



Issue Date: 12 November 2014

CASE NO.: 2014-FRS-00135

In the Matter of:

**JEREMY STRUBLE,**  
Complainant,

v.

**BNSF RAILWAY,**  
Respondent.

### FINAL ORDER OF DISMISSAL

On August 13, 2014, a Notice of Assignment and Order to Show Cause [hereafter “Show Cause Order”] was issued in the instant case, which has been brought under the employee protection provisions of the Federal Rail Safety Act (FRSA), as amended, 49 U.S.C. §20109. The Show Cause Order required that on or before September 11, 2014, Complainant respond to the Employer’s Motion to Dismiss, advise of the date he and his counsel received OSHA’s findings, and show cause (if any) why this case should not be dismissed as untimely. However, Complainant failed to respond to the Show Cause Order and, for the reasons set forth below, this case is being dismissed as untimely.

The Show Cause Order provided the following:

This case is not yet being set for a hearing, because there is a threshold issue as to whether the hearing request is timely. In that regard, OSHA issued its findings on June 17, 2014 and the Complainant Jeremy Struble had thirty days from receipt of the findings to file objections and request a hearing before an administrative law judge. [29] C.F.R. §1982.106(a).<sup>1</sup> The hearing request by Mr. Struble dated July 23, 2014, was sent by facsimile on July 24, 2014. A hard copy of the request was postmarked July 28, 2014, and received on August 5, 2014.<sup>2</sup> It is unclear when OSHA mailed the findings to Complainant or when he received them; however, the copy sent by OSHA to the Office of Administrative Law

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<sup>1</sup> The Show Cause Order incorrectly listed title 20 instead of title 29 of the Code of Federal Regulations.

<sup>2</sup> [Footnote from Show Cause Order]: Counsel for Employer, Paul S. Balanon, indicated in a Declaration that, on August 1, 2014, someone from the Office of Administrative Law Judges told him that the envelope accompanying the hearing request was not in the case file. That is no longer true, however, as the hard copy with envelope was filed on August 5, 2014.

Judges was sent under cover letter of June 19, 2014 and received on June 24, 2014. Without determining when Complainant received the findings, it is impossible to determine whether the hearing request was timely.

As also noted in the Show Cause Order, Employer moved to dismiss the appeal as untimely by Motion filed on August 12, 2014. In support, Employer accompanied the motion with a Product & Tracking Information printout relating to the Certified Mail number referenced in the letter including the Secretary's Findings that was addressed to Complainant's counsel; thus, Complainant's counsel, on behalf of Complainant, presumptively received the findings on June 23, 2014, which would make the deadline for filing the hearing request July 23, 2014. Inasmuch as the facsimile was dated July 24, 2014, one day late, Employer has asserted a basis for dismissal.

In view of the above, I issued the above Show Cause Order, which directed Complainant to respond to the Employer's motion by no later than September 11, 2014 and to advise when he and his counsel received a copy of the OSHA findings. Complainant therefore had an opportunity to show that he actually received the findings later than June 23, 2014, the date indicated on the Certified Mail receipt; however, he failed to do so. Neither Complainant nor his counsel has disputed receipt on June 23, 2014. Likewise, neither Complainant nor his counsel has asserted any basis for equitable tolling of the appeal period.

Under 29 C.F.R. §1982.106(a), objections and a hearing request must be filed within 30 days of receipt of the findings of OSHA.<sup>3</sup> The evidence of record shows that (1) OSHA issued its findings on June 17, 2014 and served them by certified mail; (2) the certified mail was received by Complainant on June 23, 2014; and (3) the hearing request was filed by facsimile on July 24, 2014 and by mail on July 28, 2014. Thus, the hearing request was, at the earliest, filed 31 days after Complainant's receipt of the findings. Complainant has not refuted these facts or provided a basis for tolling the appeal period. Under these circumstances, this case must be dismissed. *See generally Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-23 (ARB May 27, 2008) (dismissal appropriate in ERA case when hearing request was untimely.) Accordingly,

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<sup>3</sup> Section 1982.106(a) provides:

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees up to \$1,000 under NTSSA, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to paragraph (b) of §1982.105. The objections, request for a hearing, and/or request for attorney's fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001 and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

## ORDER

**IT IS HEREBY ORDERED** that Respondent's motion to dismiss be, and hereby is **GRANTED** and the instant case be, and hereby is, **DISMISSED WITH PREJUDICE**.

PAMELA J. LAKES  
Administrative Law Judge

Washington, D.C.

**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 for Occupational Safety and Health. *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).