



**In the Matter of:**

**CHAD BERG,**

**COMPLAINANT,**

**v.**

**SWIFT TRANSPORTATION,**

**RESPONDENTS.**

**ARB CASE NO. 07-046**

**ALJ CASE NO. 2006-STA-00013**

**DATE: February 28, 2007**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Respondents:*

**Andrea D. Coit, Esq., *Harrang Long Gary Rudnick P.C.*, Eugene, Oregon**

### **FINAL DECISION AND ORDER DISMISSING COMPLAINT**

This case arises under the employee protection provision of the Surface Transportation Assistance Act (STAA).<sup>1</sup> On July 13, 2005, Chad Berg filed a complaint with the Secretary of Labor alleging that his employer, Swift Transportation, violated STAA section 31105 by threatening and harassing him after he engaged in activity protected by STAA. Section 31105 provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules.

After investigating Berg's complaint, the Occupational Safety and Health Administration (OSHA) found that Swift Transportation did not violate the STAA. Berg objected to OSHA's findings and requested a hearing before a Labor Department Administrative Law Judge (ALJ).

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<sup>1</sup> 49 U.S.C.A. § 31105 (West 2007), and implementing regulations, 29 C.F.R. Part 1978 (2006).

After granting Berg's several requests for a continuance, the ALJ set the hearing for December 12 and 13, 2006. Berg failed to appear on December 12 or 13 and did not respond to telephone messages from the ALJ. On December 14, 2006, the ALJ issued an Order to Show Cause why Berg's complaint should not be dismissed for failure to prosecute. Berg did not respond to the Show Cause order. On January 19, 2007, the ALJ issued an order recommending that Berg's complaint be dismissed pursuant to 29 C.F.R. § 24.6(e)(4)(A), which permits an ALJ, on his own motion, to recommend that a complaint be dismissed when the complainant or his representative does not attend a hearing without showing good cause.<sup>2</sup> The Administrative Review Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge" in cases arising under section 31105.<sup>3</sup>

On February 12, 2007, the Board issued a Notice of Review and Briefing Schedule permitting the parties to submit briefs in support of or in opposition to the ALJ's order. Swift Transportation timely filed a brief in support of the ALJ's recommended order. Berg did not respond.

The rules of procedure applicable to STAA hearings provide for dismissal of a complaint based on abandonment:

A party shall be deemed to have abandoned a request for hearing if neither the party nor his or her representative appears at the time and place fixed for the hearing and either (a) prior to the time for hearing such party does not show good cause as to why neither he or she nor his or her representative can appear or (b) within ten (10) days after the mailing of a notice to him or her by the administrative law judge to show cause, such party does not show good cause for such failure to appear and fails to notify the administrative law judge prior to the time fixed for hearing that he or she cannot appear.

29 C.F.R. § 18.39(b).<sup>4</sup>

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<sup>2</sup> 29 C.F.R. Part 24 (2006) contains rules of procedure for hearings held under several environmental protection statutes, but not under STAA.

<sup>3</sup> 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 00-STA-50 (ARB Sept. 26, 2001).

<sup>4</sup> *Cf. Rose v. ATC Vancom, Inc.*, ARB No. 05-091, ALJ No. 2005-STA-014, slip op. at 3 (ARB Aug. 31, 2006).

Dismissal as a sanction for failure to prosecute is a matter within the sound discretion of the administrative law judge.<sup>5</sup> Berg repeatedly failed to comply with procedural orders and neither appeared for nor explained his absence from the hearing. Having considered the record, the ALJ's reasoning, and the Respondent's brief, we conclude that Berg's complaint should be dismissed because Berg abandoned his claim.

Accordingly, the Board **ACCEPTS** the ALJ's Recommended Order and **DISMISSES** Berg's complaint.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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<sup>5</sup> *Ferguson v. Bomac Lubricant Techs., Inc.*, ARB No. 04-057, ALJ No. 2002-STA-27 (ARB June 29, 2005).