



Issue Date: 01 August 2018

CASE NO.: 2017-FRS-00069

IN THE MATTER OF:

JAMEY MOODY
Complainant

v.

UNION PACIFIC RAILWAY COMPANY,
Respondent

SECOND ORDER OF DISMISSAL

This case arises under the “whistleblower” protection provisions of the Federal Railroad Safety Act (FRSA), 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. (Aug. 3, 2007), as further amended by Pub. L. No. 110-452 (Oct. 6, 2008) filed by Complainant Jamey Moody against Respondent Union Pacific Railway Company. This Order arises *sua sponte* based on Complainant’s failure to comply with the undersigned’s Notice of Hearing and Pre-Hearing Order as well as the Second Order to Show Cause issued on June 12, 2018.

On November 9, 2016, Complainant filed a complaint with the Secretary of Labor under the FRSA alleging retaliation by Respondent for making safety complaints about the new disciplinary response to emergency-braking events.

On May 18, 2017, the Secretary, acting through his agent, the Occupational Safety and Health Administration (“OSHA”), dismissed Complainant’s complaint because there was no reasonable cause to believe Respondent violated the FRSA.

On June 14, 2017, Complainant requested a hearing based upon the Secretary’s findings of May 18, 2017, that there was no merit to Complainant’s complaints of discrimination against Respondent in violation of the employee protective provision under the FRSA.

On August 29, 2017, Complainant informed the undersigned he was not represented by legal counsel and requested time to find an attorney. I granted his request. On September 26, 2017, Complainant again informed the undersigned he was actively searching for an attorney. My office instructed Complainant to update me regarding his search in two weeks.

On November 7, 2017, my office again attempted to contact Complainant regarding his representation in this matter. Complainant did not respond to this message.

On January 30, 2018, the undersigned issued a Notice of Hearing and Pre-Hearing Order, which required Complainant to file a Pleading Complaint by March 14, 2018. The Notice of Hearing and Pre-Hearing Order also stated that the “failure to comply with all aspects of this Order subjects the offending party to the exclusion of evidence at the final trial, the preclusion of issues, and other appropriate sanctions.” However, Complainant did not timely file a Pleading Complaint.

On March 28, 2018, Respondent informed the undersigned it had not received Complainant’s pleading complaint and thus, could not file an Answer as required by the Notice of Hearing and Pre-Hearing Order. Respondent also indicated it had not received Complainant’s initial disclosures or responses to discovery sent to Complainant on February 20, 2018. Further, Respondent’s attempts to contact Complainant by telephone and email were unsuccessful.

Like Respondent, the undersigned had also not received Complainant’s OALJ complaint as of March 28, 2018. On April 3, 2018, the undersigned issued an Order to Show Cause requiring Complainant to submit an OALJ Complaint and to show good cause why his claim should not be dismissed. The Order required Complainant to file a written response, within 7 days of receipt of the Order, and to show good cause why the claim should not be dismissed based on Complainant’s failure to comply with the requirements set forth in the Notice of Hearing and Pre-Hearing Order, including his failure to timely file an OALJ Complaint. The Order specifically stated that Complainant’s failure to fully comply would result in the dismissal of this claim. Complainant did not file a response to the show cause order, nor did he file an OALJ Complaint.

On April 25, 2018, I issued an Order of Dismissal based on Complainant’s failure to comply with the requirements of the Notice of Hearing and Pre-Hearing Order and with the April 3, 2018 Order to Show Cause.

On April 27, 2018, Complainant informed my office that he had been reinstated to his employment and gave notice of his intent to file his case in federal court. Thereafter, my office informed Complainant of the April 25, 2018 Order of Dismissal and instructed him to file a Motion for Reconsideration or to contact the Administrative Review Board.

On May 14, 2018, Complainant sent an email to our office informing the undersigned that he is still without an attorney and had experienced health problems that have caused a delay in moving forward with this matter. In addition, he expressed his desire to proceed forward in this matter and a timeline of events from September 2017 through May 7, 2018. In response, I considered his correspondence as tantamount to a Motion for Reconsideration and granted his Motion for Reconsideration and reinstated this matter on my docket. An Amended Notice of Hearing & Pre-Hearing Order was then issued by the undersigned on May 21, 2018, which again required Complainant to submit an OALJ Complaint by June 5, 2018. As of this Order, I have not received Complainant’s OALJ Complaint.

On June 12, 2018, the undersigned issued a Second Order to Show Cause requiring Complainant to submit an OALJ Complaint and to show good cause why his claim should not be dismissed. The Order required Complainant to file a written response by June 20, 2018, and to show good cause why the claim should not be dismissed based on Complainant's failure to comply with the requirements set forth in the Notice of Hearing and Pre-Hearing Order, including his failure to timely file an OALJ Complaint. The Order specifically stated that Complainant's failure to fully comply would result in the dismissal of this claim. As of the date of this Order, Complainant has not filed a response to the show cause order, nor has he filed an OALJ Complaint.

APPLICABLE LAW AND ANALYSIS

As an administrative law judge for Department of Labor, I must necessarily manage my docket in an effort to "achieve the orderly and expeditious disposition of cases." The rules of administrative practice are designed to ensure a "just, speedy, and inexpensive determination" of every ALJ proceeding. 29 C.F.R. § 18.10. In any proceeding under 29 C.F.R. Part 18, the administrative law judge shall have all powers necessary to conduct fair and impartial hearings, and may take measures necessary to enable him to discharge the duties of the office. 29 C.F.R. § 18.12(b). Among them is the power to "[t]erminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order." 29 C.F.R. § 18.12(b)(7).

In the instant matter, Complainant has again failed to comply with the requirements of the Notice of Hearing and Pre-Hearing Order by timely filing an OALJ Complaint. Also, Complainant has failed to comply with the June 12, 2018 Order to Show Cause by filing a response as to why the claim should not be dismissed. Moreover, Complainant also failed contact our office to request an extension to submit his OALJ Complaint. In the Order requiring Complainant to show good cause, he was specifically warned that his failure to again respond to the Order would result in dismissal of this claim. Therefore, the undersigned finds Complainant has abandoned his request for a hearing and failed to show good cause why this claim should not be dismissed.

ORDER

In view of the foregoing, **IT IS HEREBY ORDERED** that the claim in the above-captioned matter is **DISMISSED** with prejudice and Complainant's request for a hearing is **WITHDRAWN**.

IT IS FURTHER ORDERED that the formal hearing scheduled on August 1, 2018 in Little Rock, Arkansas is hereby **CANCELLED**.

SO ORDERED this 1st day of August, 2018, at Covington, Louisiana.

**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions

or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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. § 1978.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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. If you e-File your reply brief, only one copy need be uploaded.

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. §§ 1978.109(e) and 1978.110(b). 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. § 1978.110(b).