



**In the Matter of:**

**PRENTIS BOLES,**

**ARB CASE NO. 2021-0061**

**COMPLAINANT,**

**ALJ CASE NO. 2020-FRS-00101**

**v.**

**DATE: November 1, 2021**

**UNION PACIFIC RAILROAD  
COMPANY,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Prentis Boles; *pro se*; Lee's Summit, Missouri**

***For the Respondent:***

**Sierra M. Poulson, Esq.; *Union Pacific Railroad Company*; Omaha  
Nebraska**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, Randel K.  
Johnson and Stephen M. Godek, *Administrative Appeals Judges***

## **DECISION AND ORDER DISMISSING PETITION FOR REVIEW**

PER CURIAM. This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).<sup>1</sup> Complainant Prentis Boles filed

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<sup>1</sup> 49 U.S.C. § 20109 (2008), as implemented by 29 C.F.R. Part 1982 (2020) and 29 C.F.R. Part 18, Subpart A (2021). The Secretary of Labor has delegated to the Administrative Review Board the authority to review ALJ decisions under the FRSA. 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).

a complaint with the United States Department of Labor’s Occupational Safety and Health Administration alleging that Respondent Union Pacific Railroad Company violated the FRSA by terminating his employment because he reported a workplace injury. On June 28, 2021, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) dismissing the complaint.

Pursuant to the FRSA’s implementing regulations, a party desiring to appeal an ALJ’s decision must file a petition for review with the Administrative Review Board (ARB or the Board) within fourteen days of the date of the ALJ’s decision, which in this case was no later than July 12, 2021.<sup>2</sup> Complainant did not file his petition for review with the ARB until July 28, 2021 and, therefore, it was untimely. The filing period for an appeal to the ARB is not jurisdictional and is subject to equitable modification.<sup>3</sup> Therefore, we issued a Show Cause Order on August 25, 2021, instructing Complainant to explain why his petition should not be dismissed as untimely. The Order to Show Cause gave Complainant fourteen days, or until September 8, 2021, to file a response. Complainant was once again late because he did not file a response to our Show Cause Order until September 9, 2021.<sup>4</sup> Respondent filed a timely reply to Complainant’s response on September 21, 2021.<sup>5</sup>

The Board has generally recognized four situations in which it may equitably toll the appeal deadline:

- 1) when the defendant has actively misled the plaintiff regarding the cause of action; 2) when the plaintiff has in some extraordinary way been prevented from filing his action; 3) when the plaintiff has raised the precise

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<sup>2</sup> 29 C.F.R. § 1982.110(a).

<sup>3</sup> *Nevarez v. Werner Enters.*, ARB No. 2018-0005, ALJ No. 2013-STA-00012, slip op. at 2 (ARB Dec. 14, 2017) (internal citations omitted).

<sup>4</sup> The Board notified Complainant in the Order to Show Cause that his failure to timely respond to the Order could result in dismissal of his appeal without further notice. Although it was untimely filed, we nevertheless considered Complainant’s response to our Show Cause Order in reaching our decision. Complainant’s discussion of the issue was also somewhat summary, but we note that we construe “papers filed by pro se complainants,” like Complainant, “liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude.” *Salyer v. Sunstar Eng’g*, ARB No. 2014-0055, ALJ No. 2012-STA-00023, slip op. at 3 n.3 (ARB Sept. 29, 2015) (internal citations omitted).

<sup>5</sup> Complainant filed an additional response to the Board’s Order to Show Cause on October 19, 2021, which was beyond the briefing deadline and which was filed without permission or leave of the Board. Therefore, the Board will not consider this brief.

statutory claim in issue but has [mistakenly] done so in the wrong forum[;] and 4) where the defendant's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.<sup>6</sup>

The Board has not found these situations to be exclusive, and the inability to satisfy one or more is not necessarily fatal to his claim.<sup>7</sup> Complaint bears the burden of justifying why the deadline should be equitably tolled.<sup>8</sup> In addition, "courts have generally been much less forgiving in receiving late filings where the claimant failed to exercise *due diligence* in preserving his legal rights."<sup>9</sup>

Equitable tolling is granted sparingly, and only upon a showing that extraordinary circumstances that prevented a timely filing were out of a party's control.<sup>10</sup> For example, in a recent case, the Board found extraordinary circumstances justified the equitable tolling of the limitations period to file a petition for review.<sup>11</sup> During the course of the proceedings in *Mazenko*, the ALJ changed the form of service without adequately notifying Complainant, which prevented Complainant from receiving information to protect his rights and timely file a Petition for Review.

## DISCUSSION

Upon review of Complainant's response to the Order to Show Cause, Respondent's reply thereto, and the record before the Board, we hold that Complainant has not demonstrated any extraordinary circumstances, such as those present in *Mazenko*, that compel the Board to equitably toll the appeal deadline to accept his untimely appeal of the D. & O. in this case.

Complainant first asserts that he was prevented from filing a timely appeal because he did not receive a paper copy of the D. & O. directly from the ALJ. This

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<sup>6</sup> *Nevarez*, ARB No. 2018-0005, slip op. at 2 (internal citations omitted).

<sup>7</sup> *Id.*

<sup>8</sup> *See Jaludi v. Citigroup, Inc.*, ARB No. 2021-0053, ALJ No. 2021-SOX-00014, slip op. at 3 (ARB Aug. 25, 2021).

<sup>9</sup> *Lubary v. El Floridita*, ARB No. 2010-0137, ALJ No. 2010-LCA-00020, slip op. at 6 (ARB Apr. 30, 2012) (internal citation omitted) (emphasis added).

<sup>10</sup> *Jaludi*, ARB No. 2021-0053, slip op. at 2-3.

<sup>11</sup> *Mazenko v. Pegasus Aircraft Mgmt., LLC*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001 (ARB Sept. 7, 2021).

may be true, but it is not an extraordinary circumstance that justifies Complainant's tardiness in filing his Petition for Review. Complainant does not dispute that the ALJ timely delivered a copy of the D. & O. to Complainant's counsel of record. As a matter of law, proper notice to a party's representative is deemed to be actual notice to the party himself.<sup>12</sup> Complainant also does not dispute that his counsel promptly delivered an electronic copy of the D. & O. to him on July 1, 2021, well before the filing deadline. Complainant has not asserted that he was unable to access the decision in its electronic form.<sup>13</sup> Thus, Complainant has not shown that his failure to receive a paper copy of the D. & O. impeded his ability to file a timely appeal before us.

Complainant next asserts that his untimely filing should be excused because he did not know the applicable procedures or rules for filing a timely appeal. Complaint contends that the ALJ did not include specific instructions in the D. & O. that would have enabled him to timely file his Petition for Review. Additionally, Complainant argues that he repeatedly attempted to contact various representatives from the Department of Labor to inquire about the appellate procedures, but to no avail.<sup>14</sup> We are not persuaded this constitutes an extraordinary circumstance for equitably tolling the filing deadline.

The Board has consistently found that it is "unwilling . . . to depart from the general principle that 'ignorance of legal rights does not toll a statute of

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<sup>12</sup> *Ramirez v. Norfolk S. Ry. Co.*, ARB No. 2017-0003, ALJ No. 2016-FRS-00022, slip op. at 3 (ARB Jan. 12, 2017) (citing *Zahara v. SLM Corp.*, ARB No. 2008-0020, ALJ No. 2006-SOX-00130, slip op. at 3 (ARB Mar. 7, 2008); *Lotspeich v. Starke Mem'l Hosp.*, ARB No. 2005-0072, ALJ No. 2005-SOX-00014, slip op. at 4 (ARB July 31, 2006)).

<sup>13</sup> The fact that Complainant may not have personally received the D. & O. until three days after it was issued also does not warrant tolling, even if service on his counsel had not been sufficient notice. *See Nevarez*, ARB No. 2018-0005, slip op. at 3 ("While the fact that the ALJ's Order was not delivered until the ninth day after it was issued may have been unusual, we do not find it so abnormal as to qualify as an 'extraordinary circumstance' that prevented [complainant] from timely filing his petition.").

<sup>14</sup> There is no indication that Complainant contacted, or attempted to contact, the ARB before the filing deadline. Complainant does allege he made a number of inquiries, albeit misdirected, to a number of offices which were apparently left unanswered. Taken as alleged, this is unfortunate, particularly at a time when most government offices have not been open to individuals to walk in and obtain services or advice due to COVID-19 pandemic restrictions. However, the documentation on this point is equivocal and in this case does not constitute extraordinary circumstances that would justify equitably tolling the deadline based on the current state of the case law.

limitations,” and Complainant has not offered sufficient grounds to depart from that principle in this case.<sup>15</sup> Although it may have been helpful to Complainant if the ALJ included a notice of appeal rights in the D. & O., all things being equal, it is well established that the ALJ was not required by either statute or regulation to do so.<sup>16</sup> Thus, the absence of such a notice does not provide grounds for equitable tolling of the filing deadline.<sup>17</sup>

Furthermore, Complainant’s counsel delivered a copy of the D. & O. in an email dated July 1, 2021, to Complainant that specifically informed Complainant that he had fourteen days from the date of the order to file a petition for review with the ARB. Although counsel did not specifically tell Complainant how to file an appeal in that email, the ARB provides guidance to individuals on its website that explains how a petition for review can be filed electronically or by mail.<sup>18</sup> The website also provides tutorials and other useful links that describe the filing process.<sup>19</sup>

Complainant next contends that he struggled to find new legal counsel to handle his appeal in the weeks after the ALJ issued the D. & O.<sup>20</sup> However, it is well recognized that a Complainant’s inability to find a new representative does not constitute an extraordinary circumstance that would support an equitable tolling of the filing deadline.<sup>21</sup>

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<sup>15</sup> *Hemingway v. Ne. Utils.*, ARB No. 2000-0074, ALJ Nos. 1999-ERA-00014, -00015, slip op. at 4-5 (ARB Aug. 31, 2000) (quoting *Larson v. Am. Wheel & Brake, Inc.*, 610 F.2d 506, 510 (8th Cir. 1979)); accord *Minkina v. Affiliated Physician’s Grp.*, ARB No. 2005-0074, ALJ No. 2005-SOX-00019, slip op. at 5 (ARB July 29, 2005); *Santamaria v. U.S. Envt’l Prot. Agency*, ARB No. 2015-0023, ALJ No. 2004-ERA-00025, slip op. at 5 (ARB Mar. 31, 2005).

<sup>16</sup> *Swinney v. Fluor Corp.*, ARB No. 2015-0044, ALJ No. 2014-SOX-00041, slip op. at 3 (ARB June 11, 2015) (“The fact that the ALJ did not include a notice of appeal rights **is regrettable** . . . ALJs are not required by statute or regulation to do so.” (emphasis added)).

<sup>17</sup> *Jaludi*, ARB No. 2021-0053, slip op. at 3 (citing *Swinney*, ARB No. 2015-0044, slip op. at 3).

<sup>18</sup> NOTICE REGARDING CHANGE TO ELECTRONIC FILING SYSTEM, [https://www.dol.gov/sites/dolgov/files/arb/ARB\\_Electronic\\_Filing\\_System\\_Notice.pdf](https://www.dol.gov/sites/dolgov/files/arb/ARB_Electronic_Filing_System_Notice.pdf); ARB ELECTRONIC FILING SYSTEM RESOURCES, [https://www.dol.gov/agencies/arb/arb\\_efile](https://www.dol.gov/agencies/arb/arb_efile).

<sup>19</sup> *Id.*

<sup>20</sup> According to the July 1, 2021 email from Complainant’s counsel, Complainant and his counsel did not have an agreement to represent him in an appeal.

<sup>21</sup> *Jaludi*, ARB No. 2021-0053, slip op. at 3; *Minkina*, ARB No. 2005-0074, slip op. at 5.

Finally, Complainant asserts that he was not able to file an appeal by the deadline because he had not received a copy of the hearing transcript before the ALJ. However, the lack of a hearing transcript is not an extraordinary circumstance that warrants equitably tolling an appeal deadline. To the extent Complainant believed that the transcript was essential to his ability to file a petition, his potential recourse was to timely request an extension of the filing deadline, but he failed to do so.<sup>22</sup>

### CONCLUSION<sup>23</sup>

For these reasons, we conclude that Complainant has not demonstrated sufficient grounds to warrant tolling the appeal deadline or to accept his untimely appeal. Accordingly, we **DENY** Complainant's Petition for Review and **DISMISS** his appeal.

**SO ORDERED.**

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<sup>22</sup> It appears that Complainant attempted to email a document entitled "Intent Notice to File Appeal" and "Request for Extension of Time 70.25" to the ARB, the Department of Labor's Clerk of the Appellate Boards, and several individuals unrelated to the ARB on July 14, 2021. It also appears that Complainant attempted to fax the same document to the Department of Labor's Cincinnati, Ohio office on July 16, 2021. The document failed to set forth any grounds for Complainant's appeal or estimate how much additional time Complainant believed that he may need to file his appeal. The email addresses for the Board and the Clerk of the Appellate Boards contain typographical mistakes, so the document was not delivered to the ARB. Moreover, Complainant did not attempt to submit this document until after the filing deadline.

<sup>23</sup> In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board (ARB)).