



Issue Date: 01 May 2019

Case No.: 2019-FRS-00006
OSHA No.: 5-2330-18-046

In the Matter of:

KEVIN MALLOY JR.,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

DECISION AND ORDER OF DISMISSAL

The above-captioned case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 2007 (“FRSA”), 49 U.S.C. § 20109, as amended. Kevin Malloy, Jr. (“Complainant”) seeks damages from his former employer, Union Pacific Railroad Company (“Respondent”) alleging he was fired after reporting safety concerns. His claim was initiated with the Office of Administrative Law Judges (“OALJ”) on October 9, 2018, when OALJ received Complainant’s objections to findings issued by the Occupational Safety and Health Administration (“OSHA”) on August 30, 2018 dismissing the complaint.

I issued a *Notice of Hearing and Prehearing Order* (“Order”) on October 25, 2018 advising the parties that this adjudication would be conducted in accordance with the Rules of Practice and Procedure before the Office of Administrative Law Judges (“OALJ Rules”), which are found at 29 C.F.R. Part 18.¹ The parties were also advised that failure to timely comply with the prehearing order without good cause may result in the dismissal of the proceeding or the imposition of other appropriate sanctions against the non-complying party. Additionally, the Order advised the parties that all discovery was to be completed at least forty (40) days prior to the hearing and required the parties to confer in advance of the hearing date to ensure that all exhibits have been exchanged and enter into stipulations of fact, to the extent possible. Finally, the parties were instructed to exchange by mail a prehearing submission at least twenty-one (21) days before the hearing.²

On February 14, 2019, Employer’s counsel submitted a letter stating she had made multiple attempts to reach Complainant to engage in discovery and exchange of exhibits and witness lists and that Complainant had not responded. Accordingly, on February 15, 2019, I issued an *Order Compelling Response to Discovery Requests*, instructing Complainant, within ten days, to contact Employer’s counsel

¹ The Rules of Practice and Procedure before OALJ are specifically incorporated into FRSA proceedings, except to the extent that such rules conflict with the provisions of 29 C.F.R. Part 1982. *See* 29 C.F.R. § 1982.107(a).

² The prehearing submission included a statement of the issues and remedies sought; a witness list with expected testimony; and copies of exhibits to be offered into evidence.

and provide her with a current email and mailing address. The order also instructed the parties to exchange exhibits, witness lists, and provide a statement of the issues by March 4, 2019. The order advised Complainant that failure to comply could result in exclusion of his evidence at the hearing or other sanctions outlined in 29 C.F.R. § 18.57(b)(1).

On March 4, 2019, Employer's counsel submitted its prehearing information and a letter stating that she had received a voicemail from Complainant on February 26, 2019 at 7:31 a.m. and that Complainant "did not provide an email or current mailing address." Employer's counsel stated that she left Complainant voicemails on February 27 and 28, 2019, providing both her work and cell phone numbers. Employer's counsel averred that she had not received any return calls from Complainant or anyone on his behalf. Employer requested that the hearing be continued based on its inability "to adequately prepare or present a viable defense." Accordingly, on March 8, 2019, I issued an *Order to Show Cause and Order Cancelling Hearing* instructing Complainant to show cause, within twenty days, why further orders should not be issued against him as a disobedient party per 29 C.F.R. § 18.57(b), to include dismissal of his complaint. To date, this Office has not received a response from Complainant.

Complainant was warned in both the *Order Compelling Response to Discovery Requests* and in the *Order to Show Cause and Order Cancelling Hearing* that failure to comply with my orders could result in the sanctions outlined in 29 C.F.R. § 18.57(b).

The regulations at 29 C.F.R. § 18.57(b) provide that:

If a party . . . fails to obey an order to provide or permit discovery . . . the judge may issue further just orders. They may include the following: (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims; (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) Striking claims or defenses in whole or in part; (iv) Staying further proceedings until the order is obeyed; (v) Dismissing the proceeding in whole or in part; or (vi) Rendering a default decision and order against the disobedient party.

Based on Complainant's continued failure to participate in this litigation and to comply with my orders, I find that dismissal of the above-captioned proceedings is appropriate. Accordingly,

Order

Complainant's January 5, 2018 OSHA complaint is hereby DISMISSED with prejudice.

SO ORDERED:

STEPHEN R. HENLEY
Chief 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. § 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).