In the Matter of:

DANIEL S. SOMERSON,

COMPLAINANT,

v.

MAIL CONTRACTORS OF AMERICA,

RESPONDENT.

ARB CASE NO. 03-055

ALJ CASE NO. 02-STA-044

DATE: November 25, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., Esq., ***St. Augustine, Florida***

For the Respondent:
Oscar E. Davis, Jr., Esq., ***Friday, Eldredge & Clark, Little Rock, Arkansas***

FINAL ORDER STRIKING THE COMPLAINANT'S BRIEF AND DISMISSING THE COMPLAINT

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A § 31105 (West 1997). The Complainant, Daniel Somerson, filed a complaint alleging that the Respondent, Mail Contractors of America (MCOA), violated the STAA's employee protection provisions by terminating his employment because he refused to drive when he was too sick or fatigued to safely do so. We find the Administrative Law Judge's Recommended Decision and Order Dismissing Complaint and Certifying Facts Relating to Intimidation and Harassment of Witnesses and Counsel to Federal District Court (R. D. & O.) to be in accordance with the facts and the law. Accordingly, we accept the Judge's recommendation and dismiss Somerson's complaint.

BACKGROUND

This case was referred to a Department of Labor Administrative Law Judge (ALJ) pursuant to 29 C.F.R. § 1978.105 (2003). The ALJ began hearing the case on September 10, 2002, and suspended the hearing on September 19, 2002, at the parties' request. In a motion filed November 13, 2002, MCOA sought a protective order and witness interview restriction (M.P.O.). The motion for protective order asserted that both prior and subsequent to the hearing in this matter, Somerson anonymously sent MCOA's counsel and management witnesses insulting and threatening e-mails and opened anonymous websites directed at MCOA and its counsel.[1] MCOA argued that such communications constituted harassment and attempted intimidation and coercion of witnesses. Accordingly, MCOA requested the ALJ to issue "a Protective Order prohibiting all such conduct, or similar activities, in the future." M.P.O. at 2. MCOA also requested the ALJ to "reconsider its previous suggestion to undersigned counsel that he permit the ex parte interview by counsel for Complainant of Respondent's supervisor, Richard Mason, . . ." given "counsel for Complainant's obvious inability to control his client's inappropriate actions throughout the adjudication of this case . . . ."[2] *Id.*

In response to this motion for a protective order, the ALJ issued an Order to Show Cause (S.C.O.). In the order, the ALJ stated that Somerson's litigation of this case was subject to the constraints of a consent order issued in *In re: Daniel S. Somerson*, Case

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[1] The e-mails and excerpts from the websites to which MCOA objected are appended to the ALJ's R. D. & O. and are designated as Exhibit "A." *Somerson v. Mail Contractors of America*, ALJ No. 2002-STA-44 (ALJ Dec. 16, 2002).

[2] In response to MCOA's filing of the M.P.O., Somerson, filed a new STAA complaint alleging that MCOA; the law firm of Friday, Eldredge & Clark (a law firm representing MCOA); and Oscar Davis (an attorney representing MCOA) violated the STAA by requesting the M.P.O. MCOA filed a Motion to Dismiss this complaint arguing that it failed to assert a prima facie allegation of an adverse employment action. On January 10, 2003, Administrative Law Judge Thomas M. Burke issued a Recommended Decision and Order Dismissing Complaint and Referring Matter to the Tennessee Supreme Court's Board of Professional Responsibility. *Somerson v. Mail Contractors of America*, ALJ No. 2003-STA-00011. The ALJ found that "[t]he present complaint . . . is completely specious" and "fails to allege the essential elements of a violation of the whistleblower protection provisions of the STAA." Slip op.at 2. Upon automatic review, the Administrative Review Board issued a Final Order Striking the Complainant's Brief and Dismissing the Complaint. *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-00011 (Oct. 14, 2003). The Board held, inter alia, "After reviewing the record and facts in the light most favorable to Somerson, we agree that Somerson has failed to rebut the Respondent's motion to dismiss with a demonstration of a dispute in material fact and that he has failed to allege and to adduce evidence in support of an essential element of his complaint . . . ." Slip op. at 7. Accordingly, the Board dismissed the complaint. *Id.*

No. 3:02-cv-121-J-20-TEM, by the United States District Court, Middle District of Florida (Consent Order) as a result of his unacceptable conduct in a prior proceeding before the Office of Administrative Law Judges.[3] The ALJ continued:

> In addition, 29 CFR § 18.36 provides that all persons appearing in proceedings before an administrative judge are expected to act with integrity, and in an ethical manner, and provides sanctions for refusal to adhere to reasonable standards of orderly and ethical conduct. 29 CFR § 18.29 provides that the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearing. Communications of the character alleged by Respondent are deemed inimical to the orderly conduct of a fair an[d] impartial hearing, and inconsistent with the ethics and integrity appropriate to the conduct by the parties of such a hearing. Such conduct also tends predictably to cause complaints and other responses for just cause which create distractions and extraneous issues which require the attention of the tribunal. Complainant has ample notice that such behavior will not be tolerated.

S.C.O. at 2. Accordingly, Somerson was ordered to show cause why the ALJ should not certify the facts relating to the alleged misconduct to the United States District Court under the terms of the Consent Order and why the complaint should not be dismissed with prejudice. *Id.* The S.C.O. also provided, "As part of any response to this order, Complainant shall admit or deny that he is the originator of the communications complained of. Failure to admit or deny as required shall be deemed an implicit admission." *Id.*

In response, Somerson neither admitted nor denied that he was the source of these e-mails and websites. He also did not deny that the e-mails and websites at issue

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[3] This order provides, inter alia that,

> Daniel Somerson shall conduct himself within the bounds of appropriate respect and decorum albeit with allowance for appropriate zeal and vigor, during any proceedings, and any matter related thereto, held under the authority of the Office of Administrative Law Judges, U.S. Department of Labor, and regarding any other official purpose with any person or organization of the Office of Administrative Law Judges, U.S. Department of Labor, wherein Daniel S Somerson is a party, a representative, a witness or other participant.

constituted harassment and attempted intimidation and coercion of witnesses. However he did state, "It is illegal to punish or censor Mr. Somerson for criticizing large organizations" and that "[t]his is a matter of First Amendment rights, which this Court is duty-bound to protect."[4]

On December 16, 2002, the ALJ issued the R. D. & O. Describing Somerson's response to the S.C.O., the ALJ wrote:

> Complainant's response to the Order to Show Cause conspicuously ignores the concerns raised in the Order to Show Cause, which were precisely directed to the e-mail communications of implicitly threatening nature, and e-mail and website characterizations directed at Respondent's counsel that are provocative, vulgar, and egregiously abusive. Rather the response recites unfocused, inchoate, and verbose allegations referring to First Amendment rights. Complainant's response is fairly construed as a defiant declaration that Complainant will not conform his behavior to reasonable or generally acceptable norms or cooperate with this tribunal in the orderly conduct of the hearing pending before it in conformity with the Consent Order or otherwise.

R. D. & O. at 4-5. The ALJ concluded that based on "the documentation presented by Respondent, Complainant's lack of denial that he was responsible for the communications, and the lack of Constitutional protection for statements intended to harass and attempt to intimidate witnesses and an officer of the court," Somerson had engaged in sanctionable conduct in this case. *Id.* at 7. The ALJ acknowledged that dismissal of a complaint for misconduct is a most severe sanction, however he concluded that, "the obvious bad faith and the intentional compromise of the integrity of the hearing process and Complainant's history of contumacious conduct in proceedings before the Office of Administrative Law Judges establish that lesser sanctions would be ineffective in regard to his abusive behavior." *Id.* at 10. Furthermore, the ALJ determined that the abusive and threatening e-mails and websites clearly violated the Consent Order and accordingly the ALJ provided that he would submit his R. D. & O. with attachments to the United States District Court for the Middle District of Florida as a "certification of apparent violation of the Consent Order by Complainant." *Id* at 7.[5]

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[4] Mr. Somerson's Supplemental Citations, Motion to Lift Stay and Motion to List Respondent's Website Surveillance as Issue for Trial at 1.

[5] In an Order issued September 8, 2003, the United States District Court, Middle District of Florida, found that "Somerson's e-mails and websites are of a harassing nature, and are hostile and crude to say the least. His messages do not instill dignity and

Continued . . .

Pursuant to 29 C.F.R. § 1978.109, an Administrative Law Judge is required to immediately forward his or her decision under the STAA to the Administrative Review Board (ARB or Board), the Secretary's designee,[6] to issue a final order. The regulation further provides that the parties may file briefs in support of or in opposition to the Administrative Law Judge's decision within thirty days of the date on which the Judge issued the decision. 29 C.F.R. § 1978.109(c)(2). Accordingly, pursuant to 29 C.F.R. § 1978.109, review of the ALJ's R. D. & O. in this case was automatic and any briefs in support of or in opposition to the R. D. & O. were due on January 15, 2003, without further order of the Board.

On December 24, 2002, Somerson filed a Petition for Review of the R. D. & O. As indicated above, such a petition was unnecessary because all STAA Administrative Law Judge decisions are forwarded automatically to the ARB to issue a final decision. Somerson did not timely file a brief in opposition to the ALJ's R. D. & O. Nevertheless, because he did file a petition for review within the thirty-day period and appeared to misapprehend the proper procedure, the Board treated his petition for review as a motion for enlargement of time to file a brief and in an order dated February 13, 2003, permitted the parties to file simultaneous briefs within 30 days of the date of the order.

In a February 13th order, the Board also responded to Somerson's request that this case be consolidated with *Somerson v. Mail Contractors of America,* ARB No. 03-042, for briefing and oral argument. Because Somerson failed to specify any ground supporting consolidation or oral argument, the Board denied Somerson's motion, but indicated that if at some future date the Board found consolidation or oral argument to be warranted, the Board would so notify the parties.

On March 14, 2003, Somerson filed a request for a further extension of time. The Board granted the motion in an order issued March 24, 2003, and stated that "[t]he brief will be accepted as filed if received by the Board on or before **March 31, 2003.**"

MOTION TO STRIKE SOMERSON'S BRIEF

The Board did not receive Somerson's brief on or before March 31, 2003. On April 10, 2003, the Board received a single document titled "Complainant's Omnibus Opening Brief in ARB Case Nos. 03-042 & 03-055, His Response to ARB Show Cause Order in ARB Case No. 03-068, His Motion for Consolidation and His Motion for

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respect for the administrative proceedings, nor for the witnesses or counsel involved." *In re: Daniel S. Somerson,* Case No. 3:02-cv-1158-J-20TEM. The court adjudged Somerson to be in civil contempt and ordered him, inter alia, to pay a $5000.00 fine.

[6] *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002)(delegating the Secretary's authority to issue final decisions under the STAA to the Administrative Review Board).

Summary Reversal and Remand to a New ALJ" (Omnibus brief). In response, MCOA filed Respondent's Motion to Strike Complainant's Combined Omnibus Opening Brief (03-042 & 03-055), Response to ARB Show Cause Order (03-068), Motion for Consolidation and Motion for Summary Reversal and Remand to New ALJ. In this motion, MCOA argued that the Board should strike Somerson's brief because Somerson had failed to comply with the Board's Order Granting the Enlargement of Time.[7]

Somerson responded to MCOA's Motion to Strike, stating:

> Mr. Somerson's brief was signed and mailed on March 31, 2003, several hours *before* mail receipt of the Board's Order (not received by fax on that or any earlier date). Respondent's, "driving under the inference" of their extreme animus, as always assume the worst about Complainant, never letting mere facts stand in the way of their angry, ill-informed ad hominem assertions.
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> Surely there can be no "*blatant disregard"* on the part of either Mr. Somerson or his counsel by not being clairvoyant of the contents of a mailed order that was not received until later in the day on March 31, 2003.

Complainant's Response to Respondent's April 7, 2003 Motion to Strike Brief at 1 (emphasis in original). Based on this assertion that the Board's March 24, 2003 Order was not received until after Somerson filed his Omnibus brief, Somerson asked the Board to accept his brief as timely.

MCOA replied to Somerson's response pointing out that the first sentence of the Omnibus brief states, "In response to the Board's March 24, 2003 Orders, Mr. Somerson hereby respectfully combines his briefs in two cases (ARB Nos. 03-42 & 03-055) and responds to the Order to Show Cause in the third case (ARB No. 03-68)." MCOA contended that this statement obviously belies Somerson's averment that his counsel received the Board's March 24th Order Granting Enlargement of Time after he filed the Omnibus brief because Somerson's counsel could hardly file a brief in response to an Order of which he was unaware.

Somerson's assertion, by counsel, that he filed the Omnibus brief before receiving the Board's March 24th Order is patently false. As the Board recently held in *Somerson*

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[7] The Board granted this motion with respect to *Somerson v. Mail Contractors of* America, ARB No. 03-042, ALJ No. 2003-STA-00011 in a Final Order issued October 14, 2003 and *In Re: Daniel Somerson*, ARB No. 03-068, ALJ Nos. 2002-STA-00044, 2003-STA-00011 in a Final Order issued October 21, 2003.

v. Mail Contractors of America, ARB No. 03-042, ALJ No. 03-STA-11, slip op. at 4 (ARB Oct. 14, 2003):

> Such falsehoods by attorneys appearing before the Board will not be tolerated and may subject the offending attorney to sanctions. Moreover, making such false statements to the Board undermines Attorney Slavin's ability to effectively represent his clients because the Board will be reluctant to accept at face value any statement counsel makes that is not confirmed by independent collaborating evidence.

Furthermore, the Omnibus brief was not filed in accordance with the Board's March 24, 2003 Order. This Order unequivocally provided that Somerson's brief would be accepted **if** "received by the Board on or before **March 31, 2003**." Additionally, in filing an Omnibus brief, which consolidated the briefing for ARB Nos. 03-042 and 03-055, Somerson ignored the Board's order denying his motion for such consolidated briefing. Accordingly, we **GRANT** MCOA's Motion to Strike Somerson's Omnibus brief.

Nevertheless, because as provided in 29 C.F.R. § 1978.109(c)(1), the Board is required to "issue a final decision and order based on the record and the decision and order of the administrative law judge," we are required, even in the absence of Somerson's brief, to review the record and the R. D. & O. to determine whether the R. D. & O. is supported by substantial evidence and is in accordance with law.

STANDARD OF REVIEW

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.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

Administrative Law Judges have the "inherent power" to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630-631 (1962). *Accord Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989)("courts retain the inherent power to do what is necessary and proper to conduct judicial business in a satisfactory manner"), *Reid v. Niagara Mohawk Power Corp.,* ARB No. 00-082, ALJ No. 2000-ERA-23, slip op. at 7 (ARB Aug. 30, 2002). An adjunct to this power is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). Because of the very potency of this inherent power, adjudicators must exercise it with "restraint and discretion." *Id.* When assessing an appropriate sanction the adjudicator must "carefully balance the policy favoring adjudication on the merits with competing policies such as the need to maintain institutional integrity and the desirability of deterring future misconduct." *Aoude v. Mobil Oil Corp.*, 892 F.2d at 1118. Although outright dismissal of a complaint is an especially severe sanction, it is within an adjudicator's discretion to invoke under the proper circumstances and after due consideration. *Chambers v. NASCO, Inc.*, 501 U.S. at 44-45; *Aoude v. Mobil Oil Corp.*, 892 F.2d at 1118. *Accord Frumkin v. Mayo Clinic*, 965 F.2d 620, 626-627 (8th Cir. 1992)(it was within the district court's discretion to dismiss case on the ground that death threats against a party's witnesses impaired the party's ability to defend the case and undermined the judicial process.).

We have reviewed the ALJ's R. D. & O. and the record in this case and we find that the ALJ has struck the proper balance. We agree with the ALJ (and the District Court) that there is no doubt that Somerson is responsible for the harassing and implicitly threatening e-mails and websites at issue here. We also agree that Somerson's argument that the harassment and intimidation of witnesses is entitled to First Amendment protection is totally baseless and finds no support in the numerous inapposite cases he cited in support of this completely untenable position. *See United States v. Shoulberg*, 895 F.2d 882, 886 (2d Cir. 1990)("the First Amendment does not guarantee a right to make intimidating threats against government witnesses"). Attempts to intimidate witnesses strike at the very heart of the integrity of the judicial process. Somerson's response to the S.C.O., in which he evidences no recognition of the severity of his misconduct or intention to renounce his campaign of harassment and intimidation, supports the ALJ's determination that dismissal of the complaint is warranted in this case. This conclusion is strongly reinforced by the fact that at the time Somerson engaged in this most egregious misconduct he was subject to a Consent Order requiring him to "conduct himself within the bounds of appropriate respect and decorum" in litigating cases before the Office of Administrative Law Judges. Somerson, by his refusal to conduct himself in conformance with the Consent Order, has confirmed that no sanction

short of dismissal will deter his future misconduct. Accordingly, we accept the ALJ's recommendation and **DISMISS** Somerson's complaint.[8]

MCOA has requested that the Board enter an award of costs and attorney's fees against Somerson or remand the case to the ALJ to consider such an award. The Secretary of Labor has held that there is no authority to award attorney's fees and costs against a complainant under the STAA. *Abrams v. Roadway Express, Inc.*, 84-STA-2, slip op. at 1-2 (May 23, 1985). Accordingly, MCOA's request for such fees and costs is **DENIED.**

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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[8] In a letter to the Board inquiring whether the Board would be issuing a briefing order in another case involving Complainant Somerson, counsel for Somerson, Mr. Slavin, asked, "does the ARB plan to stay all action in this case and Mr. Somerson's other cases? If not, please issue a stay to avoid injustice, the possibility of reversal and waste of time." Mr. Slavin has been repeatedly admonished that all requests for action by this Board must be in the form of a motion with a caption including the ARB case number and that failure to comply with this requirement will result in the Board's refusal to consider the party's request. *See e.g., Steffenhagen v. Securitas Sverige, AR,* ARB No. 03-139, ALJ No. 03-SOX-024 (ARB Sept. 30, 2003); *Slavin v. Office of Admin. Law Judges,* ARB No. 03-77, ALJ No. 03-CAA-12 (ARB Aug. 22, 2003); *Gass v. Lockheed Martin Energy Systems,* ARB No. 03-093, ALJ Nos 2000-CAA-22, 2002-CAA-2 (ARB July 11, 2003), *Erickson v. United States Envtl. Prot. Agency,* ARB Nos. 03-02, 03, 04, ALJ Nos. 1999-CAA-2, 2001-CAA-8, 13, 2002-CAA-3, 18 (ARB Oct. 17, 2002). The letter addressed to the Board requesting the Board to take action in this case was not in the form of a motion and failed to include a caption specifying the Board's case number. Accordingly, we will not consider his request.