ALJ that when Yellow called Schwarzmueller to remind him of his deposition, Schwarzmueller said that he wanted to withdraw his objections to OSHA’s findings because of issues in his ongoing bankruptcy and personal issues. He also informed Yellow that he did not intend to appear for his deposition. Yellow therefore requested that the case be dismissed.

On October 4, 2007, the ALJ issued an order to show cause why the complaint should not be dismissed. The order provided that the case would be dismissed if Schwarzmueller failed to respond to the order:

The applicable regulations prefer that a Complainant submit a written statement to the effect that he wishes to withdraw his complaint.

It should be pointed out that a non-response to this order will result in a dismissal of the complaint.

Therefore, it is ORDERED that the complainant file a response as to his intentions on or before OCTOBER 22, 2007.

Non-response to this order will be taken as a request for a dismissal.

Schwarzmueller did not respond to the order. On February 11, 2008, the ALJ issued an R. D. & O. recommending dismissal of the complaint for failure to comply with his October 4, 2007 order pursuant to 29 C.F.R. § 18.6(d)(2)(v).

This case is before the Board pursuant to the STAA's automatic review provisions.<sup>2</sup> On February 29, 2008, the Board issued a Notice of Review and Briefing Schedule, informing the parties of their right to file briefs in support of or in opposition to the R. D. & O. Schwarzmueller did not file a brief. On March 17, 2008, Yellow informed the Board by letter that it would not file a brief unless Schwarzmueller filed one.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA and its implementing regulations.<sup>3</sup> The ARB is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."<sup>4</sup> The Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.<sup>5</sup> The Board reviews questions of law de novo.<sup>6</sup>

### DISCUSSION

Courts possess the "inherent power" to dismiss a case on their own initiative for lack of prosecution.<sup>7</sup> This power is "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."<sup>8</sup> Like the courts, the Department of Labor's Administrative Law Judges and this Board must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." Thus, the Board will

---

<sup>2</sup> "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." 29 C. F. R. § 1978.109(a).

<sup>3</sup> Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C. F. R. Part 1978.

<sup>4</sup> 29 C. F. R. § 1978.109(c)(1).

<sup>5</sup> 29 C. F. R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998).

<sup>6</sup> *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

<sup>7</sup> *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630 (1962).

<sup>8</sup> *Id.* at 630-631.

affirm an ALJ's recommended decision and order on the grounds of abandonment, where the facts dictate that a party has failed to prosecute his or her case.<sup>9</sup> Furthermore, as the ALJ noted, the applicable Rules of Practice and Procedure permit an ALJ to dismiss cases when a party fails to comply with any of the ALJ's orders.<sup>10</sup>

On October 4, 2007, the ALJ issued a lawful order to show cause why the complaint should not be dismissed, instructing Schwarzmuller to file a response as to his intentions and also informing Schwarzmuller that non-response would be taken as a request for dismissal. Schwarzmuller did not respond to the ALJ's order. Based upon the record before us, we conclude that substantial evidence and well-established legal precedent support the ALJ's recommended decision to dismiss.

### CONCLUSION

Schwarzmuller failed to comply with the ALJ's October 4, 2007, order to show cause. Accordingly, the Board **ACCEPTS** the ALJ's R. D. & O. and **DISMISSES** Schwarzmuller's complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Chief Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

---

<sup>9</sup> *Rose v. ATC Viacom, Inc.*, ARB 05-091, ALJ No. 2005-STA-00014 (Aug. 31, 2006), slip op. at 3-4; *Kruml v. Patriot Express*, ARB 03-015, ALJ No. 02-STA-7, slip op. at 4-5 (ARB Feb. 25, 2004); *Assistant Sec'y for OSH and Reichelderfer v. Bridge Transp., Inc.*, ARB No. 02-068, ALJ No. 2001-STA-041, slip op. at 3 (ARB Aug. 29, 2003).

<sup>10</sup> R. D. & O. at 2. See 29 C.F.R. § 18.6(d)(2)(v); *Dickson v. Butler Motor Transit*, ARB No. 02-098, ALJ No. 01-STA-00039, slip op. at 4 (ARB July 25, 2003) (holding ALJ acted within range of his discretion in dismissing STAA complaints after complainant repeatedly ignored the ALJ's discovery and other orders).