



**In the Matter of:**

**ANTHONY ELLISON,**

**ARB CASE NO. 08-119**

**COMPLAINANT,**

**ALJ CASE NO. 2005-CAA-009**

**v.**

**DATE: March 16, 2009**

**WASHINGTON DEMILITARIZATION  
COMPANY, A SUBSIDIARY OF  
WASHINGTON GROUP, INTERNATIONAL,  
INC. (A.K.A. WESTINGHOUSE ANNISTON),**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

Mick G. Harrison, Esq., *The Caldwell Eco Center*, Bloomington, Indiana

***For the Respondent:***

John J. Coleman, III, Esq. and Katherine Morris Willis, Esq., *Burr & Forman  
LLP*, Birmingham, Alabama

**FINAL DECISION AND ORDER DISMISSING APPEAL**

The Complainant, Anthony Ellison, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Washington Demilitarization Company, a subsidiary of Washington Group, International, Inc. (a.k.a. Westinghouse Anniston), retaliated against him in violation of the employee protection provisions of the Clean Air Act;<sup>1</sup> the Comprehensive Environmental Response, Compensation and Liability Act;<sup>2</sup> the Federal Water Pollution

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<sup>1</sup> 42 U.S.C.A. § 7622 (West 2003).

<sup>2</sup> 42 U.S.C.A. § 9610 (West 2005).

Control Act;<sup>3</sup> the Solid Waste Disposal Act;<sup>4</sup> the Toxic Substances Control Act;<sup>5</sup> the Safe Drinking Water Act;<sup>6</sup> (known collectively as the environmental acts), and their implementing regulations,<sup>7</sup> and the Occupational Safety and Health Act.<sup>8</sup> The employee protection provisions of the environmental acts authorize the Secretary of Labor to hear complaints of alleged retaliation because of protected activity and, upon finding a violation, to order abatement and other remedies.<sup>9</sup> The Secretary has delegated authority to the Administrative Review Board (ARB) to review an ALJ's initial decision.<sup>10</sup> Because Ellison failed to file a timely initial brief and more importantly, because we find that his attorney's rationalization for his failure to timely file the brief was not proffered in good faith, we dismiss Ellison's appeal.

### BACKGROUND

On July 31, 2008, the ARB issued a Notice of Appeal and Order Establishing Briefing Schedule ordering Ellison to file an initial brief "on or before **September 2, 2008.**" The Board cautioned Ellison, "If the Complainant fails to file the initial brief on time, the Board may dismiss the Complainant's appeal."<sup>11</sup> The Board received no brief from Ellison filed on or before September 2, 2008.

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<sup>3</sup> 33 U.S.C.A. § 1367 (West 2001).

<sup>4</sup> 42 U.S.C.A. § 6971 (West 2003).

<sup>5</sup> 15 U.S.C.A. § 2622 (West 1998).

<sup>6</sup> 42 U.S.C.A. § 300j-9 (West 2003).

<sup>7</sup> 29 C.F.R. Part 24 (2008). The Department of Labor has amended these regulations since Ellison filed his complaint in 2004. 72 Fed. Reg. 44,956 (Aug. 10, 2007). We have applied the regulations in effect when Ellison filed his complaint, and in any event, application of the amended regulations would not alter our decision.

<sup>8</sup> 29 U.S.C.A. §§ 651 et seq. We note that the Administrative Review Board does not have jurisdiction of Administrative Law Judge decisions under this Act. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

<sup>9</sup> *Jenkins v. U.S. Emtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 9 (ARB Feb. 28, 2003).

<sup>10</sup> 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

<sup>11</sup> Notice of Appeal and Order Establishing Briefing Schedule (ARB July 31, 2008) at 1.

On September 8, 2008, the Board received a brief from Ellison delivered by Federal Express. Attached to the brief is a Certificate of Service signed by Ellison's attorney, Mick G. Harrison (Counsel), stating, "The undersigned hereby certifies that a copy of the foregoing Complainant's Initial Brief was served on and filed with the following parties via FedEx postage prepaid for delivery **within five days of September 2, 2008.**" (Emphasis added). Thus the certificate of service does not state the date on which the brief was served; it merely states the date on which Harrison expects it to be delivered. In fact, the envelope in which Harrison sent the brief to the Board indicates that he did not send it until September 6, 2008, four days after its due date.

On September 9, 2008, we received Respondent's Motion to Strike Complainant's Initial Brief. In this Motion, the Respondent argues that we should strike Ellison's brief because he has failed to timely file it. In response, we issued an Order requiring Ellison to show cause why we should not strike his brief as untimely. In this Order we noted that we were greatly troubled by counsel's apparent attempt to mislead the Board as to the date of filing by omitting the date that the document was actually remitted for delivery.

Ellison, in his response to the show cause order, argued that the ARB's General Counsel (who had signed the Order to Show Cause for the Board) was mistaken as to the applicable procedures before the ARB in environmental whistleblower cases.<sup>12</sup> He averred that the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges applied to determine the timeliness of his filing before the Board, regardless of the plain terms of the Board's briefing order.<sup>13</sup>

Furthermore, Ellison asserts that the Show Cause Order's statements that a brief, which his counsel did not remit for delivery until September 6, 2008, and which the

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<sup>12</sup> Complainant's Response to Order to Show Cause and in Opposition to Respondent's Motion to Strike Complainant's Initial Brief (C. R.) at 1.

<sup>13</sup> 29 C.F.R. § 18.4(c)(2008) provides

*Computation of time for delivery by mail.* (1) Documents are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges. However, when documents are filed by mail, five (5) days shall be added to the prescribed period.

(2) Service of all documents other than complaints is deemed effected at the time of mailing.

(3) Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.

Board did not receive until September 8, 2008, was not filed “on or before **September 2, 2008,**” and that the Board was troubled by a Certificate of Service that does not state when the document was remitted for delivery demonstrates a premature determination of the timeliness of the brief by the Board.<sup>14</sup> Ellison requests that “any members of the Board or their staff, involved in consideration of, influencing, drafting or issuing the instant Order to Show Cause recuse themselves from any further involvement in deciding Respondent’s motion and the Order to Show Cause”<sup>15</sup> and that “the ARB General Counsel and her staff, and the Board members and their staff, make a full written disclosure to Complainant regarding which of them were involved in making, drafting, issuing or influencing the decision/conclusion reflected in the Order to Show Cause that Complainant’s initial brief was not filed in compliance with the ARB scheduling order, and which of these persons will recuse.<sup>16</sup> Finally, Ellison requests that “the ARB General Counsel and her staff and the Members of the Board and their staff make a full written disclosure to Complainant stating which of them has had any direct or indirect communication from Respondent or Respondent’s counsel or any agent for Respondent, even if through third parties, whether considered technically prohibited ‘*ex parte* communications’ or not, at any time regarding Complainant’s case, Complainant, Complainant’s counsel, or any fact or legal issues or matters involved in the instant ARB appeal or the underlying dispute or Respondent’s motion to strike or the Order to Show Cause, and which of these person [sic] will recuse.”<sup>17</sup>

## DISCUSSION

The Board’s authority to effectively manage its docket, including authority to require compliance with Board briefing orders, is necessary to “achieve orderly and expeditious disposition of cases.”<sup>18</sup> This Board has authority to issue sanctions, including dismissal, for a party’s failure to comply with the Board’s orders and briefing requirements.<sup>19</sup> Counsel for Ellison, Mick G. Harrison, is an experienced litigator before

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<sup>14</sup> C.R. at 15-17.

<sup>15</sup> *Id.* at 17.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 17-18.

<sup>18</sup> *Link v. Wabash*, 370 U.S. 626, 630-31 (1962).

<sup>19</sup> *Blodgett v. TVEC*, ARB No. 03-043, ALJ No. 2003-CAA-007 (ARB Mar. 19, 2003). See also *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-006 (ARB Dec. 30, 2004, Reissued Jan. 5, 2005), *aff’d sub nom. Powers v. U.S. Dep’t of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004), *aff’d sub nom. Powers v. U.S. Dep’t of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006); *cf.* Fed. R. App. P. 31(c) (allowing dismissal as sanction for failure to file a conforming brief); Fed R. App. P. 41(b)

the Board.<sup>20</sup> Harrison argues that he genuinely and reasonably believed that he was not required to state in the Certificate of Service the date that he remitted his brief for delivery (September 6, 2008), but only needed to state that he expected the brief to be delivered within five days of September 2, 2008, the date the Board's Order specified that he must file his brief "on or before." He also argues that he honestly and reasonably believed that based on the ALJ regulations for filing documents, he had an additional five days from the date on which the Board's Briefing Order stated that the brief was due "on or before" to file his brief. Based on Counsel's extensive litigating experience before us and his previous filings with the Board, we do not find his argument to be credible.

When this case was previously before the Board,<sup>21</sup> we issued a Notice of Appeal and Order Establishing Briefing Schedule stating, "The Complainant may file an initial brief . . . , on or before **June 6, 2005**. . . . The Complainant may file a rebuttal brief, exclusively [responsive] to the [Respondent's] reply brief , . . . on or before **July 21, 2005**."<sup>22]</sup>

In response, Counsel Harrison filed an initial brief dated **June 6, 2005**, with a Certificate of Service that stated, "[t]he undersigned hereby certifies that a copy of the foregoing Complainant's Initial Brief was served on and filed with the following parties on **June 6, 2005** . . ." (emphasis added). The Board received this brief on **June 6, 2005**. The rebuttal brief that Counsel filed in response to the Board's briefing order stated, "[t]he undersigned hereby certifies that a copy of the foregoing Complainant's Initial [sic] Brief was served on and filed with the following parties on **July 21, 2005** as indicated." The rebuttal brief was dated **July 21, 2005**. Counsel faxed a copy of the brief to the Board on **July 21, 2005**, with the following message, "Please file this rebuttal brief in the above-referenced case. An original plus four copies are being sent to the Board

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(permitting courts to dismiss a complaint for failure to comply with court orders).

<sup>20</sup> See e.g., *Caldwell v. EG & G Defense Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-001 (ARB Oct. 31, 2008); *Dixon v. U.S. Dep't. of Interior*, ARB Nos. 06-147, 06-160; ALJ No. 2005-SDW-008 (ARB Aug. 28, 2008); *Ellison v. Washington Demilitarization Co.*, ARB No. 05-098, ALJ No. 2005-CAA-009 (ARB Sept. 25, 2007); *Yarborough v. U.S. Dep't. of the Army*, ARB No. 05-117, ALJ No. 2004-SDW-003 (ARB Aug. 30, 2007); *Johnson v. EG&G Defense Materials, Inc.*, ARB No. 06-067, ALJ No. 2005-SDW-002 (ARB May 25, 2006); *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-005 (ARB Dec. 30, 2004); *Mugleston v. EG&G Defense Materials, Inc.*, ARB No. 04-060, ALJ No. 2002-SDW-004 (ARB June 30, 2004); *Ewald v. Commonwealth of Va.*, ARB No. 00-77, ALJ No. 1989-SWD-001 (ARB Aug. 21, 2000).

<sup>21</sup> Our decision in *Ellison v. Washington Demilitarization Co.*, ARB No. 05-098, ALJ No. 2005-CAA-009 (Sept. 25, 2007)(*Ellison I*) remanded the case to the ALJ for further consideration. The present case is on appeal from the ALJ's decision on remand.

<sup>22</sup> Notice of Appeal and Order Establishing Briefing Schedule at 1 (May 5, 2005).

this day via Fed Ex. Service is being accomplished on respondent this day via fax, email and Fed Ex.” (Emphasis added). Thus it appears the Counsel was fully apprised of and fully comprehended that a Certificate of Service should state the date that the document was remitted to the mail and that the Board required that a copy of the briefs served be filed with the Board on or before the designated date (not five days later). Otherwise, why would Counsel have gone to the trouble of faxing a copy of the rebuttal brief on the date for filing designated in the Order, if he, in fact, believed he had five additional days to file his brief and he had sent it to the Board by Fed Ex?

Perhaps Counsel Harrison would argue that it was just serendipity that he certified in his certificate of service that these briefs were served on the dates provided in the Board’s briefing order and that he dated and filed those briefs (including a faxed copy) on the dates the Order specified. But the procedure he followed in serving his briefs in *Caldwell v. EG & G Defense Materials, Inc.*,<sup>23</sup> absolutely belies any such argument. In *Caldwell*, the Board issued a briefing order stating, “The Complainant may file an initial brief . . . , on or before **June 24, 2005**. . . . The Complainant may file a rebuttal brief, exclusively [responsive] to the [Respondent’s] reply brief, . . . on or before **August 9, 2005**.”<sup>24</sup> In response to the Board’s Briefing Order, Counsel Harrison faxed a copy of his brief dated **June 24, 2005**, to the Board on **June 24, 2005**, and certified that “a copy of the foregoing complainant’s Initial Brief was served on the parties below, and filed with ARB, **June 24, 2005**, via U.S. Priority Mail or, if otherwise, as indicated.” (Emphasis added). Moreover, and indisputably confirming Counsel’s understanding of proper filing procedure before the Board, on August 8, 2005, Counsel requested a one-day enlargement of time to file his rebuttal brief. Counsel stated in Complainant’s Motion for One Day Extension of Time:

Complainant Caldwell hereby, by counsel, respectfully submits his Motion for a one day extension of time to file his rebuttal brief. In support of this motion, Complainant states as follows:

1) Complainant’s rebuttal brief was due to be filed August 9, 2005 by Order of the ARB.

2) Complainant’s counsel was traveling in Utah on other whistleblower cases during the two week period prior to the rebuttal brief due date.

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5) As a consequence of the travel, overlapping

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<sup>23</sup> ARB No. 05-101, ALJ No. 2003-SDW-001 (ARB Oct. 31, 2008).

<sup>24</sup> Notice of Appeal and Order Establishing Briefing Schedule at 1 (May 24, 2005).

deadlines and the unexpected problem with the Hall transcript, counsel was unable to complete and mail the rebuttal brief in the instant case **until the day after it was due**. Due to a temporary phone outage at the residence where counsel is staying in Utah, complainant was unable to fax the service copy to EG&G until today, August 12, 2005.

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For the foregoing reasons, Complainant requests that the ARB allow Complainant's rebuttal brief to be filed **one day later than originally ordered**, on August 10, 2005 by commercial courier (Fed Ex) to be received August 12, 2005, with service to be completed on August 12, 2005.

Respectfully submitted,

Mick G. Harrison, Esq.<sup>[25]</sup>

Based on Counsel's statements that "Complainant's rebuttal brief was due to be filed August 9, 2005 by Order of the ARB" and that "counsel was unable to complete and mail the rebuttal brief in the instant case until the day after it was due," it is beyond cavil that Counsel did not honestly believe that he had an additional five days to file his brief in this case. His argument that the ALJ regulations permitted him to do so was simply a baseless post hoc rationalization for his failure to timely file his brief.

Counsel's filings in *Caldwell* clearly demonstrate that he understood the plain language of the Board's briefing order, but if for some reason he subsequently became uncertain as to its meaning, it was his obligation to contact the Board to resolve any questions that might have arisen in his mind. Moreover, Counsel knew how to request additional time to file his brief and had he done so with a credible explanation of his inability to timely file, the Board almost certainly would have granted him additional time. But instead, Counsel simply failed to timely file either a brief or a motion for enlargement and when pressed for an explanation for his failure to do so, provided a justification, which based on his extensive litigating experience before the Board and his own filings in prior cases, was, most simply, unbelievable. Unfortunately, this is not the first time that Counsel Harrison's failure to comply with the Board's briefing order has prejudiced the interests of a client. In *Mugleston v. EG&G Defense Materials*,<sup>26</sup> the

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<sup>25</sup> Complainant's Motion for One Day Extension of Time at 1-3 (emphasis added). The Board granted this Motion and accepted Counsel's brief.

<sup>26</sup> ARB No. 04-060, ALJ No. 2002-SDW-004 (ARB June 30, 2004).

Board dismissed the complainant's appeal when Counsel Harrison failed to file an Initial Brief in compliance with the Board's scheduling order and did not even request an enlargement to file the brief until three months after the brief was due.

Striking or refusing to accept a petitioner's opening brief because the petitioner has failed to comply with the Board's briefing order can lead to dismissal of the petitioner's appeal.<sup>27</sup> The Board recognizes that dismissal of an appeal for failure to file a timely brief is a very serious sanction and we do not take it lightly. In *Harris v. Callwood*, the Court of Appeals for the Sixth Circuit concluded that such dismissals represent a harsh sanction to be carefully reviewed on appeal and held that, "in the absence of notice that dismissal is contemplated a district court should impose a penalty short of dismissal unless the derelict party has engaged in 'bad faith or contumacious conduct.'" <sup>28</sup>

The Board specifically and explicitly warned Ellison in the Notice of Appeal and Order Establishing Briefing Schedule that it could dismiss his appeal if he failed to file a timely brief. And there is no doubt that Counsel understood the significance of the failure to file a timely brief since the Board had dismissed a prior appeal he had filed on behalf of a complainant because he failed to file a timely brief. Moreover, given Counsel's extensive litigating experience before the Board and his clearly expressed understanding in prior filings of the Board's procedures, we cannot conclude that his rationalization for filing the brief six days out of time was proffered in good faith.<sup>29</sup>

While we recognize that Ellison is not personally responsible for the failure of his attorney to timely file the brief, parties are ultimately responsible for the acts and

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<sup>27</sup> *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-006 (ARB Dec. 30, 2004, Reissued Jan. 5, 2005), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006); *cf.*, *Somerson v. Mail Contractors of America*, ARB No. 03-055, ALJ No. 2002-STA-044 (ARB Nov. 25, 2003)(Board struck complainant's brief in case in which complainant's counsel offered patently false explanation for his failure to timely file the opening brief; but ARB was nevertheless compelled to review the administrative law judge's recommended decision because case was subject to regulations requiring automatic review of recommended decisions); *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-011 (ARB Oct. 14, 2003)(same).

<sup>28</sup> 844 F.2d 1254, 1256 (1988).

<sup>29</sup> Because the Board did not receive the Brief until September 8, 2008, six days after it was due under the Board's briefing Order, even under the Complainant's rationale, the brief was not timely filed.

omissions of their freely chosen representatives.<sup>30</sup> As the Supreme Court held in *Link v. Wabash Railroad Co.*, “[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all fact, notice of which can be charged upon the attorney.’”<sup>31</sup>

Finally we reject Ellison’s completely unsupported and false allegation that the General Counsel or the Board had impermissibly prejudged his case. Under the plain language of the Board’s Briefing Order and the Board’s well-established procedures, of which Counsel has indisputably demonstrated his knowledge, there is no doubt that Counsel failed to timely file the brief. The purpose of the Order to Show Cause was to provide Counsel with the opportunity to proffer a credible explanation for his failure to timely file the brief, and had he done so, the brief most likely would have been accepted, although filed out of time. Moreover, at the time Counsel Harrison attacked the General Counsel’s impartiality because she stated that the brief was untimely, Counsel Harrison knew that he had not timely filed the brief because the Show Cause Order states that the Board did not receive the brief until September 8, 2008, one day after the date on which even Counsel concedes that it was due.

#### CONCLUSION

Ellison failed to timely file his initial brief in this case. We find that Counsel’s rationalization for his failure to comply with the Board’s briefing order was not proffered in good faith given his extensive litigation experience before the Board and his demonstrated understanding of the plain language of the Board’s briefing order. Consequently, we **GRANT** the Respondent’s Motion to Strike Ellison’s opening brief and **DISMISS** Ellison’s appeal.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administration Appeals Judge**

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

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<sup>30</sup> *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-006, slip op. at 5 (ARB Aug 27, 2002).

<sup>31</sup> 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)). The Court in *Link* did note, however, that “if an attorney’s conduct falls substantially below what is reasonable under the circumstances, the client’s remedy is against the attorney in a suit for malpractice.” 370 U.S. at 634 n.10.