U.S. Department of Labor

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

In the Matter of:

SOMA PRIDDLE,

COMPLAINANT,

v.

UNITED AIRLINES, INC.,

RESPONDENT.

ARB CASE NO. 2022-0006

ALJ CASE NO. 2020-AIR-00013

DATE: March 21, 2022

Appearances:

For the Complainant:
Soma G. Priddle, Esq.; *pro se*; Norwalk, Wisconsin

For the Respondent:
Ada W. Dolph, Esq. and Matthew A. Sloan, Esq.; *Seyfarth Shaw LLP*; Chicago, Illinois

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

ORDER DENYING INTERLOCUTORY APPEAL

PER CURIAM. This case arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[1] On October 28, 2021, Respondent United Airlines, Inc. (United) filed a Petition for Review requesting the Administrative Review Board (ARB or the Board) vacate an Administrative Law

[1] 49 U.S.C. § 42121 (2020), as implemented by the regulations at 29 C.F.R. Part 1979 (2021).

Judge's (ALJ) order imposing sanctions on United for discovery violations. For the following reasons, we deny United's interlocutory appeal.[2]

BACKGROUND

Complainant Captain Soma Priddle (Captain Priddle) alleges that her employer, United, violated AIR 21 by taking adverse action against her in retaliation for raising complaints identifying critical safety and maintenance issues protected by the statute. The discovery dispute underlying this appeal concerns Captain Priddle's request for maintenance records associated with the aircraft that were the subject of her complaints. After more than a year of conferences and discussions between the parties, conferences with the ALJ, motions to compel, motions for sanctions, and a series of orders from the ALJ, the ALJ sanctioned United on October 18, 2021, for its discovery violations with respect to the production of the maintenance records.[3] In the ALJ's Order Granting in Part Complainant's Second Motion for Sanctions (the Sanctions Order), the ALJ ordered the following:

> [T]he Tribunal is willing to find objectively reasonable Complainant's reporting of the safety and/or maintenance issues contained in the FSAPs[4] she filed prior to her Boeing 777 type certification training in 2018. Therefore, for purposes of this litigation, the Tribunal finds that Complainant has established that the safety reports

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[2] This is United's second interlocutory appeal regarding discovery-related orders in this case. United previously appealed an order requiring it to produce certain safety complaints filed by its employees under the Federal Aviation Administration's Aviation Safety Action Program. We denied that appeal on January 26, 2022. *Priddle v. United Airlines, Inc.*, ARB No. 2021-0064, ALJ No. 2020-AIR-00013 (ARB Jan. 26, 2022) (Decision and Order Denying Interlocutory Appeal).

[3] The ALJ provided a thorough history of the case, the discovery dispute, and the parties' respective positions in his order. It is not necessary for our resolution of this appeal to recount the extensive procedural history or the parties' substantive arguments regarding United's discovery practices.

[4] The Federal Aviation Administration administers an initiative called the Aviation Safety Action Program (ASAP) that allows air carriers and their employees to report aviation-related hazards and safety concerns to management and to the FAA. The "Flight Safety Action Program," or FSAP, is United's internal program implementing the ASAP for its pilots and is the program through which Captain Priddle made many of her safety complaints in this case.

> alleged as protected activity in her pleading complaint were objectively reasonable.
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> Further, the Tribunal has lingering concerns about Complainant's access to documents that either were not provided timely or in some cases, not at all. Accordingly, the Tribunal will *bar Respondent from presenting any evidence as to the events contained in Complainant's FSAPs or IORs dated prior to* Complainant's type certification training for the Boeing 777, except as specifically identified in documented reports that have been provided to Complainant. In practice, this means Respondent will not be permitted to supplement, through the taking of testimonial evidence, the contents of such reports. Complainant, on the other hand, shall be permitted to provide testimonial or documentary evidence to support or rebut assertions contained within the FSAPs or IOR reports.[5]

In this appeal, United asks the Board to vacate the Sanctions Order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review appeals of ALJ decisions under AIR 21.[6] This includes the discretion to consider interlocutory appeals "in exceptional circumstances."[7]

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5 Order Granting in Part Complainant's Second Motion for Sanctions at 11 (emphasis original).

6 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

7 *Id.*

DISCUSSION

1. Collateral Order Appeal

As we expressed in our order denying United's first appeal in this case, the Board generally disfavors interlocutory appeals.[8] Although the Secretary of Labor has granted the Board the discretion to consider interlocutory appeals, such discretion may only be exercised in "exceptional circumstances." This is a demanding standard. The Board has repeatedly emphasized there is a strong policy against the piecemeal appeals that result from permitting interlocutory review.[9] Instead, the Board strives to "'combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when'" the ALJ issues a final decision.[10]

When determining whether to entertain an interlocutory appeal before the ALJ's entry of a final judgment, the Board first looks to the procedures provided in 28 U.S.C. § 1292(b).[11] That section permits a tribunal to certify an interlocutory order to an appellate body for immediate review when: (1) the order involves a controlling question of law; (2) there is a substantial ground for difference of opinion in resolving the issues presented by the order; and (3) an immediate appeal may materially advance the litigation's ultimate termination.[12] United has not stated whether the ALJ certified its appeal for interlocutory review under this provision. It appears from the record that United did not request, let alone receive, this certification.

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[8] *Priddle*, ARB No. 2021-0064, slip op. at 7 (citing *Turin v. AmTrust Fin. Servs., Inc.*, ARB No. 2017-0004, ALJ No. 2010-SOX-00018, slip op. at 4 (ARB Apr. 20, 2017)).

[9] *See Turin*, ARB No. 2017-0004, slip op. at 3-4.

[10] *Greene v. Env't Prot. Agency*, ARB No. 2002-0050, ALJ No. 2002-SWD-00001, slip op. at 4 (ARB Sept. 18, 2002) (Order Dismissing Interlocutory Appeal) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *see also Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 2007-0010, ALJ No. 2005-SOX-00015, slip op. at 4 (ARB Jan. 19, 2007) (Final Decision and Order Denying Interlocutory Appeal) (expressing that the Board adheres to the federal courts' finality requirement provided at 28 U.S.C. § 1291).

[11] *Kim v. SK Hynix Memory Sols.*, ARB No. 2020-0020, ALJ No. 2019-SOX-00012, slip op. at 3-4 (ARB Jan. 28, 2020) (Decision and Order Denying Petition for Interlocutory Appeal).

[12] 28 U.S.C. § 1292(b); *see also Kim*, ARB No. 2020-0020, slip op. at 4.

When an ALJ has not certified an order for interlocutory review pursuant to 28 U.S.C. § 1292(b), the Board has expressed that it may nevertheless consider the appeal if the order qualifies under the collateral order exception articulated by the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation*.[13] To fall within this narrow exception to the traditional finality rule, the appellant must establish that the order being appealed: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment.[14] Well-established and extensive case law dictates that the "conditions for collateral order appeal [are] stringent."[15] The Board has emphasized that "we must strictly construe the collateral appeal exception to avoid the serious 'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'"[16]

United has not demonstrated that the Sanctions Order would be "effectively unreviewable" upon appeal of a final judgment. To be "effectively unreviewable," "denial of immediate review [must] render impossible any review whatsoever . . . ."[17] As long as the rights at issue "can be adequately vindicated by other means, the

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[13] *Kim*, ARB No. 2020-0020, slip op. at 5 (citing *Cohen*, 337 U.S. at 546).

[14] *Johnson*, ARB No. 2007-0010, slip op. at 5 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

[15] *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

[16] *Johnson*, ARB No. 2007-0010, slip op. at 5 (quoting *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 960 n.2 (5th Cir. 1980)); *see also Digital Equip.*, 511 U.S. at 868 (stressing that the collateral order doctrine must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered . . . ."); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) ("This [finality] rule . . . serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial . . . . In addition, the rule is in accordance with the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration." (internal quotations and citations omitted)).

[17] *United States v. Ryan*, 402 U.S. 530, 533 (1971); *accord In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 418 F.3d 372, 377 (3d Cir. 2005) (stating that to be effectively unreviewable, the right sought to be vindicated must "be, for all practical and legal purposes, destroyed if it were not vindicated prior to final judgment." (internal quotations and citation omitted)).

chance that the litigation at hand might be speeded, or a particular injustice averted, does not provide a basis for" immediate appellate review of an interlocutory order.[18]

United argues that the Sanctions Order is improper, compromises the integrity of the proceedings, and will deprive United of its due process right to a fair hearing. United contends that the Sanctions Order must be reviewed now, before the case proceeds to a hearing, because its right to a fair hearing could not be vindicated by post-final judgment review. We disagree. If Captain Priddle ultimately prevails in her case against United before the ALJ, United may appeal the ALJ's decision, including the imposition of sanctions, to the Board upon entry of a final judgment. If the Board agrees with United at that time that the ALJ erred by imposing the sanctions against United, and that the error was not harmless, we can order necessary relief, including, potentially, remanding the case to the ALJ for further proceedings free of the sanctions.[19] In this way, the Board could offer United

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[18] *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (internal quotations and citation omitted); *see also Digital Equip.*, 511 U.S. at 871-72 ("A fully litigated case can no more be untried than the law's proverbial bell can be unrung, and almost every pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewriting history. Thus, erroneous [orders] may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . . But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one . . . ."); *see generally* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3911.4 (2d ed. Apr. 2021 update) ("The mere burden of submitting to trial proceedings that will be wasted if the appellant's position is correct does not support collateral order appeal. Nor is it enough to show that a wrong order may cause tactical disadvantages that cannot be undone even by a second trial. The final judgment rule rests on a determination that ordinarily these costs be borne to support the greater benefits that generally flow [from] denying interlocutory appeal.").

[19] The Board and federal appellate courts have often declined to consider interlocutory appeals where parties argued, like United does here, that the lower tribunal's order, including an order imposing discovery sanctions, would prejudice them at trial or deprive them of their due process rights, because such harm could be remedied or vindicated after entry of a final judgment. *See, e.g., Mohawk*, 558 U.S. at 109 (order requiring the disclosure of privileged materials; "[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings; by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence"); *Firestone Tire & Rubber*, 449 U.S. at 377-78 (order refusing to disqualify counsel; "should the Court of Appeals conclude after the trial has ended that permitting continuing representation was prejudicial error, it would retain its usual authority to vacate the judgment appealed from and order a new trial"); *United States v. Perea*, 977 F.3d 1297, 1302 (10th Cir. 2020) (order finding defendant competent to stand trial; "[w]hile Defendant's 'right not to be tried or convicted while

the opportunity for meaningful review and could vindicate and restore United's rights, to the extent the Sanctions Order violated them, after final judgment.[20]

United also argues that denying review now would "manifestly harm" United due to the "exorbitant labor and financial costs" it would incur from having to re-litigate the case if the Board later finds that United was deprived of its due process

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incompetent . . . deprives him of his due process right to a fair trial,' this right can be vindicated by post-conviction appellate review." (citations omitted)); *United States v. Henderson*, 915 F.3d 1127, 1131 (7th Cir. 2019) (order requiring criminal defendant to be shackled during proceedings; "due-process shackling claims may be effectively reviewed on appeal from a final judgment."); *Linde v. Arab Bank, PLC*, 706 F.3d 92, 106 (2d Cir. 2013) (order giving adverse inference jury instruction and precluding certain evidence for discovery violations; "a jury verdict entered upon an erroneous instruction of material importance and to which a timely objection is made may be reversed if we conclude that the erroneous instruction prejudiced the party challenging the jury's verdict"); *D & H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443, 1445-46 (1st Cir. 1984) (order granting default judgment in part for discovery violations; the order is "not enforceable by the prevailing party until the entire case is terminated and the usual protections of appeal and potential for a new trial are available."); *Turin*, ARB No. 2017-0004, slip op. at 7 (order dismissing some respondents; "[t]he parties may be inconvenienced by having to return for additional hearing proceedings should the Board ultimately overturn the ALJ's finding that [certain respondents] are not employers, but no rights will be lost."); *Saporito v. GE Med. Sys. Adecco Tech.*, ARB No. 2004-0007, ALJ No. 2003-CAA-00001, -00002, slip op. at 5 (ARB Nov. 25, 2003) (order denying motion to allow additional rebuttal to hearing testimony; "[i]f we agree with Saporito [on review of a final judgment] that the ALJ erred and that the error was not harmless, we will remand the case to the ALJ for further proceedings consistent with our order."); *see generally* WRIGHT, *supra* note 18, § 3914.23 ("Sanctions imposed for violation of discovery orders might seem plausible candidates for appeal on the theory that the sanction is severable from the continuing proceedings. The opportunities for appeal, however, have generally been limited to sanctions that conclude the proceedings or that involve nonparties.").

[20] United cites the Board's decision in *Willbanks v. Atlas Air Worldwide Holdings, Inc.*, ARB No. 2014-0050, ALJ No. 2014-AIR-00010 (ARB Mar. 18, 2015), as an example of the Board granting collateral order review. In that case, the Board considered an interlocutory appeal of an ALJ's order staying the administrative proceedings and directing the parties to arbitrate an AIR 21 claim pursuant to an arbitration agreement between the complainant and the respondent. In an earlier order, the Board accepted the case for interlocutory review because, in relevant part, "there exist[ed] the realistic prospect that referral to arbitration could foreclose any meaningful subsequent review by the Department of Labor or the course of her rights under AIR 21." *Willbanks v. Atlas Air Worldwide Holdings, Inc.*, ARB No. 2014-0050, ALJ No. 2014-AIR-00010, slip op. at 3-4 (ARB July 17, 2014). In contrast, for the reasons explained herein, meaningful review is available to United.

rights or that the ALJ otherwise committed reversible error.[21] However, the possibility that United may incur additional costs does not render the issue "effectively unreviewable" upon review of a final judgment or create sufficient grounds to eschew the strong policy and sound practical considerations behind the finality rule.[22]

Accordingly, we decline to consider United's interlocutory appeal under the collateral order exception.[23]

2. Writ of Mandamus

As an alternative to its request that the Board consider its appeal under the collateral order exception, United requests the Board issue a writ of mandamus vacating the ALJ's order. As we explained in response to United's first interlocutory appeal, the Board may only act to the extent it is has been delegated authority by

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[21] Respondent's Reply Brief at 9.

[22] *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985) ("If the expense of litigation were a sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule. The [collateral order exception] test looks not to the litigation expense imposed by a possibly erroneous ruling, but rather to whether the right affected by the ruling can and should be protected by appeal prior to judgment." (internal quotation and citation omitted)); *see also Linde*, 706 F.3d at 106 ("[T]he [defendant's] interest in avoiding this [reputational] harm and the resulting financial consequences of an adverse jury verdict are easily outweighed by the judiciary's interest in preserving the district court's role in managing litigation."); *New Jersey, Dep't of Treasury, Div. of Inv. v. Fuld*, 604 F.3d 816, 823 (3d Cir. 2010) ("Congress considered the expense of litigation when it fashioned the final judgment rule . . . and we cannot second-guess its policy choice by using those same litigation expenses to justify departure from the rule.").

[23] With respect to the ALJ's sanction relating to United's ability to supplement the record with testimony, United argues that the ALJ's sanction would potentially prohibit it from even cross-examining witnesses with regard to the events underlying Captain Priddle's safety complaints. Respondent's Opening Brief at 25. However, the exact scope of the ALJ's sanction is not clear as phrased and on the current record. For example, it is not clear whether the ALJ intended to prohibit cross-examination, and if, so, whether he intended to prohibit cross-examination regarding all of Captain Priddle's safety complaints or only those for which United failed to produce (or timely produce) complete maintenance records. More broadly, it is also not clear at this stage how the sanction will be applied in practice at the hearing or how the sanction will impact the proceedings and United's due process rights. Essentially, United asks us to speculate as to the impact the sanction may have at the hearing. Not only is review possible after final judgment, but, pragmatically, a post-final judgment review would also likely be more effective because we can avoid conjecture and, instead, assess what impact the sanction actually had on the proceedings.

the Secretary of Labor. Although the Secretary has given the Board the authority to review final ALJ decisions and, in "exceptional circumstances," interlocutory appeals, the Board has observed on multiple occasions that the Secretary has not expressly provided mandamus authority to the Board.[24] Accordingly, it has been the Board's practice not to issue writs of mandamus.[25] As with United's earlier appeal, we find no reason to deviate from that practice in the circumstances of this appeal.

CONCLUSION

For the foregoing reasons, we **DENY** United's Petition for Review.

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[24] *Office of Fed. Cont. Compliance Programs, U.S. Dep't of Labor v. JPMorgan Chase & Co.*, ARB No. 2017-0063, ALJ No. 2017-OFC-00007, slip op. at 2-3 (ARB Oct. 5, 2017) (Order Denying Petition for Interlocutory Review); *Lewis v. Metro. Transp. Auth.*, ARB No. 2011-0070, ALJ No. 2010-NTS-00003, slip op. at 2 (ARB Aug. 8, 2011) (Order Denying Motion for Writ of Mandamus); *Somerson v. Eagle Express Lines Inc.*, ARB No. 2004-0046, ALJ No. 2004-STA-00012, slip op. at 2 (ARB May 28, 2004) (Order Dismissing Petition for Review). As it did in its earlier interlocutory appeal, United cites the All Writs Act, 28 U.S.C. § 1651, for the Board's authority to issue a writ of mandamus. As we explained in our first opinion, that statute does not apply or give authority to the Board. *Priddle*, ARB No. 2021-0064, slip op. at 13 n.38.

[25] *Priddle*, ARB No. 2021-0064, slip op. at 13; *see also JPMorgan Chase*, ARB No. 2017-0063, slip op. at 2-3, 7-8; *Lewis*, ARB No. 2011-0070, slip op. at 2-3; *Somerson*, ARB No. 2004-0046, slip op. at 2-3.