



Issue Date: 21 May 2020

OALJ No.: 2018-FRS-00096

OSHA No.: 5-1260-18-085

In the Matter of:

FENTON POWELL,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

ORDER DISMISSING CASE FOR FAILURE TO PROSECUTE

On July 17, 2019, I issued a Notice of Assignment, which directed the parties to contact my office to set up an initial conference call. On August 15, 2019, Complainant requested mediation. The next day, Respondent declined mediation, and Complainant requested an initial conference call in January 2020. My office suggested a date much closer because initial conference calls are typically short and simple, but Complainant said no.

On January 29, 2020, my law clerk reached out to the parties to schedule the initial conference call. Respondent replied with availability, but my office had not heard from Complainant. On February 5, 2020, I ordered a conference call for February 19, 2020, and my law clerk distributed the call-in information. Respondent, but not Complainant, was on the February 19, 2020 call. On the call, Respondent indicated he experienced difficulty contacting Complainant.

On February 21, 2020, I issued an Order to Show Cause, giving Complainant 45 days to explain why I should not dismiss this case for failure to prosecute. On April 6, 2020, Respondent filed its Response to Show Cause Order Directed to Complainant (the "Response" or "Resp."). Respondent asserts with evidence that it tried to schedule a deposition with Complainant, but Complainant did not respond to emails, respond to phone

calls, or attend the deposition. Resp. at 3–4. Respondent argues that this claim can be dismissed on both grounds of failure to cooperate with discovery and failure to prosecute. Resp. at 4–5. While there may be merit to a dismissal for failure to cooperate with discovery, it is unnecessary to consider here because a dismissal for failure to prosecute is sufficient and strongly founded.

Since the August 2019 email exchange, Complainant has not filed anything or contacted my office. Complainant has also failed to comply with or respond to my orders. Complainant has not been in communication with me or the opposing party, despite the in August 2019 email exchange demonstrating we had his correct contact information. Complainant has been given multiple chances over the course of several months to engage in discovery, contact my office, and explain the lapse in communication, but has not done so. These facts are sufficient for me to dismiss for failure of prosecution.

It is **ORDERED** that that his case be **DISMISSED** for Complainant’s failure to prosecute this case.

SO ORDERED.

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

Washington, D.C.
WSC/aje

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. § 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).

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 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. §§ 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).