



**In the Matter of:**

**COLEEN L. POWERS,**

**ARB CASE NO. 04-102**

**COMPLAINANT,**

**ALJ CASE NO. 2004-AIR-6**

**v.**

**DATE: December 30, 2004  
(Reissued on January 5, 2005)**

**PINNACLE AIRLINES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

*Appearances:*

*For the Complainant:*

*Coleen L. Powers, pro se, Memphis, Tennessee*

*For the Respondent*

*Douglas W. Hall, Piper Rudnick, LLP, Reston, Virginia*

**FINAL DECISION AND ORDER**

This case arose when the Complainant, Coleen Powers, filed a complaint under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 1997), and its implementing regulations at 29 C.F.R. Part 1979 (2004), alleging that the Respondent, Pinnacle Airlines, discriminated against her in violation of that provision. On April 29, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Denying Complainant's Complaint (D. & O.) The ALJ based her D. & O. on Powers's failure to cooperate in discovery and her failure to comply with the ALJ's Orders directing her to do so. D. & O. at 6.

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under AIR 21.<sup>1</sup> The issue before the Board is

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<sup>1</sup> Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110 (a).

whether the Board should refuse to accept Powers's opening brief and dismiss her appeal because, even after the Board gave Powers explicit instructions concerning the Board's page limitation requirements, gave her ample opportunities to file a brief conforming to these limitations and unambiguously warned her that if she failed to file a conforming brief her appeal would be subject to dismissal without additional order, she nevertheless filed a brief that, including incorporated documents, exceeds the Board's page limitations. Given Powers's adamant refusal to comply with the Board's briefing requirements, we refuse to accept her non-conforming brief and accordingly, we dismiss her appeal.

### **BACKGROUND**

The Board issued a Notice of Appeal and Order Establishing Briefing Order in this case on June 14, 2004. The order permitted Powers to file an initial brief not to exceed thirty double-spaced pages on or before July 13, 2004. The thirty-page limitation is standard for initial briefs. Because Powers had previously refused to comply with the Board's thirty-page limitation,<sup>2</sup> the order advised Powers, "The initial brief should provide original legal argument in support of the Complainant's claims without relying on incorporation of analysis from the Complainant's previous filings."

Powers did not file a brief on July 13. Instead she filed a request for a thirty-day enlargement of time to file her brief. She also requested the Board to clarify that part of its June 14, 2004 Notice of Appeal and Order Establishing Briefing Schedule addressing incorporation of previously filed documents. The Board granted the request for an enlargement of time and informed Powers that

if the Complainant chooses to rely on previously filed documents, . . . she may do so, as long as the incorporated documents do not exceed the page limitations indicated in the Board's June 14th Order.

On July 25, 2004, Powers filed a second motion for enlargement of time to file her brief in support of her petition for review. In this motion, Powers urged the Board to reconsider its July 13, 2004 Order Granting Extension of Time and Amending Briefing Schedule to the extent that it provided that the total page limitation of her opening brief including incorporated documents could not exceed 30 pages. In an Order issued September 9, 2004, the Board denied Powers's motion to reconsider its determination that her brief, including incorporated documents, could not exceed thirty pages.

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<sup>2</sup> *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004)(Board dismissed Powers's appeal for failure to file a conforming brief)(appeal to the United States Court of Appeals for the Sixth Circuit pending).

The Board further advised Powers,

According to our July 13 Order Granting Extension of Time, Powers' brief was due on August 14, 2004. Although Powers has requested a further enlargement of time, the Board has not granted the enlargement and Powers has not submitted a brief in compliance with the Board's amended briefing schedule. Powers is advised that the mere filing of a request for enlargement does not toll the due date for filing a brief with the Board and that the appeal of a party who does not file a brief in compliance with the Board's briefing schedule is subject to dismissal for failure to prosecute. *See Gass v. Lockheed Martin Energy Sys.*, ARB No. 03-093, ALJ No. 00-CAA-22 (ARB Jan. 29, 2004).

Nevertheless recognizing that dismissing an appeal because the petitioner has failed to file an opening brief is a very severe penalty, the Board gave Powers one final chance to file a conforming brief not to exceed thirty double-spaced typed pages on or before October 25, 2004, and cautioned Powers:

**The Board will grant no further enlargements of time to file the Complainant's opening brief. If the Complainant fails to file an opening brief as ordered, her appeal will be subject to dismissal without further order.**

Emphasis in original.

On September 23, 2004, the Board received Complainant's Motion for Judicial Notice of Plain and Harmful Errors in The Board's July 24, 2004 and July 30, 2004 Orders in ARB 04-066; Motion to Stay ARB 04-102; & Motion to Strike named Person's July 30, 2004 Filing Titled "Respondents' Opposition to Complainant's July 25, 2004 Motion for Extension of Briefing Schedule." Because the Board found no legal support for the motions, we denied them in their entirety.

Powers requested the Board to strike Respondent's Opposition to Complainant's July 25, 2004 Motion for Extension of Briefing Schedule in this case because she believed the "opposition serves solely to improperly influence the Board through its' [sic] misconduct." We carefully reviewed the Opposition and found no basis for Powers's objection to it. We noted that to the extent that she disagreed with any of Pinnacle's assertions relevant to the appeal before us, she could so argue in her brief. We concluded that Powers's suggestion that Pinnacle's opposition could "improperly influence" the Board was somewhat surprising given the fact that in the face of Pinnacle's opposition, the Board nevertheless granted Powers one final enlargement of time to file a conforming brief.

Finally, we denied Powers's request for an additional thirty-day enlargement of time to file a brief in this case and repeated our warning that we would grant no further extensions of time and that Powers's brief must conform to the thirty-page limit or her appeal would be subject to dismissal without further order.

Powers submitted her opening brief on October 24, 2004. The length of the document is thirty pages, but in violation of the Board's explicit order to the contrary, Powers both specifically incorporated other filings by reference<sup>3</sup> and "referred" the Board to argumentation in previously filed documents.<sup>4</sup> Thus, her brief exceeded the prescribed thirty-page limitation. On November 17, 2004, the Board issued an Order suspending the briefing schedule to permit the Board to consider what steps to take in light of Powers's failure to file a brief in compliance with the Board's briefing order.

### DISCUSSION

Proceedings before the Administrative Review Board are appellate in nature. The Board renders its decision based upon review of the decision of the Administrative Law Judge, the record compiled before the Administrative Law Judge and the briefs of the parties filed with the Board. As we previously stated in our September 9, 2004 Order in this case, in considering whether to permit expansion of the page limitations by incorporation of argumentation from previously filed documents, we are guided by the Federal Rules of Appellate Procedure. Upon consideration of this issue, several federal courts of appeals have held that the Federal Rules of Appellate Procedure do not permit incorporation in briefs of documents and pleadings filed in district courts.<sup>5</sup>

The Board, of course, recognizes that dismissal of an appeal for failure to file a conforming brief is a very serious sanction and one not to be taken lightly. But the Board's several attempts to explicitly explain the Board's policy to Powers and to give her opportunities to file a conforming brief have been futile.

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<sup>3</sup> See Complainant's opening brief at 24 ("The details will not be repeated here, to save time, they are wholly detailed in Ms. Powers subsequent April 10, 2004 Motion to Amend and Alter the March 31, 2004 ALJ Order; {inc. by ref.}"). There are other instances of incorporation by reference, but because the documents so "incorporated" are not previous filings by Powers, but instead are an ALJ order, an ARB order, and a Supplementation Request filed by Pinnacle, we do not consider these designations as an attempt to expand the page limitations by incorporating previously filed argumentation. See opening brief at 7, 16, 20.

<sup>4</sup> Opening brief at 9, 14, 25, 25, 26, 27.

<sup>5</sup> E.g., *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452 (6th Cir. 2003). *Accord Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 623-24 (10th Cir. 1998); *Toney v. Gammon*, 79 F.3d 693, 696 n.1 (8th Cir. 1996); *Gilday v. Callahan*, 59 F.3d 257, 273 n.23 (1st Cir. 1995); *Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 396 n.6 (4th Cir. 1994); *Yohey v. Collins*, 985 F.2d 222, 224-225 (5th Cir. 1993).

Powers's incorporation by reference of her April 10, 2004 Motion to Amend and Alter the March 31, 2004 ALJ Order is the most blatant violation of the Board's page-limitation requirement. We also note, however, that Powers's effort to disguise her intention to incorporate by reference by "respectfully" referring the Board to previous documents also violates the plain meaning, if not the exact terms of our direction to Powers. One particularly blatant attempt to subvert the requirement occurs at page 25 of Powers's brief where she had originally written, "Ms. Powers' [sic] incorporates and adopts by reference her *February 17, 2004 Extraordinary Appeal* and her erred Feb. 15, 2004 *Motion to the ALJ to Certify Questions of Law*" but where she subsequently drew a line through "incorporates and adopts by reference" and wrote above it "respectfully refers to [her *February 17, 2004 Extraordinary Appeal*]" Cosmetic changes in terminology are not sufficient to satisfy the Board's requirement that Powers produce an opening brief of not more than 30 pages including all incorporated arguments. We also note Powers's practice of respectfully referring the Board to Complainant's Exhibits (C.E.). See, e.g., opening brief at 26, 27. These exhibits are not evidentiary exhibits that the ALJ has entered into the record. Instead these "exhibits" so identified and numbered by Powers, herself, include motions and briefs that she has filed in this and other cases and which she cites not simply for the fact that she has filed them but for the Board's consideration of their contents in the context of her opening brief. Thus the citation of these "Complainant's Exhibits" is simply another attempt to circumvent the Board's page limitations.

As the Board recently held in *Powers v. Pinnacle Airlines, Inc.*, in dismissing Powers's appeal because she failed to file a conforming brief:

The Board's authority to effectively manage its affairs, including authority to require compliance with Board briefing orders, is necessary to "achieve orderly and expeditious disposition of cases." *Link v. Wabash*, 370 U.S. 626, 630–31 (1962). This Board has authority to issue sanctions, including dismissal, for a party's continued failure to comply with the Board's orders and briefing requirements. See *Blodgett v. T[D]EC*, ARB No. 03-043, ALJ No. 2003-CAA-7 (ARB March 19, 2003) (dismissing complaint for failure to comply with briefing order); cf. Fed. R. App. P. 31(c) (allowing dismissal as sanction for failure to file a conforming brief); Fed R. App. P. 41(b) (permitting courts to dismiss a complaint for failure to comply with court orders).

Considering that Powers is proceeding in this appeal without representation by counsel, this Board has afforded her expansive latitude in achieving compliance with procedural requirements. This latitude, however, is not without bounds. Powers's persistent and contumacious

refusal to comply with the Board's briefing order warrants sanctions in this case.<sup>6</sup>

In this previous case, prior to dismissing Powers's appeal, the Board considered the initial sanction of requiring the Respondent, Pinnacle Airlines, Inc., to reply only to those claims actually set forth in the April 13, 2004 thirty-page brief itself, without reference to the incorporated documents. After careful consideration, however, the Board concluded that any analysis present in this document was insufficient to justify further consideration of this appeal. To the extent that Powers regarded the Board's consideration of a lesser sanction in her previous case as license to ignore the Board's clear warning in this case that non-conformance would lead to dismissal, Powers seriously misjudged the Board's resolve, as clearly stated in its orders, that unless Powers filed a conforming brief, the Board would dismiss her appeal. Powers disregarded the Board's unequivocal caution at her peril. Accordingly, we refuse to accept her brief for filing and we **DISMISS** her appeal.<sup>7</sup>

**SO ORDERED.**

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

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

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<sup>6</sup> ARB No. 04-035, slip op. at 3.

<sup>7</sup> On October 29, 2004, Pinnacle filed a Motion to Strike Complainant's Opening Brief and to Dismiss her Appeal. On November 27, 2004, Powers filed Complainants' *Preliminary Concerns & Opposition* to the Board Order Dated November 17, 2004 [the Board's Order suspending the briefing schedule]; *Preliminary Opposition* to Exparte Motion Allegedly filed by Named Person, Pinnacle on October 29th, 2004; Motion for Leave of Court to File full Opposition, Response, and Objections Once Pinnacle Provides Complainant a Service copy of Said Motion. In this document, Powers alleges that Pinnacle failed to serve her with a copy of its Motion to Strike. Pinnacle responded to Powers's Preliminary Concerns and Opposition on November 30, 2004, stating that it had served Powers both by first class mail and e-mail. Powers next filed Complainant's/Crewmembers' *Supplemental Memorandum in Opposition* to the Exparte Motion Allegedly Filed by the Named Person, Pinnacle on October 29th, 2004 and their November 30, 2004 Response, in which Powers moved the Board to dismiss Pinnacle's Motion to Strike and to sanction Pinnacle and its counsel. Because the Board clearly warned Powers that if she failed to file a conforming brief, her appeal would be subject to dismissal without further order, it is immaterial whether and when she received Pinnacle's motion. Under the Board's clear orders, dismissal was not dependent on a motion from Pinnacle and Powers had no right to further filing after she failed to file a conforming brief. Nevertheless, the Board did review and consider Powers's filings, but found no reason to depart from the dismissal sanction, in accordance with its prior orders.