JAMES AUSTERMAN,

COMPLAINANT,

v.

BEHNE, INC., and NATHAN BEHNE,

RESPONDENTS.

ARB CASE NOS. 10-149
11-001

ALJ CASE NO. 2010-STA-018

DATE: December 17, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, *Truckers Justice Center,* Burnsville, Minnesota

For the Respondent:
Beth A. Serrill, *Blethen, Gage & Krause, PLLP,* Mankato, Minnesota

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge* and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DISMISSING COMPLAINT

On July 2, 2009, the Complainant, James Austerman, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration alleging that the Respondents, Behne, Inc., and Nathan Behne, had retaliated against him in violation of the whistleblower protection provisions of the Surface Transportation Assistance Act of 1982, as amended (STAA),[1] and its implementing regulations,[2] when

[1] 49 U.S.C.A. § 31105 (Thomson/West Supp. 2010).

the Respondents terminated his employment in retaliation for protected activities. On September 10, 2010, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order – Order of Dismissal finding that Austerman had failed to show that the Respondents retaliated against him because he engaged in STAA-protected activity.[3]

Both the Petitioner and Respondents filed petitions for review with the Administrative Review Board. The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA.[4]

On November 9, 2010, the Board received from Austerman a Notice of Commencement of Civil Action in United States District Court, in which he stated that he had commenced an action in federal court, as authorized by 49 U.S.C.A. § 31105(c), for de novo review of the complaint currently pending before the Board. If the Board has not issued a final decision within 180 days of the date on which the complainant filed the complaint, and there is no showing that the complainant has acted in bad faith to delay the proceedings, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court, which will have jurisdiction over the action without regard to the amount in controversy.[5] Accordingly, we ordered the parties to show cause no later than November 26, 2010**,** why the Board should not dismiss Austerman's complaint pursuant to 29 C.F.R. § 1978.114.

Austerman filed a reply repeating that he had filed in district court and stating that the matter should be dismissed, without prejudice. The Respondents filed a response to the Show Cause Order urging the Board to dismiss Austerman's case for failure to prosecute because he neglected to give the Board the 15-day notice of his intent to file in district court as provided in 29 C.F.R. § 1978.114(b), and he failed to file an opening brief.

Although a party disregards the Department's regulations at its peril, under the facts of this case, we are not persuaded by the Respondents' argument that we should dismiss Austerman's appeal for failure to prosecute. The 15-day notice gives the Board the opportunity to issue a decision in a case before it is removed from DOL jurisdiction, if the issuance is imminent, or alerts the Board that the case will soon be removed, so that it will not expend its limited resources on a case that it will not have the opportunity to

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[2] 29 C.F.R. § 1978.114, 75 Fed. Reg. 53558 (Aug. 31, 2010).

[3] Recommended Decision and Order – Order of Dismissal at 10-12.

[4] Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.110(a).

[5] 18 U.S.C.A. § 31105(c); 29 C.F.R. § 1978.114.

decide. Neither situation applies here. Our decision was not imminent, nor did we begin the decision-making process within 15 days of Austerman's notification to us that he had filed in district court.

Austerman has demonstrated his intention to prosecute his case, just not before the Board. Accordingly, we would be inclined to permit Austerman to file his opening brief, time having expired, rather than to dismiss his case for failure to prosecute as the Respondents argue. But if we did so, Austerman would simply give the Board the 15-day notice he should have given before initially filing in district court, and then he would re-file in district court. For all that effort, we would be in no different position than we are now.[6] Accordingly, because forcing Austerman to comply with the 15-day notice requirement in this case would serve no useful purpose, and the Respondents have failed to demonstrate that Austerman has acted in bad faith to delay the proceedings, we **GRANT** his motion to withdraw his complaint[7] so that he may proceed in district court.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

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[6] We do note however, that had the Board been in a position to issue the decision within 15 days, the case might have had a different outcome.

[7] We are unsure what Austerman intends by requesting that the complaint be dismissed without prejudice. Obviously, since the case before the district court is de novo, the dismissal is without prejudice in regard to the district court case. But if Austerman means to suggest that the complaint is dismissed without prejudice to re-file with the Department of Labor, should he be dissatisfied with the outcome of his district court case, we doubt whether such an action would comport with the intent or language of the statute. In any event, this question need not be addressed until, or if, Austerman attempts to re-file his complaint before the Department of Labor.