



In the Matter of:

KEVIN S. ROSE,

ARB CASE NO. 05-091

COMPLAINANT,

ALJ CASE NO. 2005-STA-14

v.

DATE: August 31, 2006

ATC VANCOM, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:

James N. Forster, Jr., Esq., Geoffrey M. Gilbert, Jr., Esq., *McMahon, Berger, Hanna, Linihan, Cody & McCarthy*, St. Louis, Missouri

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended.¹ Kevin S. Rose filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that ATC Vancom, Inc. terminated his employment in violation of the STAA. On May 16, 2005, an Administrative Law Judge (ALJ) issued a "Recommended Decision and Order Dismissing Case and Vacating Trial" (R. D. & O.), recommending that the complaint be dismissed. For the following reasons we dismiss the complaint.

¹ 49 U.S.C.A. § 31105 (West 1997).

BACKGROUND

Rose was employed by ATC Vancom as a bus driver when he refused to drive his assigned vehicle on two occasions in July 2004. ATC Vancom discharged Rose on or about August 2, 2004. Secretary's Findings at 2. On August 17, 2004, Rose filed his complaint with OSHA. OSHA investigated and found that ATC Vancom did not violate the STAA. Rose submitted a request for a hearing to the Office of Administrative Law Judges on January 21, 2004.

The ALJ issued a Notice of Hearing and Prehearing Order (Prehearing Order) on February 2, 2005. The Order indicated that the ALJ would conduct a hearing on Rose's complaint on February 24, 2005. The Order also instructed Rose to submit a prehearing statement and witness list to the ALJ and ATC Vancom, and to exchange exhibits with ATC Vancom.

On February 16, 2005, Rose sent a letter to the ALJ requesting that his hearing "be rescheduled to a later date" and requesting an attorney to present his case at the hearing. Rose did not send a copy of the letter to ATC Vancom. The ALJ responded to Rose's letter on March 3, 2005, by informing Rose that: (1) the hearing would take place on March 17, 2005; (2) Rose should not send correspondence to the ALJ on an ex parte basis; (3) the Office of Administrative Law Judges does not provide advocate representatives; and (4) his failure to submit a prehearing statement could result in dismissal of his case for lack of prosecution.

ATC Vancom filed a Motion for Continuance of Hearing Date on March 7, 2005, requesting that the hearing be rescheduled because it had not received Rose's prehearing statement. In response, the ALJ issued a Notice of Second Trial Continuance on March 14, 2005 (Notice), rescheduling the hearing for May 16, 2005. The Notice ordered Rose to "immediately serve on Respondent and file with this Office his prehearing statement of position and witness lists." Notice at 1. The Notice also instructed Rose to "make all efforts to retain an attorney for his representation in this case or be prepared to proceed without an attorney" and indicated that "[t]here will be no further continuances." *Id.* at 2. Rose did not submit a prehearing statement or witness list to either the ALJ or ATC Vancom.

On May 12, 2005, ATC Vancom filed a "Motion to Dismiss or In the Alternative Motion to Extend Trial Date" arguing that, because Rose had not complied with the Prehearing Order, the ALJ should dismiss the complaint for lack of prosecution. Rose did not respond to this motion. On May 16, 2005, the ALJ issued an R. D. & O. recommending dismissal of the complaint based upon Rose's failure to comply with the Prehearing Order.

This case is before the Board pursuant to the STAA's automatic review provisions.² On May 23, 2005, the Board issued a Notice of Review and Briefing Schedule, informing the parties of their right to file briefs in support of or in opposition to the R. D. & O. Rose did not file a brief. ATC Vancom submitted a Brief in Support of Administrative Law Judge's Dismissal on June 15, 2005.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA and its implementing regulations.³ The ARB is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."⁴ The Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.⁵ The Board reviews questions of law de novo.⁶

DISCUSSION

Courts possess the "inherent power" to dismiss a case on their own initiative for lack of prosecution.⁷ 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."⁸ 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." Thus, the Board will affirm an ALJ's recommended decision and order on the grounds of abandonment, where the facts dictate that a party has failed to prosecute his or her case.⁹

² "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee." 29 C.F.R. § 1978.109(a).

³ Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Part § 1978 (2005).

⁴ 29 C.F.R. § 1978.109(c)(1).

⁵ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998).

⁶ *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

⁷ *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630 (1962).

⁸ *Id.* at 630-631.

⁹ *Kruml v. Patriot Express*, ARB 03-015, ALJ No. 02-STA-7, slip op. at 4-5 (ARB Feb. 25, 2004); *Assistant Sec'y for OSH and Reichelderfer v. Bridge Transp., Inc.*, ARB No.

Furthermore, as the ALJ noted, the applicable Rules of Practice and Procedure permit an ALJ to dismiss cases when a party fails to comply with any of the ALJ's orders.¹⁰

Here the ALJ issued a lawful order on February 2, 2005, when he instructed Rose to submit a prehearing statement and witness list and to exchange exhibits with ATC Vancom. The ALJ issued two subsequent notices reminding Rose to comply with the Prehearing Order, the first of which warned Rose that his case could be dismissed if he did not comply. But Rose did not submit any prehearing materials or explain his failure to comply. In addition, Rose did not submit a brief to this Board explaining his failure to comply with the Prehearing Order. Based upon the record before us, we conclude that substantial evidence and well-established legal precedent support the ALJ's recommended decision to dismiss.

CONCLUSION

Rose failed to comply with the ALJ's February 2, 2005 Prehearing Order requiring him to serve and file a prehearing statement, witness list, and exchange exhibits with ATC Vancom. Accordingly, the Board **ACCEPTS** the ALJ's R. D. & O. and **DISMISSES** Rose's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

02-068, ALJ No. 2001-STA-041, slip op. at 3 (ARB Aug. 29, 2003); *Tucker v. Connecticut Winpump Co.*, ARB No. 02-005, ALJ No. 2001-STA-53, slip op. at 4 (ARB Mar. 15, 2002); *Curley v. Grand Rapids Iron & Metal Co.*, ARB No. 00-013, ALJ No. 99-STA-39, slip op. at 2 (ARB Feb. 9, 1999).

¹⁰ See 29 C.F.R. § 18.6(d)(2)(v); *Dickson v. Butler Motor Transit*, ARB No. 02-098, ALJ No. 01-STA-039, slip op. at 4 (ARB July 25, 2003) (ALJ acted within range of his discretion in dismissing STAA complaints after complainant repeatedly ignored the ALJ's discovery and other orders.).