



In the Matter of:

PATRICK ALSTON,

ARB CASE NO. 2022-0011

COMPLAINANT,

ALJ CASE NO. 2021-STA-00065

v.

DATE: May 6, 2022

HH XPRESS LLC,

RESPONDENT.

Appearances:

For the Complainant:

Patrick Alston; *pro se*; Sanford, North Carolina

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, and
Thomas Burrell, *Administrative Appeals Judge***

DECISION AND ORDER DISMISSING PETITION FOR REVIEW

PER CURIAM. This case arises under the Surface Transportation Assistance Act of 1982 (“STAA”), as amended.¹ Patrick Alston (Complainant) filed a whistleblower complaint against HH Xpress LLC (Respondent) for alleged retaliation. The Administrative Law Judge (ALJ) issued an Order Dismissing Complaint as Untimely (Order). Complainant appealed the ALJ’s decision to the Administrative Review Board (ARB or Board). We affirm.

BACKGROUND

Complainant worked for Respondent as a truck driver until he was fired on November 12, 2020.² On July 1, 2021, he filed a whistleblower complaint with the

¹ 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2020) (the STAA’s implementing regulations).

² Order at 1.

Occupational Safety and Health Administration (OSHA), alleging his employment was terminated for reporting violations of the Federal Motor Carrier Safety Regulations. On July 21, 2021, OSHA dismissed the complaint as untimely because it was due on or before May 11, 2021.³

Complainant, proceeding *pro se*, requested a hearing before an ALJ with the Office of Administrative Law Judges (OALJ). On September 22, 2021, the ALJ ordered Complainant to show cause as to why the complaint should not be dismissed for failure to file it within the 180-day limitation. Complainant filed a response. On October 29, 2021, the ALJ dismissed the complaint.⁴

On November 18, 2021, Complainant filed a petition for review with the Board. On November 22, 2021, the Board issued a notice of appeal and order establishing briefing schedule, which required that Complainant's opening brief be filed by December 20, 2021. Complainant did not file a timely opening brief.

On February 11, 2022, the Board issued an order to show cause, ordering Complainant to explain why his appeal should not be dismissed for failing to file a timely opening brief. On February 17, 2022, Complainant filed his response as well as his opening brief.

On February 25, 2022, the Board issued an order providing that Respondent had 28 days from receipt of the order to file a response brief and that Complainant had 14 days from receipt of Respondent's response brief to file a reply brief. Respondent did not file a response brief and has never filed an appearance in this matter.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue final agency decisions under the STAA, as amended.⁵ The Board reviews an ALJ's determinations on procedural issues under an abuse of discretion standard.⁶

³ *Id.*

⁴ *Id.*

⁵ 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. 13186 (Mar. 6, 2020).

⁶ *Butler v. Anadarko Petroleum Corp.*, ARB No. 2012-0041, ALJ No. 2009-SOX-00001, slip op. at 2 (ARB June 15, 2012) (citation omitted).

DISCUSSION

The Board has inherent power to dismiss a case for want of prosecution to control its docket and to promote the efficient disposition of its cases.⁷ Further, the Board may dismiss a complaint in a case in which the complainant failed to adequately explain his failure to comply with the Board's briefing schedule.⁸

Complainant's deadline to file an opening brief was December 20, 2021. However, the Complainant did not file his brief until February 17, 2022.

Complainant contends his appeal should not be dismissed because he was delayed in filing his brief for several reasons. First, Complainant asserts that he relies on local and state agencies and resources, such as the U.S. Postal Service, to communicate and transact his affairs. He contends he was delayed because these agencies were closed due to the holidays and wintry weather conditions and experienced backlogs. He also explains that he was delayed in filing a timely brief because of a bereavement and because he was ill with the flu and/or COVID-19.

However, we find that Complainant has not demonstrated good cause to excuse his failure to file a timely brief. While he asserts several factors delayed him, he has neither substantiated these claims nor explained why he was unable to request an extension of time to file a brief.

Complainant also asserts that he filed the brief on January 27, 2022. He explains that he intended to mail his brief but did not because of the cost of postage. Rather, he states that he emailed his brief to OALJ-Headquarters-DC, an address from which he previously received an email.⁹

However, the briefing order instructed Complainant to file his brief either by mail or through the Board's Electronic File and Service (EFS) system.¹⁰ The briefing order did not provide that a brief could be filed via email.¹¹ In addition to the instructions set out in the briefing order, the Board also provides guidance to

⁷ *Lewman v. Ken Brick Masonry Supply*, ARB No. 2007-0015, ALJ No. 2006-STA-00018, slip op. at 3 (ARB Oct. 31, 2007) (quoting *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630-31).

⁸ *Novick v. Morgan Stanley Smith Barney, LLC, et al.*, ARB No. 2021-0024, ALJ No. 2020-SOX-00026, slip op. at 4 (ARB July 16, 2021) (citing *Steffenhagen v. Securitas Sverige, AR, et al.*, ARB No. 2003-0139, ALJ No. 2003-SOX-00024 (ARB Jan. 13, 2004)).

⁹ Comp. Br. at 2.

¹⁰ Notice of Appeal and Order Establishing Briefing Schedule (ARB Nov. 22, 2021).

¹¹ *Id.*

individuals on its website that explains the filing process and how briefs can be filed electronically or by mail.¹²

Further, the briefing order provided Complainant with the Board's telephone and facsimile numbers in case he had any questions regarding his case.¹³ Notably, he acknowledged that he called this number.¹⁴ However, despite knowing how to contact the Board, he did not contact the Board regarding an extension of time to file his brief.

Even if the Board had received Complainant's brief on January 27, 2022, it would have been more than five weeks late. While Complainant filed his brief on February 17, 2022, he did not seek leave from the Board to file a late brief.

Moreover, this is not the first instance that Complainant was untimely in relation to this matter. Respondent fired Complainant on or about November 12, 2020.¹⁵ However, Complainant did not file his complaint with OSHA until July 1, 2021, beyond the 180-day statute of limitations.¹⁶ The ALJ determined the complaint was untimely and no equitable tolling principles applied.¹⁷

Thus, Complainant has not provided a sufficient explanation as to why he did not file a timely brief and did not request an extension of time. Therefore, we conclude that Complainant's appeal should be dismissed for failure to prosecute it before the Board.

CONCLUSION¹⁸

Accordingly, we **DISMISS** Alston's complaint.

SO ORDERED.

¹² See *Boles v. Union Pacific R.R. Co.*, ARB No. 2021-0061, ALJ No. 2020-FRS-00101, slip op. at 4-5 (ARB Nov. 1, 2021) (Absence of a notice of appeal rights and lack of instruction from counsel on how to file an appeal do not provide grounds for equitable tolling of the filing deadline).

¹³ Notice of Appeal and Order Establishing Briefing Schedule (ARB Nov. 22, 2021).

¹⁴ Comp. Response to Order to Show Cause at 2.

¹⁵ D. & O. at 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).