

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



IN THE MATTER OF:

SHERVIS SMITH,

ARB CASE NO. 2022-0041

COMPLAINANT,

ALJ CASE NO. 2021-STA-00028

v.

DATE: January 12, 2023

**AKAL EXPRESS, INC. and
DALSHER SINGH,**

RESPONDENTS.

Appearances:

For the Complainant:

Shervis Smith; *pro se*; Kansas City, Missouri¹

For the Respondents:

Samantha J. Monsees, Esq.; *Fisher & Phillips, LLP*; Kansas City, Missouri; and Patrick W. Dennison, Esq.; *Fisher & Phillips, LLP*; Pittsburgh, Pennsylvania

Before BURRELL and PUST, Administrative Appeals Judges

ORDER REGARDING PENDING MOTIONS

PUST, Administrative Appeals Judge:

This case arises under the Surface Transportation Assistance Act of 1982 (“STAA”), as amended.² On November 12, 2020, Shervis Smith (Smith) filed a

¹ Shervis Smith was represented by Garrett M. Hodes, Esq., of the Hodes Law Firm, LLC, prior to this Order.

² 49 U.S.C. § 31105(a); *see also* 29 C.F.R. Part 1978 (2020) (the STAA’s implementing regulations).

complaint with the Department of Labor’s Occupational Safety and Health Administration (OSHA) alleging that Akal Express, Inc., (Akal Express) and Dalsher Singh (Singh) (collectively, “Respondents”) violated the employee protection provisions of the STAA.³ OSHA dismissed the complaint because Smith requested that OSHA terminate its investigation to allow him to file a hearing request with the Office of Administrative Law Judges (OALJ).⁴ On April 5, 2021, a Department of Labor Administrative Law Judge (ALJ) issued and served on the parties a Notice of Assignment and Preliminary Order setting relevant proceeding dates and advising the parties of the consequences of non-appearance.⁵ After an issued Order to Show Cause Directed to Respondents expired without appearance by Respondents, on November 16, 2021, the ALJ issued a Default Decision and Order Against Akal Express, Inc. and Dalsher Singh (Default D. & O.).⁶ On May 5, 2022, the same ALJ issued an Order Awarding Damages, Fees, and Costs (Order Awarding Damages).⁷ Respondents promptly appealed to the Administrative Review Board (ARB or Board) on May 19, 2022.⁸

On June 21, 2022, Respondents filed a Motion to Supplement the Record (Motion to Supplement). On the following day, Respondents filed their opening brief. The parties subsequently filed several pleadings in response to Respondents’ Motion to Supplement and opening brief, listed below.

- Smith filed a Motion to Strike Brief of Petitioners and Portions of Joint Appendix and For Suspension of Briefing Schedule (Complainant’s Motion to Strike) on June 30, 2022.
- Also on June 30, 2022, Smith filed a Response to Petitioners’ Motion to Supplement the Record (Complainant’s Response to Motion to Supplement).

³ *Smith v. Akal Express, Inc.*, ALJ No. 2021-STA-00028, slip op. at 1 (ALJ Nov. 16, 2021) (Default D. & O.).

⁴ *Id.*

⁵ *Id.* at 2-3.

⁶ *Id.* at 4.

⁷ *Smith v. Akal Express, Inc.*, ALJ No. 2021-STA-00028 (ALJ May 5, 2022) (Order Awarding Damages).

⁸ Respondents’ Petition for Review; *Smith v. Akal Express, Inc.*, ARB No. 2022-0041, ALJ No. 2021-STA-00028, slip op. at 1 (ARB May 25, 2022) (Notice of Appeal and Order Establishing Briefing Schedule); The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under the STAA. Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

- On July 7, 2022, Respondents filed their Reply to the Complainant’s Response to Petitioners’ Motion to Supplement the Record (Respondents’ Reply).
- Respondents filed their Response in Opposition to Complainant’s Motion to Strike Brief of Petitioners and Portions of Joint Appendix and for Suspension of Briefing Schedule and Akal’s Motion to Supplement the Record (Respondents’ Response) on July 11, 2022.
- On July 15, 2022, Smith filed a Reply to Petitioners’ Opposition to Motion to Strike Brief of Petitioners and Portions of Joint Appendix (Complainant’s Reply).
- Smith’s attorney filed a Motion for Leave to Withdraw as Counsel for Complainant (Motion to Withdraw) on November 1, 2022.

For the reasons set forth below, the Board **DENIES** Respondents’ Motion to Supplement, **GRANTS** Complainant’s Motion to Strike, and **GRANTS** Complainant’s Counsel’s Motion to Withdraw.

DISCUSSION

1. Respondents’ Motion to Supplement

Respondents move to include a supplemental appendix containing documents from *Smith v. U.S. Dep’t of Labor*⁹ and “documents containing non-confidential evidence of . . . Smith discussing on his public Facebook page issues highly relevant to this matter” in the record.¹⁰ Respondents claim that the documents from *Smith v. U.S. Dep’t of Labor* should be supplemented to the record because the documents demonstrate Smith’s “history of orchestrating and masterminding these types of complaints, deceiving unsuspecting employers, DOL investigators, and courts, with the goal of obtaining a financial windfall.”¹¹ Respondents also aver that the documents containing Smith’s Facebook posts should be supplemented to the record because several posts depict Smith “boasting—while using derogatory, foul, harassing, and obscene language consistent with Akal’s account of his action during his employment—that he plotted and masterminded this action against [Respondents],”¹² and contradict his allegations against Respondents and his proof

⁹ Respondents’ Motion to Supplement the Record (Motion to Supplement) at 1-2; *Smith v. U.S. Dep’t of Labor*, 775 F. App’x 950 (10th Cir. 2019) (unpublished) (dismissing petition for judicial review due to timeliness issues and lack of jurisdiction).

¹⁰ Motion to Supplement at 1.

¹¹ *Id.* at 2.

¹² *Id.*

of damages and declaration replied upon by the ALJ in assessing damages, fees, and costs.¹³

In Respondents' Reply, Respondents present four new arguments in support of their Motion to Supplement that were not included in their initial motion. First, Respondents cite to the Board's standard when it considers requests to supplement the record with new and material evidence¹⁴ and to ARB precedent involving these matters.¹⁵ Second, Respondents attempt to distinguish the cited cases from the present case.¹⁶ Third, Respondents argue that "[u]nder the principles of equity or fairness, the 'extraordinary circumstances' of this case merit the record to be supplemented."¹⁷ Fourth, Respondents claim that the Board has the discretion to consider new evidence that questions the legal basis for Smith's complaint and the veracity of his evidence, set aside the Default D. & O. and Order Awarding Damages, and remand the case to the ALJ for a new hearing.¹⁸

Conversely, Smith argues that the Board should deny Respondents' Motion to Supplement because no "extraordinary circumstances" exist that would permit the

¹³ *Id.*

¹⁴ Respondent's Reply at 1; 29 C.F.R. § 18.54(c).

¹⁵ Resp. Reply at 1-2. These cases include *Overall v. Tenn. Valley Auth.*, ARB Nos. 1998-0111, -0128, ALJ No. 1997-ERA-00053, slip op. at 2 n.2 (ARB Apr. 30, 2001) (granting parties' request to supplement the record with new and material evidence which recently became available and was not readily available prior to the closing of the record); *Nolan v. AC Express*, No. 1992-STA-00037, slip op. at 2 (Sec'y Jan. 17, 1995) (Decision and Remand Order) (granting a motion to supplement the record with new and material evidence concerning damages, finding that the evidence, which included an affidavit, was not available prior to the end of the hearing); *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 1998-0075, ALJ No. 1996-CAA-00008, slip op. at 2 (ARB Sept. 1, 1998) (Order) (denying a motion to supplement the record with a newspaper article without reference to whether the article was new, but instead, based on finding that the article was hearsay and not directly relevant to the facts of the case); *Hoffman v. Nextra Energy, Inc.*, ARB No. 2012-0062, ALJ No. 2010-ERA-00011, slip op. at 12 (ARB Dec. 17, 2013) (denying a motion to supplement the record because the evidence was available at the time of the ALJ hearing); and *Johnson v. U.S. Bancorp.*, ARB No. 2013-0014, ALJ No. 2010-SOX-00037, slip op. at 3-4 (ARB May 21, 2013) (denying party's argument that it was denied due process because it lacked an opportunity to be heard or present evidence on reinstatement at the ALJ hearing).

¹⁶ Respondents argue that these cases are distinguishable from the present case because there was no hearing in this matter. Resp. Reply at 2.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 3-7.

record to be supplemented on appeal¹⁹ and the new information and declarations that Respondents seek to supplement are not dispositive of the appeal.²⁰

When determining whether to consider new evidence, the Board relies on the standard contained in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges,²¹ which provides that “[n]o additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed.”²² The Board has repeatedly upheld this standard.²³

Respondents have failed to demonstrate that the new materials they wish to introduce into the record on appeal could not have been discovered with reasonable diligence or were not readily available prior to the closing of the record below. Clearly, the documents could have been discovered with reasonable diligence. Respondents do not specifically address this point. It appears that they claim that they did not discover the materials because they did not participate in the proceedings below. Respondents assert that because Singh, “did not understand Akal’s role in responding to” the communications from the OALJ and Akal’s owner, Rajwinder Kaur, traveled to India and remained there because of illness and circumstances related to the COVID-19 pandemic, they should be now allowed to supplement the record with material they recently discovered.²⁴

The Board has consistently held that “ignorance of the law is neither a sufficient basis for granting equitable tolling nor by itself an independent ground for establishing entitlement.”²⁵ Ultimately, Respondents chose not to obtain legal counsel and instead, relied upon Singh’s mistaken belief that following OSHA’s

¹⁹ Complainant’s Response to Motion to Strike (Comp. Res.) at 7-11.

²⁰ Comp. Res. at 11-15.

²¹ 29 C.F.R. Part 18.

²² 29 C.F.R. § 18.90(b)(1).

²³ *Childs v. DimensionalMechanics, Inc.*, ARB No. 2021-0001, ALJ No. 2017-LCA-00008, slip op. at 2 (ARB Sept. 30, 2021) (Rejecting newly submitted evidence as the complainant was unable to show that it could not have been discovered with reasonable diligence before the record closed); *Aityahia v. Air Line Pilots Assoc.*, ARB No. 2019-0037, ALJ No. 2018-AIR-00042, slip op. at 3 n.2 (ARB May 19, 2020) (Same).

²⁴ Motion to Supplement at 4.

²⁵ *Lugg v. Lear Corp.*, ARB No. 2022-0008, ALJ No. 2021-SOX-00022, slip op. at 7 (ARB May 19, 2022) (quoting *Tardy v. Delta Air Lines*, ARB No. 2016-0077, ALJ No. 2015-AIR-00026, slip op. at 5 (ARB Oct. 5, 2017)).

dismissal “the matter was over.”²⁶ Additionally, although the Board acknowledges that Kaur departed the United States on April 10, 2022,²⁷ the record reflects that the Notice of Assignment and Preliminary Order was issued on April 5, 2021, and served to Respondents via regular mail and e-mail. Thus, Respondents and Kaur should have been aware of the OALJ proceedings before she left the country. Respondents have acknowledged that, during her travels, Kaur was intermittently in contact with Singh regarding this proceeding.²⁸ To the extent that Kaur’s availability in the United States was essential to Respondents’ appearance in the case and/or discovery efforts, their recourse was to timely request extensions to complete discovery. Either way, Respondents have not demonstrated that the evidence they wish to introduce could not have been discovered with reasonable diligence.

It is also clear that the documents were readily available prior to the closing of the record. The Tenth Circuit Court of Appeals issued its decision in *Smith v. U.S. Dep’t of Labor* on June 12, 2019. Smith’s Facebook posts that Respondents now seek to introduce are dated between April 28, 2020, and December 22, 2021. The record closed on January 16, 2022.²⁹ Both sets of documents were available to public access via the internet prior to the record closing.³⁰ Therefore, the Board finds that the documents Respondents seek to introduce could have been discovered with reasonable diligence and were readily available to both parties before the closing of the record.

Respondents also argue that the Board has the discretion to: consider new evidence that questions the legal basis for Smith’s complaint and the veracity of his evidence; set aside the Default D. & O. and Order Awarding Damages; and remand the case to the ALJ for a new hearing. The Board finds this argument unpersuasive.

²⁶ Respondents claim that they believed that “the matter was over,” yet on May 20, 2021, Singh filed an untimely response to Smith’s complaint with OALJ. Default D. & O. at 3. Filing a response with OALJ contradicts Respondents’ argument that Singh believed the matter to be over following the OSHA dismissal. If Respondents thought the matter was truly over then Singh would not have prepared such a response.

²⁷ Respondents’ Response (Resp. Res.) at 10.

²⁸ *Id.* at 11.

²⁹ The ALJ ordered “Respondents shall have 30 days within which to respond to Complainant’s proof of damages.” Complainant’s proof of damages was due within 30 days of November 16, 2021. Default D. & O. at 6.

³⁰ Respondents concede in their Motion to Supplement that these Facebook posts “were publicly available on Smith’s Facebook page.” Motion to Supplement at 5.

Respondents rely on *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*³¹ In *Hazel-Atlas*, the U.S. Supreme Court held that an appellate court can vacate its own judgment entered at a prior term and direct vacation of a lower court’s decree upon proof that fraud was perpetrated upon the court by a successful litigant.³² Respondents contend that, as in *Hazel-Atlas Glass Co.*, Smith’s Facebook posts demonstrate his efforts to undermine the integrity of the proceedings, including his appeal to the Board.³³ Since *Hazel-Atlas Glass Co.*, courts have limited their interpretation of “fraud on the tribunal.” In *Bulloch v. U.S.*,³⁴ the Tenth Circuit Court of Appeals interpreted “fraud on the tribunal” to mean “fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury.”³⁵ Although Smith’s Facebook posts appear to use derogatory, lude, and obscene language, the posts do not meet the restrictive formulation of “fraud on the tribunal.” Furthermore, other posts that Respondents claim demonstrate Smith’s fraud are not included in the pleadings, but rather are Respondents’ narrations of the posts. For example, Respondents stated that Smith’s posts from March 13, 14, 15, 18, and 20, 2021, depict Smith working, which contradicts the facts cited in the Order Awarding Damages,³⁶ yet Respondents did not attach these posts to the pleadings.

Accordingly, Respondents’ Motion to Supplement the Record is **DENIED**.

2. Complainant’s Motion to Strike

On June 30, 2022, Smith filed a Motion to Strike. Smith argues that Respondents included evidence that was not part of the record before the ALJ in their opening brief and in portions of the Joint Appendix,³⁷ improperly tried to

³¹ *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (May 15, 1944).

³² In *Hazel-Atlas Glass Co.*, the Supreme Court granted relief from judgment because it found “a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.” The court of appeals relied upon an article contained in the device’s patent application that described the device as “a remarkable advance in the art of fashioning glass by machine.” The article was signed by the National President of the Flint Glass Workers’ Union. However, it was later determined that the article was actually drafted by Hartford’s attorney, and Hartford then paid the National President of the Flint Glass Workers’ Union to sign the article and claim that he drafted it. *Id.* at 240-51.

³³ Resp. Reply at 4-6.

³⁴ *Bulloch v. U.S.*, 763 F.2d 1115, 1121 (10th Cir. 1985).

³⁵ *Bulloch*, 763 F.2d at 1121; *see In re Laing*, 945 F.2d 354, 358 (10th Cir. 1991) (adhering to the restrictive formulation of “fraud of the court” in a bankruptcy proceeding).

³⁶ Motion to Supplement at 9.

³⁷ Complainant’s Motion to Strike (Comp. Motion to Strike) at 1.

unilaterally enlarge the record,³⁸ and attempted to circumvent the Board’s “Orders and Rules,” including the Federal Rules of Appellate Procedure.³⁹ Respondents filed their Response on July 11, 2022. Respondents aver that the Board should deny Smith’s Motion to Strike because such motions are burdensome to courts and disfavored,⁴⁰ the cases relied upon by Smith are inapposite to the present case,⁴¹ Respondents did not circumvent the Board’s Orders or the Federal Rules of Appellate Procedure and sought permission from the Board to supplement the record,⁴² Smith failed to object to Respondents’ inclusion of the new material in the Joint Appendix,⁴³ and extraordinary circumstances exist for the inclusion of this new material.⁴⁴

The Board agrees with Smith. As discussed above, review is generally limited to the record that was before the ALJ when the case was decided. Since the Board has already denied Respondents’ Motion to Supplement, the material cited in Respondents’ opening brief and contained in the Joint Appendix should be limited to the record before the ALJ. Accordingly, Complainant’s Motion to Strike is **GRANTED**.

Given that the Board has granted Complainant’s Motion to Strike and stayed the briefing schedule pending the resolution of the parties’ motions, the Board permits Respondents to re-file a new brief in accordance with this Order and re-establishes the following briefing schedule:

OPENING BRIEF: Within twenty-eight (28) days of the issuance of this Order, the petitioner must file with the Board a supporting legal brief of points and authorities not to exceed fifty (50) double-spaced pages.

RESPONSE BRIEF: Within twenty-eight (28) calendar days from the date of service of the petitioner’s principal legal brief, the opposing party must file with the Board any response brief in opposition to the supporting legal brief not to exceed fifty (50) double-spaced pages.

³⁸ *Id.* at 1, 3.

³⁹ *Id.* at 1, 3-4.

⁴⁰ Resp. Res. at 4.

⁴¹ *Id.* at 4-6.

⁴² *Id.* at 4.

⁴³ *Id.* at 6-7.

⁴⁴ *Id.* at 8-12.

REPLY BRIEF: Within fourteen (14) calendar days of the service of a legal brief in opposition to the petitioner’s opening brief, the petitioner may file with the Board a reply brief not to exceed twenty (20) double-spaced pages.⁴⁵

The remaining provisions of the Notice of Intent to Review and Briefing Schedule remain in effect.

3. Complainant’s Attorney’s Motion for Leave to Withdraw as Counsel

On November 1, 2022, Smith’s attorney, Garrett Hodes, Esq., filed a Motion for Leave to Withdraw as Counsel for Complainant. In the motion, Hodes requested leave to withdraw as counsel because Smith “discharged” him, and therefore, he is required to withdraw from further representation under Missouri Supreme Court Rule 4-1.16(a)(3) and Kansas Rule of Professional Conduct 1.16(a)(3).⁴⁶ There being no objection, the Motion is **GRANTED**.

ELECTRONIC FILING AND SERVICE:

The use of the Board’s Electronic File and Service (EFS) system is MANDATORY for all parties represented by counsel. The EFS 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 EFS 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 webbased 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 electronically filing any document.

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://efile.dol.gov>.

⁴⁵ The parties may also submit a revised Joint Appendix in accordance with this Order. If the parties elect not to submit a revised Joint Appendix, the Board will not consider material that was not before the ALJ when he decided the case.

⁴⁶ Comp. Motion for Leave to Withdraw as Counsel at 1.

You are still ultimately responsible for service of all of your filings with the Board on the other parties to the case and for attaching a certificate of service to your filings. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing/service of your document on those registered parties. Non EFS-registered parties must be served using other means. Include a certificate of service showing how you completed service whether through the EFS system or otherwise.

If you are a party other than the party that has filed an appeal with the ARB, you may request access to the appeal by obtaining a login.gov account (if you do not already have one) and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at <https://efile.dol.gov/support/boards/request-access-an-appeal>. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>.

If you are a self-represented (pro se) party, you may mail or deliver paper copies (if e-Filing is not used) of pleadings, including briefs, appendices, motion, and other supporting documentation to: Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-5220, Washington, D.C., 20210.

Although the ARB strongly recommends that all parties use the Boards' Electronic Filing System (EFS) for greater efficiency in filing and service, the Board is able to allow pro se litigants who are unable to use the EFS to file their correspondence using the Board's email address and to accept service from the Board via email. 29 C.F.R. § 26.4(a)(1). **The pro se litigant must send the Board an email clearly granting the Board consent to service via email to ARB-Correspondence@dol.gov.** After the Board has received the pro se litigant's consent to email service, the Board will then provide all future correspondence to the pro se litigant by email only. The pro se litigant is cautioned that the Board will only accept the filings of motions and briefs via email (no other communication from the parties about a case).

CONCLUSION

For the foregoing reasons, Respondent's Motion to Supplement is **DENIED**, Complainant's Motion to Strike is **GRANTED**, and Complainant's attorney's Motion for Leave to Withdraw as Counsel is **GRANTED**.

SO ORDERED.



TAMMY L. PUST
Administrative Appeals Judge



THOMAS H. BURRELL
Administrative Appeals Judge