

**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



**IN THE MATTER OF:**

**KENNETH MCDOWELL,**

**ARB CASE NO. 2022-0046**

**COMPLAINANT,**

**ALJ CASE NO. 2020-STA-00054**

**v.**

**DATE: March 27, 2023**

**EAGLE INTERMODAL, INC.,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Kenneth McDowell; *pro se*; Matteson, Illinois**

***For the Respondent:***

**Sean Fagan; *Director of Safety, M&J Eagle Intermodal Logistics;*  
Chicago, Illinois**

**BEFORE PUST and BURRELL, Administrative Appeals Judges**

**DECISION AND ORDER DISMISSING PETITION FOR REVIEW**

PUST, Administrative Appeals Judge:

This case arises under the Surface Transportation Assistance Act of 1982 (“STAA”), as amended.<sup>1</sup> Kenneth McDowell (Complainant) filed a whistleblower complaint against Eagle Intermodal, Inc. (Respondent) for alleged retaliation. On May 26, 2022, a United States Department of Labor Administrative Law Judge

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<sup>1</sup> 49 U.S.C. § 31105(a); *see also* 29 C.F.R. Part 1978 (2022) (the STAA’s implementing regulations).

(ALJ) issued a Decision and Order (D. & O.) dismissing the complaint based on her finding that Complainant did not engage in protected activity.<sup>2</sup>

On June 7, 2022, Complainant appealed the ALJ's decision to the Administrative Review Board (Board or ARB).<sup>3</sup> On June 16, 2022, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule (Briefing Order). The Briefing Order required Complainant to file an opening brief by July 13, 2022. The order specified that if Complainant wanted to accept service from the Board via e-mail, he had to "send the Board an e-mail clearly granting the Board consent to service via e-mail to ARB-Correspondence@dol.gov."<sup>4</sup> On July 18, 2022, Complainant sent to the Board, at ARB-Correspondence@dol.gov, an e-mail from a yahoo.com account stating "I, Kenneth McDowell consent [to] service via e-mail." Thereafter, the Board issued its orders to Complainant to his yahoo.com e-mail account.

Complainant did not submit an opening brief as ordered. Consequently, on September 14, 2022, the Board issued an Order to Show Cause ordering Complainant to explain why the Board should not dismiss his appeal for failing to timely file his opening brief.<sup>5</sup> The Board cautioned Complainant that if the Board did not receive his response and opening brief on or before September 28, 2022, the Board may dismiss the appeal without further notice.<sup>6</sup>

Complainant did not file a response to the Order to Show Cause or an opening brief as ordered. As a result, on October 20, 2022, the Board issued a Decision and Order Dismissing the Petition for Review as Complainant failed to respond to, and comply with, the Board's orders.<sup>7</sup>

On October 20, 2022, Complainant sent an e-mail request for reconsideration from his yahoo.com e-mail address, asserting that the Board should reconsider its decision because he did not receive the Board's orders either by postal mail or e-

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<sup>2</sup> D. & O. at 28.

<sup>3</sup> Complainant's Petition for Review.

<sup>4</sup> Briefing Order at 2.

<sup>5</sup> Order to Show Cause at 1.

<sup>6</sup> *Id.* at 1-2.

<sup>7</sup> *McDowell v. Eagle Intermodal, Inc.*, ARB No. 2022-0046, ALJ No. 2020-STA-00054 (ARB Oct. 20, 2022).

mail.<sup>8</sup> He requested that the Board reconsider its decision dismissing his complaint as he did not receive any correspondence regarding his appeal until he received the October 20, 2022 dismissal order.<sup>9</sup>

On February 14, 2023, the Board issued an Order Granting Reconsideration, Vacating Decision and Order Dismissing Petition for Review, and Establishing Amended Briefing Schedule.<sup>10</sup> The Board found that the unique circumstances in this case justified granting reconsideration and proceeding with the appeal.<sup>11</sup> To ensure compliance with future deadlines and orders, the Board directed Complainant to familiarize himself with the ARB's Rules of Practice and Procedure, 29 C.F.R. Part 26, available at <https://www.dol.gov/agencies/arb/resources/rules> and urged him to register for electronic filing and service through the ARB's Electronic Filing System (EFS) available at [https://www.dol.gov/agencies/arb/arb\\_efile](https://www.dol.gov/agencies/arb/arb_efile).<sup>12</sup>

The Board reestablished the Briefing Schedule and ordered Complainant to file an opening brief by March 14, 2023.<sup>13</sup> Nevertheless, Complainant did not file an opening brief as ordered.

The Board has the inherent power to dismiss a case for failure to prosecute in an effort to control its docket and to promote the efficient disposition of its cases.<sup>14</sup> Pursuant to this authority, the Board may dismiss a complaint in a case in which the complainant failed to comply with the Board's orders and briefing requirements.<sup>15</sup>

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<sup>8</sup> Complainant's Petition for Reconsideration.

<sup>9</sup> *Id.*

<sup>10</sup> Order Granting Reconsideration, Vacating Decision and Order Dismissing Petition for Review, and Establishing Amended Briefing Schedule at 1 (ARB Feb. 14, 2023).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Lewman v. Ken Brick Masonry Supply*, ARB No. 2007-0015, ALJ No. 2006-STA-00018, slip op. at 3 (ARB Oct. 31, 2007) (citing *Link v. Wabash R. R. Co.*, 370 U.S. 626, 630-31 (1962)).

<sup>15</sup> *Jessen v. BNSF Ry. Co.*, ARB No. 2012-0107, ALJ No. 2010-FRS-00022, slip op. at 2 (ARB July 26, 2013) (citations omitted) (dismissing the appeal where Complainant failed to comply with the Board's briefing order).

Complainant failed to file an opening brief as ordered by the Board. The Board previously cautioned Complainant that failure to comply with the Board's briefing order could result in dismissal of his appeal. Given Complainant's failure to respond to, and comply with, the Board's orders, we **DISMISS** Complainant's appeal.<sup>16</sup>

**SO ORDERED.**



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**TAMMY L. PUST**  
**Administrative Appeals Judge**



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**THOMAS H. BURRELL**  
**Administrative Appeals Judge**

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<sup>16</sup> In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.