



Issue Date: 18 March 2015

CASE NO.: 2014-FRS-00081

In the Matter of

OMAR BELL

Complainant

v.

METRO NORT RAILROAD

Respondent

DECISION AND ORDER OF DISMISSAL

The above-captioned matter arises under the employee protection provisions of the Federal Rail Safety Act (“FRSA,” or “the Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”), Pub. L. No. 110-53. Omar Bell (“Complainant”) filed a complaint under the Act on February 27, 2014, alleging that his employment with MTA Metro-North Commuter Railroad (“Respondent”) was terminated because he testified before the National Transportation Safety Board and the Federal Railroad Administration. The Occupational Safety and Health Administration (“OSHA”), as the agent for the Secretary of Labor, investigated the complaint and found that it was not timely filed. OSHA issued the Secretary’s findings including that of untimely filing and dismissed the complaint on March 6, 2014. Complainant, pro se, requested a hearing before the Office of Administrative Law Judges (“OALJ”) on March 30, 2014.

On April 22, 2014, I issued an Order to Show Cause Why Complaint Should Not Be Dismissed as Untimely. Complainant retained counsel and timely submitted a response on May 21, 2014. Upon finding good cause shown for the untimely complaint, I issued a Notice of Hearing and Pre-Hearing Order on June 18, 2014, scheduling a hearing for November 6, 2014.

Complainant filed his Initial Submissions on July 3, 2014. On October 21, 2014, I issued a Second Notice of Hearing and Pre-Hearing Order, scheduling a pre-hearing conference for February 12, 2015. By letter dated November 20, 2014, Complainant’s counsel withdrew from this matter and requested that the dates set for hearing, discovery cut-off, etc., as outlined in my Second Notice of Hearing and Pre-Order, be adjourned to allow Complainant to obtain other counsel. In an Order dated December 10, 2014, I denied the adjournment request, finding that Complainant would have sufficient time to obtain other counsel prior to those dates. In that December 10, 2014 Order, I advised Complainant that if he did not wish to pursue this matter, he may submit a written withdrawal of his objection to the Secretary’s findings.

My December 10, 2014 Order Denying Adjournment Request was sent to Complainant by certified mail, return receipt requested, to his last known address of record (i.e., 148 East 3rd Street, Deer Park, NY, 11729); it was returned to this office as undelivered on January 9, 2015. That December 10, 2014 Order was then re-sent to Complainant at his last known address by regular mail on January 14, 2015. To date, the re-sent December 10, 2014 Order has not been returned to this office and its service upon Complainant is therefore presumed.¹

By letter to me dated January 6, 2015, Respondent's counsel indicated that his several attempts (after an initial telephone conversation) to schedule Complainant for a deposition prior to the previously ordered discovery deadline had been unsuccessful. In that January 6, 2015 letter, Respondent's counsel requested that I therefore suspend the hearing date, as well as the deadlines previously ordered for completion of discovery and submission of motions for summary decision.

On January 22, 2015, I issued an Order Granting Respondent's Requests and Scheduling a Status Conference, suspending all previously ordered deadlines, postponing the hearing set for February 25, 2015, and scheduling a telephonic status conference with the parties for 10:00 a.m., EST, February 19, 2015. My January 22, 2015 Order specifically advised Complainant that his failure to appear for the status conference as scheduled, without good cause shown, may result in the imposition of sanctions, including dismissal of this matter before the OALJ.² I convened the telephonic status conference as scheduled on February 19, 2015: Respondent's counsel was present, but Complainant failed to appear.

On February 23, 2015, I issued an Order To Show Cause As To Why This Matter Should Not Be Dismissed, directing Complainant to show cause within 10 days as to why his complaint should not be dismissed for failure to respond to my January 22, 2015 Order. My Order further advised Complainant that "[i]f good cause is not shown, this matter will be dismissed before this office and the Secretary's findings will become the final agency action in this case."³ The deadline for a timely response has passed, and to date, Complainant has not responded to my Order to Show Cause.

DISCUSSION

Where a party fails to respond to an order, the regulations at 29 C.F.R. § 18.6(d)(2)(ii) provide me with the authority to render a decision against the non-compliant party regarding the matter of issue in the order. § 18.6(d)(2)(ii). The authority to dismiss a case also comes from my "inherent power" to control my docket and prevent undue delays in disposition of pending cases for lack of prosecution. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962)

¹ Under 29 C.F.R. 18.3(c), proper service from the OALJ to a party is described as follows: "Service of notices, orders, decisions and all other documents, except complaints, shall be made by *regular mail* to the *last known address*." *See* 29 C.F.R. 18.3(c) (*emphasis added*). "The controlling regulations require that an ALJ's order be served upon the parties by mail." *Galle v. Dir., OWCP*, 246 F.3d 440, 449 (5th Cir. 2001). Further, a party is deemed to have received adequate notice when notice is mailed to the address on the record. *See Newport News Shipbuilding & Dry Dock Co. v. Gregory*, 213 F.3d 632, 2000 U.S. App. LEXIS 7515, at *1 (4th Cir. 2000) (unpub.).

² This January 22, 2015 Order was also served on Complainant by regular mail to his last known address of record.

³ This February 23, 2015 Order was also served on Complainant by regular mail to his last known address of record.

(finding that courts possess the “inherent power” to dismiss a case for lack of prosecution). Further, “[t]he authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered 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.” *Id.* at 630-31; *see also Solnicka v. Wash. Pub. Power Supply Sys.*, ARB No. 00-009, ALJ No. 1999-ERA-19 at 3 (ARB Apr. 25, 2000) (dismissing a claim for failure to prosecute, stating “[l]ike the courts, this Board must necessarily manage its docket in an effort to achieve the orderly and expeditious disposition of cases” (internal citations omitted)). Moreover, the regulations at 29 C.F.R. § 18.39(b) provide authority for dismissal for “abandonment by a party” where a party does not appear for a hearing, and subsequently fails to provide good cause for its failure to appear. *Id.* (allowing for a default judgment to be entered against the non-complying party under § 18.5(b)); *see also* 29 C.F.R. § 18.29 (providing the powers of an ALJ).

As of March 13, 2015, Complainant has not filed any response to my February 23, 2015 Order to Show Cause, nor has he corresponded with this office in any way. I find that Complainant has previously failed to comply with my January 22, 2015 Order, directing him to attend a status conference on February 19, 2015. As stated previously, Complainant failed to attend the February 19, 2015 conference. Complainant was plainly advised that failure to comply with the January 22, 2015 Order could result in sanctions including dismissal, and subsequently that failure to comply with the February 23, 2015 Order to Show Cause as to Why This Matter Should Not Be Dismissed would result in dismissal of his claim. Complainant has not responded and, consequently, failed show good cause as to why his complaint should not be dismissed.

For the above stated reasons, I find that the complaint is dismissed before this office with prejudice for abandonment and failure to prosecute.

ORDER

It is hereby ORDERED that the complaint be DISMISSED WITH PREJUDICE on the grounds of abandonment and failure to prosecute and that the Secretary’s March 6, 2014 findings stand as the final agency action in this case.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the

foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).