In the Matter of:

JOHN P. BACON, **ARB CASE NO. 01-058**

COMPLAINANT, **ALJ CASE NO. 01-STA-7**

v. **DATE: April 30, 2003**

CON-WAY WESTERN EXPRESS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
John P. Bacon, *pro se, Fort Lupton, Colorado*

For the Respondent:
David L. Smith, *Constangy, Brooks & Smith, LLC, Atlanta, Georgia*

FINAL DECISION AND ORDER

This case arises under the employee protection ("whistleblower") provision of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C. ' 31105 (2000). Complainant John P. Bacon filed a complaint alleging that Respondent Con-Way Western Express (Con-Way) violated the STAA by terminating his employment in retaliation for raising safety concerns. On May 15, 2001, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he held that Bacon's complaint should be dismissed. After a careful review of the record, we concur with the ALJ's ruling and dismiss the complaint.

BACKGROUND

In August 2000 Con-Way hired Bacon as a commercial motor vehicle driver. Con-Way discharged Bacon in September 2000. Bacon filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Con-Way terminated his employment because he

lodged various complaints with Con-Way's management. OSHA ruled in Con-Way's favor, and Bacon appealed the decision to the Office of Administrative Law Judges.

On November 30, 2000, the ALJ issued a Pre-Hearing Order noting that he attempted to schedule a telephone conference with the parties to discuss procedural matters but was unable to locate Bacon. *See* Pre-Hearing Order #1. On January 12, 2001, the ALJ conducted a telephone conference with the parties during which he attempted to convince Bacon to retain an attorney because the Department of Labor could not appoint one for him. Bacon rejected the ALJ's advice and indicated his desire to receive a hearing "as soon as possible." R. D. & O. at 1. The parties agreed upon April 3, 2001, as the date upon which to conduct the hearing.

On February 23, 2001, the ALJ received from Bacon a copy of Pre-Hearing Order #1 upon which Bacon wrote the following words: "Six or more (Jury Trial Demand) (Motions) Due to unemployed Need Appointed (Council) Need All People & Materials (Sobpoena's)." R. D. & O. at 2.[1] Attached to this document was an additional hand-written document that the ALJ interpreted as a request for subpoenas. The ALJ responded by sending blank subpoena forms and instructions to Bacon. Bacon did not submit the forms to the ALJ prior to the date of the hearing. Transcript (T.) 8, R. D. & O. at 2.

In response to requests for witnesses Bacon had made in the January 12 telephone call, on March 20 Con-Way filed a Response to Complainant's Motion to Make Witnesses Available at Hearing, which stated that Con-Way would not make its CEO available because he had no knowledge of Bacon's complaints or his discharge until well after Bacon's employment was terminated. Bacon was sent copies of this motion on March 19 by overnight service and by certified mail. Respondent's Brief at 9. Bacon made no response to that motion prior to the hearing. On March 21 and on March 23, by overnight service and certified mail, Bacon was sent documents responding to requests he had made in the January 12 telephone call. Respondent's Brief at 9-10. Attachments E and F.[2] Bacon made no response to this production of documents prior to the hearing.

The ALJ convened the hearing as scheduled on April 3, 2001, pursuant to 29 C.F.R. § 24.6 (2002). The ALJ states that prior to "going on the record," Bacon "carried on for the better part of an hour an almost incomprehensible diatribe against the Respondent, Respondent's Counsel, and witnesses." R. D. & O. at 2. The ALJ then opened the hearing on the record and gave the parties the opportunity to address any preliminary matters they wished to discuss. T. 5. In response, Bacon requested a continuance to have the ALJ appoint an attorney for him. T. 5-7, R. D. & O. at 3. The ALJ reminded Bacon that he had previously informed him that he had no

---

[1] Con-Way apparently did not receive a copy of this document until on or about March 21, when it received Bacon's answers to interrogatories. The document was folded and taped to those answers. Respondent's Brief at 8.

[2] Respondent apparently made a broad request for documents in the telephone call, which was limited by the ALJ to documents relevant to Complainant's discharge and complaints about DOT-regulated hazards. Respondent's Brief at 8.

authority under the STAA to appoint an attorney for him. T. 6, R. D. & O. at 3 n.6. Noting that both parties previously had agreed upon the hearing date and that eight[3] witnesses were in attendance, the ALJ attempted to proceed with the hearing. T. 8, 15-16.

Bacon then became sufficiently disruptive that the ALJ warned him that his outbursts would prevent him from receiving a hearing. T. 13, 16. Bacon refused to proceed with his case and instead "hurl[ed] invective and verbal abuse" at the ALJ and Con-Way's witnesses. R. D. & O. at 3. *See* T. 13-15. The ALJ twice advised Bacon to continue with the presentation of his case. T. 18-19. However when Bacon declined to do so and continued in his "repeated abusive, belligerent, and irate behavior," the ALJ adjourned the hearing and summoned United States Marshals to escort Bacon from the courtroom. Post-Hearing Order #1-Order to Show Cause at 1, R. D. & O. at 3.

On April 6, 2001, the ALJ issued an Order to Show Cause allowing Bacon to demonstrate why his complaint should not be dismissed, given his behavior and refusal to prosecute his complaint. Both Bacon and Con-Way responded to the show cause order. The ALJ found Bacon's response to be "essentially [an] incomprehensible rant laced with invective against Respondent" which "does little to address the concerns expressed in the show cause order." R. D. & O. at 1 (footnote omitted). Before us now for review is the ALJ's R. D. & O. recommending dismissal of Bacon's complaint "for his atrocious behavior and failure to prosecute his complaint." *Id.* at 3.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to automatically review the ALJ's recommended decision under 49 U.S.C. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(2002). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia*, the STAA).

Under the STAA, the Board is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . .." 5 U.S.C. § 557(b) (2000). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's

---

[3] Of the eight witnesses in attendance, seven were then-current Con-Way employees and six were present at Bacon's request. *See* Respondent's Brief at 7; *See also* Respondent's Response to Complainant's Motion to Make Witnesses Available at Hearing.

conclusions of law *de novo*. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

As the Board recently held in *Reid v. Niagara Mohawk Power Corp*., ARB No. 00-082, ALJ No. 2000-ERA-23 (ARB Aug. 30, 2002):

> Courts possess the "inherent power" to dismiss a case for lack of prosecution. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id*. at 630-631. Like the courts, the Department of Labor's Administrative Law Judges and this Board must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." *Smith v. Lyondell-Citgo Refining LP*, ARB No. 01-012, ALJ No. 2000-CAA-8 (ARB June 27, 2001); *Mastriana v. Notheast Utilities Corp.*, ARB No. 99-012, ALJ No. 98-ERA-33 (ARB Sept. 13, 2000).

Id. at 7. *Accord Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir.1993), *citing Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980)(Courts possess inherent power to "levy sanctions in response to abusive litigation practices.").

Nevertheless, we recognize that dismissal with prejudice is "a severe sanction reserved for extreme circumstances." *See, e.g., Meade v. Grubbs*, 841 F.2d 1512, 1520 (10th Cir. 1988). Dismissal with prejudice "defeats altogether a litigant's right to access to the courts" and "should be used as a weapon of last, rather than first, resort." *Id*. at 1520, n.6, quoting *Loya v. Desert Sands Unified School District*, 721 F.2d 279, 280 (9th Cir. 1983); *Maggette v. Dalsheim*, 709 F.2d 800, 803 (2d Cir.1983); and *Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir.1981).

The Tenth Circuit Court of Appeals has identified a number of factors to be considered before dismissal of a case for want of prosecution is warranted. *See, e.g., Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir.1992). These factors include: (1) the degree of prejudice to the defendant, (2) the amount of interference with the judicial process, (3) the culpability of the litigant, (4) whether the party was warned in advance that dismissal of the action would be a likely sanction for noncompliance, and (5) the efficacy of lesser sanctions. *Id.* The Tenth Circuit has noted that "[t]hese factors do not constitute a rigid test; rather, they represent criteria for the district court to consider prior to imposing dismissal as a sanction." *Id.* We have considered the Tenth Circuit's guidelines in determining whether this case should be dismissed for want of prosecution.

The costs and disruption to its workplace that Con-Way incurred in producing seven witnesses at the hearing who were its current managers and employees and in attorneys' fees for representation at the hearing are examples of prejudice. *Jones v. Thompson,* 996 F.2d 261, 264 (10th Cir. 1993)(attorneys' fees); *Scarborough v. Eubanks*, 747 F.2d 871, 876 (3d Cir. 1984)(irremedial costs). Moreover, we note that in this case the ALJ found that "Complainant made it clear that his last minute continuance request was motivated, in no small part, by a desire to inconvenience Respondent and Respondent's attorney and witnesses as much as possible (Tr. 16)." R. D. & O. at 3 n.7.

Bacon's actions and pleadings before the ALJ indicate a desire to consciously interfere with the judicial process. Bacon waited until the hearing was convened to ask for a continuance. The grounds for the continuance were completely spurious because the ALJ previously had informed him that he was not authorized to appoint counsel for Bacon. Furthermore, even though Bacon failed to submit subpoenas as directed, Con-Way voluntarily produced six witnesses who Bacon had identified as necessary to make his case. When Bacon insisted that Con-Way's CEO be forced to testify, even though Bacon had failed to comply with the required procedures, the ALJ, in an effort to accommodate Bacon, ruled that Bacon could take a post-hearing deposition of the CEO to determine if he had any relevant knowledge or relevant documents that Con-Way had not previously delivered to Bacon.[4] Bacon spurned the ALJ's offer and refused to proceed with his case, even after the ALJ warned Bacon:

> **JUDGE SARNO**: Mr. Bacon, you are absolutely preventing yourself from getting a hearing here by your outbursts.
>
> **MR. BACON**: So be it. So be it. At least I've got these people here and let them know who I am.

T. 16. Bacon's response to the ALJ's warning demonstrates that Bacon's interest in subjecting the witnesses and Con-Way's counsel to invective and abuse was at least, if not more, important than his interest in litigating his complaint. T. 16.

In consideration of factor three, the culpability of the litigant, Bacon was solely responsible for his refusal to proceed. Furthermore, while the ALJ did not specifically warn Bacon that his case would be dismissed if he did not proceed, the ALJ did warn him–that he would lose his opportunity for a hearing. T. 16. Finally, as Bacon has given neither the ALJ, nor the Board, any indication whatsoever that he is either willing or able to conduct himself appropriately, if offered the opportunity to proceed with this case, we do not believe that a lesser sanction would be efficacious.

---

[4] Bacon was notified that the CEO would not testify well before the hearing but made no objection prior to the hearing. Moreover, it appears that he was aware that he would not receive the broad array of documents he initially requested, both because the judge had limited production in January and because he had received the documents in March; nonetheless he made no objection prior to the hearing.

We acknowledge that in many cases dismissed for a lack of prosecution, the failure to prosecute has resulted in a delay of months or even years. *See, e.g., Emerson v. Thiel College*, 296 F.3d 184 (3d Cir. 2002)(plaintiff attempted to obtain stays over period of two years); *S.E.C. v. Power Resources Corp*., 495 F.2d 297 (10th Cir. 1974) (plaintiff's inaction resulted in three-year delay). While Bacon's failure to proceed in this case caused no such delay, we find that his totally unacceptable conduct and the absence of any expression of apology or avowal to conform his conduct to an appropriate standard in the future is an additional factor that tips the balance in favor of dismissal. *Cf. Peker v. Fader*, 965 F. Supp. 454 (S.D.N.Y. May 27, 1997) (In upholding the magistrate judge's dismissal of the plaintiffs' case for contemptuous conduct in screaming at the magistrate judge and storming out of the pre-trial conference, the court, quoting from the magistrate judge's opinion wrote, "'Certainly, if the Court can dismiss under Rule 37 of the Federal Rules of Civil Procedure for disobedience of discovery and scheduling orders in appropriate cases, the Court should be able to dismiss as a contempt sanction where, as here, no other sanction seems appropriate for the contempt.'"). Furthermore, far from employing dismissal as a weapon of first resort, the ALJ displayed admirable patience and forbearance in his ultimately unsuccessful attempts to convince Bacon to conform his conduct to acceptable standards and to proceed with his case. T. 17-19.

Before dismissing the case, the ALJ also gave Bacon an opportunity to demonstrate why his case should not be dismissed because of his failure to proceed on the date of the hearing. *See* Order to Show Cause. However, Bacon failed to avail himself of this opportunity and instead used it once again as a vehicle to vilify and excoriate Con-Way. Although a party appearing *pro se* may be allowed some leeway, he must nonetheless take appropriate steps to litigate his case. *See, e.g., Smith v. Lyondell-Citgo Refining LP*, ARB No. 01-012, ALJ No. 2000-CAA-8, slip op. at 2 (ARB June 27, 2001). Bacon's response to the Order to Show Cause does not address any of the concerns raised by the ALJ, thereby supporting the latter's recommendation to dismiss the complaint. *See* 29 C.F.R. § 18.5(d) (2002) ("Any person to whom an order to show cause has been directed and served shall respond to the same by filing an answer in writing. Arguments opposing the proposed sanction should be supported by reference to specific circumstances or facts surrounding the basis for the order to show cause.").

CONCLUSION

The record supports the ALJ's recommendation that Bacon's complaint be dismissed. Bacon's appeal to this Board explains neither his actions before the ALJ nor

his failure to provide the information requested pursuant to the Order to Show Cause. Therefore, for all the reasons stated above, we **AFFIRM** the R. D. & O. and **DISMISS** this case.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge