



**Issue Date: 03 March 2020**

Case No.: 2019-FRS-00101

In the Matter of

**ROBERT MITCHELL**  
Complainant

v.

**NATIONAL RAILROAD PASSENGER  
CORPORATION, d/b/a AMTRAK**  
Respondent

**DECISION AND ORDER OF DISMISSAL**

The above-captioned matter arises from the complaint of Robert Mitchell (“Complainant”) filed against the National Railroad Passenger Corporation, doing business as Amtrak (“Respondent”) pursuant to the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, and its implementing regulations, 29 C.F.R. Part 1982. The Rules of Practice and Procedure for Administrative Hearings before this Office found at 29 C.F.R. Part 18, Subpart A also apply to matters not addressed in those implementing regulations.

This Decision and Order of Dismissal is issued on my own motion based on Complainant’s failure to comply with the Notice of Hearing and Pre-Hearing Order issued October 29, 2019, as well as the Order to Show Cause issued on February 12, 2020 in this matter.

*Procedural Background*

On December 6, 2016, Complainant filed a complaint with the Secretary of Labor under the FRSA alleging retaliation by Respondent for his reporting electrical code violations to various managers.

By letter dated August 20, 2019, the Secretary, acting through his agent, the Occupational Safety and Health Administration (“OSHA”), dismissed Complainant’s complaint, finding “there was insufficient evidence to support a charge of discrimination under FRSA or to determine that Complainant’s alleged protected activity was a contributing factor in his alleged adverse employment action.”

By letter from Complainant’s attorney, James M. Duckworth, dated August 23, 2019 and received on August 26, 2019, Complainant objected to Secretary’s findings as outlined in the OSHA determination and requested a hearing before an Administrative Law Judge. The case was referred to the U.S. Department of Labor’s Office of Administrative Law Judges (“OALJ”) and assigned to me on or around September 17, 2019.

On October 29, 2019, I issued an Initial Pre-hearing Order and Notice of Hearing (“Hearing Order”). Among other things, the Hearing Order scheduled a hearing for March 4 and 5, 2020. The Hearing Order also directed the parties to make initial disclosures within 21 days of its receipt, as well as to exchange and submit prehearing statements by Tuesday, February 11, 2020. The Hearing Order also directed the parties to appear for a telephonic prehearing conference scheduled for 10:00 a.m., EST, on Wednesday, February 12, 2020. The Hearing Order specially explained the information to be included in the prehearing statements, outlined the purpose of the prehearing conference, provided detailed dial-in instructions to the parties, and advised that failure to comply with its provisions without good cause shown may result in the imposition of sanctions.

The telephonic prehearing conference was convened on the record as scheduled. Present was counsel for Respondent, attorney Matthew P. Strauskulage of Landman Corsi Ballaine & Ford, PC. Complainant’s counsel, attorney James M. Duckworth of Keller & Goggin, PC, failed to appear for telephonic prehearing conference as ordered. Neither Complainant nor Respondent submitted a prehearing statement as directed. During the conference, Respondent’s counsel indicated that he had had minimal contacts with Complainant’s counsel about this matter and that Complainant did not make his initial disclosure as directed in the Hearing Order, and that Complainant had not responded to Respondent’s discovery requests or settlement offers.<sup>1</sup>

I issued an Order to Show Cause on February 12, 2020, directing Complainant to show cause, in writing, as to why he failed (1) to exchange and submit a prehearing statement and (2) to appear for the telephonic prehearing conference on that date as scheduled. Complainant was directed to submit his response *for receipt by no later than February 28, 2020* and advised that failure to do so may result in the dismissal of the proceeding before the OALJ.

In a letter dated March 2, 2020, and received by facsimile transmission on that date, Complainant’s counsel states that he is “requesting thirty [30] days to complete transfer of [Complainant’s] file and either continuing the administration law route or filing in the United States District Court” and notes Respondent has “no objections.” The March 2, 2020 letter indicates that Complainant’s counsel has a conflict in representing Complainant due his representation of other Respondent’s employees who were injured in November 2019 and that he is “[p]resently” seeking Complainant’s permission to forward this matter to other counsel to represent Complainant. The March 2, 2020 letter further states that Complainant’s counsel has advised Complainant he may seek other counsel himself. Finally, the March 2, 2020 letter also states that it was Complainant’s counsel’s “plan to file [Complainant’s] FRSA complaint in United States District Court,” but he refrained from doing so due to the conflict and “assignment of new counsel.”

#### *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. §

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<sup>1</sup> Respondent’s counsel explained during the teleconference that Respondent did make its initial disclosures but did not submit its prehearing statement due to Complainant’s non-responsiveness.

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 failed to comply with the requirements of the Hearing Order by not (1) making his initial disclosure, (2) filing a prehearing statement or (3) appearing for a scheduled prehearing conference. Also, Complainant has failed to comply with the February 12, 2020 Order to Show Cause by not timely filing a response as to why this proceeding should not be dismissed. That Order to Show Cause specifically warned that a failure to respond to it could result in dismissal.

If the March 2, 2020 letter from Complainant’s counsel were intended to constitute a response to Order to Show Cause issued in this matter, it is untimely. Even if the untimely submission of Complainant’s counsel were considered, I find it insufficient to establish good cause for Complainant’s failure to appear for the scheduled prehearing conference in this matter or to comply otherwise with the directives given in the October 2019 Hearing Order issued in this case. Notwithstanding any potential or actual client conflict of interest he believed to have existed, the March 2, 2020 letter fails to convey that circumstances existed beyond the control of Complainant’s counsel which prevented complying with the Administrative Law Judge’s directives issued in this case.<sup>2</sup>

#### *Conclusion*

Based on Complainant’s inaction and non-compliance with the undersigned’s directives as outlined in the Hearing Order and the Order to Show Cause as discussed above, it must be concluded Complainant has failed to show good cause why this claim should not be dismissed before the OALJ.<sup>3</sup>

#### **ORDER**

**IT IS ORDERED** that this proceeding be **DISMISSED** with prejudice and Complainant’s request for a hearing be deemed **WITHDRAWN**.

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<sup>2</sup> The lack of specificity in the March 2, 2020 letter as to when concerns about any client conflict arose or were confirmed during the period between November 2019 and the present would also support finding good cause absent in this matter for Complainant’s non-compliance with the Hearing Order’s directives. The existence of a mere “plan” to file a complaint in District Court as described in the March 2, 2020 letter also would not constitute good cause for such non-compliance.

<sup>3</sup> On February 19, 2020, Respondent filed a Motion for Sanctions and a Motion to Compel Complainant’s Initial Disclosures and Discovery Responses. In light of the action taken herein, no ruling will be made on those Motions.

**IT IS FURTHER ORDERED** that the formal hearing scheduled for March 4-5, 2020 in Cherry Hill, NJ be **CANCELED**.

**SO ORDERED.**

**LYSTRA A. HARRIS**  
Administrative Law Judge

Cherry Hill, New Jersey

**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](mailto: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).