



Issue Date: 30 January 2018

CASE NO. 2017-FRS-00041

In the Matter of:

THOMAS O'BRIEN, JR.,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY CO.,
Respondent.

**DECISION AND ORDER FOR DEFAULT JUDGMENT
AGAINST COMPLAINANT**

Background and Procedural History

This matter arises under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, as amended, and has been indefinitely continued to allow the parties to conduct discovery. On May 19, 2017, I issued an Initial Prehearing Order in which I ordered both parties to make initial disclosures within 21 days from the date of the Order. On August 10, 2017, counsel for Respondent filed a Motion to Compel Complainant to make the required initial disclosures. Respondent also averred that Complainant had not answered interrogatories or permitted inspection of documents requested by Respondent, and requested that I compel Complainant to accomplish these actions. Respondent also requested that the scheduled hearing be delayed at least 90 days to allow completion of discovery and other hearing preparation. Complainant did not respond to Respondent's motion.

On August 28, 2017, I ordered Complainant to provide the initial disclosures required by 29 C.F.R. 18.50(c), answer the interrogatories Respondent had served upon him, and produce the documents identified by Respondent. In my order I stated that failure to comply with any of these three orders would result in the entry of a default decision and order against Mr. O'Brien, the Complainant in this matter. In documents filed by facsimile on September 27, 2017, Complainant apparently provided signed

Initial Disclosures.¹ In a Motion for Entry of Default Decision and Order filed November 3, 2017, Respondent averred that Complainant provided initial disclosures as required but had not as of yet provided full and complete answers to interrogatories one through four, responded at all to interrogatories five and six, or produced the requested documents.² Respondent therefore requested that I enter a default decision and order and dismiss the complaint. On November 13, 2017, Complainant filed a document styled “Response to Motion of Respondent Norfolk Southern Railway for Entry of Default Decision and Order,” in which he largely admits the factual assertions made by Respondent in support of its Motion for Entry of Default Decision and Order, but nevertheless requested that I deny the motion.

In light of the procedural posture of the complaint and the fact that Complainant was self-represented, on December 4, 2017, I ordered a telephonic prehearing conference to discuss the remaining issues with discovery, to be held on December 15, 2017. I have made specific findings of fact concerning this conference below, but, in sum, I gave Complainant until January 19, 2018, to comply with my previous Order or suffer default judgment against him. On January 23, 2018, Respondent renewed its Motion for Entry of Default Decision and Order in a new filing that reiterated its previous assertions.

Findings of Fact

The following facts are uncontroverted:

1. On May 19, 2017, I issued a Notice of Assignment and Initial Prehearing Order. That Order set the hearing in this matter for October 10-13, 2017, and ordered the parties to complete all discovery by September 5, 2017.
2. On May 31, 2017, I received a letter from an attorney [hereinafter CWC] stating that his office had received the Notice and Order issued on May 19th, but that his office did not represent Complainant.
3. On June 9, 2017, Complainant informed me by letter that CWC, his “formal attorney,” no longer represented Complainant and that a “general delay of all deadlines” was necessary “due to seeking new counsel.” I did not grant the requested delay.

¹ I have attached to this Order a copy of all documents received from Complainant in this filing.

² I have attached copies of the interrogatories at issue and the request for production of documents to this Order.

4. On June 19, 2017, counsel for Respondent sent a document styled "First Request for Production of Documents and First Set of Interrogatories" to Complainant. In an accompanying letter, counsel for Respondent informed Complainant that he had 30 days to produce the requested documents and provide answers to the interrogatories. Complainant did not reply until July 19, 2017.
5. On July 19, 2017, Complainant sent counsel for Respondent two unsworn emails that apparently contained answers to four out of the six interrogatories posed by Respondent. The emails did not contain answers to either the fifth or sixth interrogatories, nor did they transmit any documents responsive to Respondent's request for production. Complainant also asserted that he was "still having difficulties finding an attorney."
6. Counsel for Respondent sent emails to Complainant on July 20 and July 24 asking Complainant to contact counsel for Respondent to discuss "next steps in this Matter." Complainant did not reply to these emails.
7. On August 10, 2017, Respondent filed a Motion to Compel Complainant to produce his Initial Disclosures, fully answer the interrogatories posed by Respondent, and produce the requested documents. Complainant did not respond to this motion.
8. On August 28, 2017, I ordered Complainant to fully answer the interrogatories posed by Respondent and to produce the requested documents. I specified that failure to comply with this order would "result in the entry of a default decision and order against Mr. O'Brien in this matter." I also specified that Complainant must comply with these orders no later than 21 days after the issuance of the Order, that is, September 18, 2017.
9. On September 12, 2017, Attorney CWC sent another letter to the undersigned requesting that he be removed from the service list for this matter as neither he nor his law firm had ever represented Complainant in this matter.
10. On September 18, 2017, at 11:06 PM, Complainant requested that Respondent allow him an additional seven days to comply with my order. Counsel for Respondent did not accede to this request and informed Complainant that the undersigned had been informed of Complainant's noncompliance. Complainant then served his Initial Disclosures upon counsel for Respondent on September 19, 2017.

11. On September 27, 2017, Complainant filed a letter with the undersigned that stated, inter alia, that he was still having difficulties finding an attorney to represent him.
12. Complainant did not comply with my order to answer the interrogatories posed by respondent and to produce the requested documents. To address this non-compliance, I conducted a prehearing conference by telephone on December 15, 2017. Present at the conference were counsel for Respondent, Complainant, an attorney-advisor from my chambers, and myself. Complainant asserted that an attorney had agreed to represent him and requested a continuance to allow time for the attorney to review case materials. I told the Complainant that any representative would have to file a notice of appearance in this matter no later than January 5, 2018, and that I would allow additional discovery responses by Complainant until January 19, 2018, at which time I would rule on Respondent's Motion for Entry of Default Decision and Order. No notice of appearance on behalf of Complainant has been filed since the conference, and Complainant has not complied with Respondent's outstanding discovery requests as of the date of issuance of this order.
13. Complainant appears to understand his obligations, is fluent in written and spoken English, and his submissions to the undersigned and to opposing counsel, especially his Initial Disclosures, Response to the Motion for Default Decision and Order, and his answers to Respondent's interrogatories, are coherent and articulate. Complainant has not asserted an inability to answer the interrogatories at issue or compose or deliver the documents at issue. Accordingly, I find that Complainant's failure to comply with his disclosure obligations is unrelated to his self-represented status and is, in the absence of any evidence to the contrary, intentional.

Conclusions of Law

1. I may render a default decision and order against a party that fails to obey an order to provide or permit discovery. 29 C.F.R. § 18.57(b)(vi).
2. Other authorized sanctions include staying further proceedings until the order is obeyed, prohibiting the disobedient party from supporting or opposing designated claims, or dismissing the proceeding in whole or in part. See 29 C.F.R. § 18.57(b).
3. Lesser sanctions are not appropriate in this matter due to the extended and repeated non-compliance with judicial orders by Complainant. The Initial Prehearing Order describing discovery obligations and initial mandatory disclosures was issued on May 19, 2017. In response to Complainant's noncompliance with that Order and

Respondent's discovery requests, I issued an Order Compelling Discovery on August 28, 2017, and was forced to cancel the scheduled hearing in an effort to ensure that both parties would have an adequate opportunity to conduct discovery. Even after the issuance of that Order with notice that noncompliance would result in default judgment, Complainant still failed to respond to produce requested documents or to fully answer all interrogatories. And when given yet another opportunity to provide the requested documents and responses to interrogatories in December 2017, Complainant once again declined to do so, with full knowledge of the consequences.

4. I have considered whether to allow the complaint to proceed to hearing but with limitations on the evidence Complainant could introduce to support his claim, such as a prohibition on the introduction of documentary evidence in light of Complainant's non-compliance with Respondent's request for production, limiting testimony on the topics implicated by Respondent's unanswered interrogatories, or both. However, the breadth of Complainant's non-compliance is so great that such an approach would likely require piece-meal adjudication of the admissibility of any testimony or evidence he tendered at hearing. Moreover, this alternative would force Respondent to go to trial with incomplete information through no fault of its own, which would not further "the just, speedy, and inexpensive determination of [this] proceeding." 29 C.F.R. § 18.10(a).
5. I have considered whether to stay the proceedings until discovery is complete, but I have concluded that to delay under these circumstances would operate to penalize Respondent, the party which has complied with its obligations at every step of this adjudication, by delaying the opportunity to defend itself against this complaint. Complainant has been seeking counsel since at least June 2017 without apparent success. Moreover, Complainant asserted in his May 31, 2017, letter to the undersigned seeking delay in the proceedings that Attorney CWC no longer represented him, whereas Attorney CWC unambiguously stated that neither he nor his firm had ever represented Complainant. During the recent Prehearing Conference, Complainant sought to avoid default and obtained additional delay by stating that he had found an attorney that would represent him, but in the weeks subsequent to the conference no notice of appearance has been filed. Under these circumstances, I cannot conclude that Complainant has been acting diligently or in good faith, and it is unreasonable to delay the proceeding further to allow Complainant to continue to search for a representative or to complete discovery without the aid of a representative.

6. I have considered Complainant's status as a self-represented litigant at every stage of this proceeding.
7. Accordingly, I conclude that entry of a default judgment is appropriate in light of Complainant's inaction in this matter and is necessary to further the just, speedy, and inexpensive determination of this proceeding. Complainant was informed of his obligations, warned about the consequences of non-compliance, and given multiple opportunities to obtain counsel, to fully respond to all the interrogatories posed by Respondent, and to produce the requested documents.

ORDER

Respondent's Motion for Default Decision and Order is hereby **GRANTED** and the Complaint in this matter is **DISMISSED WITH PREJUDICE**.

SO ORDERED:

WILLIAM T. BARTO
Administrative Law Judge

Washington, DC