COLEEN L. POWERS,

COMPLAINANT,

v.

PAPER, ALLIED-INDUSTRIAL CHEMICAL & ENERGY WORKERS INT'L UNION (PACE),

RESPONDENT.

ARB CASE NO. 04-111

ALJ CASE NO. 04-AIR-19

DATE: December 21, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Coleen L. Powers, *pro se*, Memphis, Tennessee

ORDER GRANTING RECONSIDERATION IN PART

On August 31, 2007, we issued a Final Decision and Order (F. D. & O.) remanding to the ALJ for further proceedings related to the complaint filed by Coleen Powers under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2006), the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 15l4A (West 2006), and six environmental acts.[1] On October 4, 2007, Powers filed a Motion to Amend the August 31, 2007 Order of Remand (Petition), and

[1] The Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9 (West 2003); the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); the Solid Waste Disposal Act (SWDA), also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. § 6971 (West 2003); and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 2005). We hereafter refer to these acts collectively as the Environmental Acts. Our listing of the statutes pursuant to which Powers has filed her claim should not be construed as a decision about whether Powers has in fact stated a claim under any of these statutes.

on November 3, 2007, Powers filed a further pleading styled "Supplemental Responses to ARB's August 31, 2007 'Order of Remand'" (Supplemental Petition). We treat these two pleadings as petitions for reconsideration of our August 31 decision. We did not decide many of the issues raised in the petitions, so we leave those for the ALJ on remand. With respect to those issues we did decide, the petitions are untimely with respect to all but one and so we deny reconsideration of those issues to which objection is untimely raised. With respect to the one remaining issue, we conclude that reconsideration is warranted and we hereby accept the petitions inasmuch as they relate to that one issue

I. Authority to Reconsider Decisions Issued Pursuant to AIR 21

We previously have concluded that we have authority to reconsider decisions made pursuant to the Sarbanes-Oxley Act (SOX or the Act) and the Environmental Acts.[2] We have not yet examined our authority to reconsider decisions made pursuant to AIR 2l.[3]

As we recently explained, "[t]he Administrative Review Board (ARB or Board) has inherent authority to reconsider its decisions, so long as that authority has not been limited by a statute or regulatory provision." *Henrich*, slip op. at 2. We further explained that "[t]he question of reconsideration authority can be answered only with specific reference to the statute(s) underlying the challenged decision." *Id.* Therefore, we must "consider whether anything in [AIR 21] or its implementing regulations explicitly limits reconsideration, and whether our reconsideration would 'interfere with, delay or otherwise adversely affect accomplishment of the Act's ... purposes and goals." *Id.*

Both AIR 21 and DOL's implementing regulations are silent regarding the Board's reconsideration authority in cases decided pursuant to AIR 21.[4]

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[2] *See Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51, slip op. at 2-4 (ARB May 30, 2007) (concluding that ARB has authority to reconsider decisions made pursuant to the SOX); *Leveille v. N.Y. Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4, slip op. at 4 (ARB May 16, 2000) (concluding that ARB has authority to reconsider decisions made under SDWA, the CWA, and the CERCLA); *Jones v. EG&G Def. Materials, Inc.*, ARB No, 97-129, ALJ No. 1995-CAA-3, slip op. at 2-3 (ARB Nov. 24, 1998) (concluding that ARB has authority to reconsider decisions made pursuant to the CAA, the TSCA, and the SWDA).

[3] Although the Board has twice ruled upon a petition seeking reconsideration in an AIR 21 case, the Board rejected both petitions and — perhaps for this reason — did not explicitly examine its authority to reconsider a decision issued pursuant to AIR 21. *See Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32, slip op. at 2 n.4 (ARB July 27, 2007) (noting the Board's authority to reconsider decisions issued under statutes, but not explicitly discussing the Board's authority to reconsider decisions issued pursuant to AIR 21); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-6, slip op. at 1 n.2 (ARB Feb. 17, 2005) (same).

[4] The implementing regulations do, however, explicitly refer to the possibility that a motion for reconsideration may be filed with the ALJ. *See* 29 C.F.R. § 1979.110(c) (conclusion

AIR 21 was passed in 2000 as a reauthorization bill for the Federal Aviation Administration (FAA). 68 Fed. Reg. 14,099, 14,100 (2003) (Procedures for the Handling of Discrimination Complaints Under Section 319 of the Wendell H. Ford Aviation Investment am Reform Act for the 21st Century; Final Rule). In addition to funding various modernization measures, AIR 21 included certain initiatives designed to increase airline safety. Among these latter measures was a provision designed to "provide[] protection to employees against retaliation by air carriers, their contractors and their subcontractors, because they provided information to the employer or the Federal Government relating to air carrier safety violations, or filed, testified, or assisted in a proceeding against the employer relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other law relating to the safety of air carriers, or because they [we]re about to take any of these actions." 68 Fed. Reg. 14,100.

Primary authority to administer AIR 21 is vested in the Secretary of Transportation. The Secretary has delegated to the Administrator of the FAA certain "duties and powers . . . related to aviation safety." *See* 49 U.S.C.A. § 106(g)(A) (listing statutory sections delegated to FAA Administrator). Those powers and duties do not include the whistleblower protection section, section 519, which instead is administered entirely by the Secretary of Labor *See id.* (omitting section 519 from list of sections delegated to FAA Administrator); 49 U.S.C.A. § 42121(b) (providing for Secretary of Labor to administer complaints brought under section 519).

In administering section 519 of AIR 21, the Secretary of Labor is not authorized to determine whether an employer has violated any other provision of AIR 21. Moreover, while the Secretary of Labor is required to "notify, in writing, . . . the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person" during the Secretary of Labor's investigation, the Secretary of Labor is not required to notify the FAA Administrator of the outcome of the complaint. 49 U.S.C.A. § 42121(b)(l). Thus, like the SOX employee protection provision, Section 519

> is solely an employee protection provision. It does not grant to DOL any authority to determine whether an employer has violated any other provision of the Act. It also does not provide for an employer to suffer any related consequences from having been found by DOL to have violated Section [42121]. For example, the DOL is not required to notify . . . any other governmental entity when it has determined that an employer has violated this section of the Act, and no other governmental entity is required to debar,

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of hearing is date of ALJ's decision unless "within 10 days . . . a motion for reconsideration has been filed"); *see also* 68 Fed. Reg. 14,099, 14,106 (Final Regulation, Mar. 21, 2003) (same); 67 Fed. Reg. 15,453, 13,436 (Interim Final Regulation, Apr. 1, 2002) (same, but using 15 day-deadline).

> disqualify or otherwise punish an employer who is found by DOL to have violated the Act.

Henrich, slip op. at 3. Thus, just as with the SOX, "the DOL's role under [AIR 21] does not overlap with the investigatory or administrative roles [of any other governmental entity]. For this reason, our reconsideration of any orders we issue pursuant to Section [42121] would not interfere with or adversely affect [AIR 21's] other enforcement mechanisms." *Henrich*, slip op. at 4. *Compare Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 98-164, ALJ No. l996-DBA-033, slip op. at 5-6 (ARB June 8. 2001) (expressing concern that allowing reconsideration might complicate DOL's duty to notify Comptroller General of companies found to have violated Davis-Bacon Act). Moreover, we conclude that "based upon our experience rendering whistleblower decisions, . . . reconsideration of [AIR 21] whistleblower decisions would not adversely affect DOL' s enforcement of Section [42121]." *Henrich*, slip op. at 4.

Therefore, we conclude that our reconsideration of AIR 21 decisions would not adversely affect accomplishment of the purposes and goals of AIR 21, and thus AIR 21 does not limit our inherent authority to reconsider decisions we make under Section 42121 of AIR 21.

II. Powers' Petitions

Powers raises multiple issues in her two petitions. Before addressing whether those issues meet the ARB's screening criteria for reconsideration, we first must determine whether these petitions are timely.

A. Timeliness

As we recently have explained, a petition for reconsideration by the Board must be filed within a "reasonable time."[5] In applying this requirement, "[t]he Board and its predecessors have presumed a petition timely when the petition was filed within a short time after the decision . . . [and] also have granted reconsideration where a petition, though filed after a longer period, raised Rule 60(b)-type grounds or showed "good cause" for the delay." *Henrich*, slip op. at 15.

Did Powers file her Petition within a short time after the decision?

Powers filed her first petition more than a month after the Board issued its decision, and her supplemental petition more than two months afterwards. Under our precedent, this does not constitute a "short" time. Our recent survey of reconsideration cases indicated that "the Board and its predecessors have characterized as 'short' only time periods of twelve days or less." *Henrich*, slip op. at 17.[6] We see no reason to extend our definition of "short" to encompass the

[5] *Henrich*, slip op. at 11. Because of the similarity between the employee protection provisions of AIR 21 and the SOX, *see, e.g.*, 68 Fed. Reg. 31,860, 31,860 (May 28, 2003) (Interim Final Rule), our conclusion in *Henrich* — that the SOX did not alter this default reasonable-time standard — also applies to AIR 21.

[6] Although in several instances in 1992 the Board of Service Contract Appeals (BSCA)

thirty-four days that Powers waited.[7]

Because Powers did not file within a short time, we next examine whether she showed good cause for her delay.

Did Powers show good cause for her delay?

Powers argues that her petitions were timely "[b]ecause there is no time frame set in the ARB Order and there are no promulgated procedures before the US DOL ARB." Petition at 2 n.1. But these two reasons do not demonstrate good cause for her delay.

Contrary to Powers' assertion, the Board is governed by procedural requirements. Secretary's Order 1-2002 states that the Board must "adhere to the rules of decision and precedent applicable under each of the laws" pursuant to which it makes decision, "until and unless the Board or other authority explicitly reverses such rules of decision or precedent."[8] There is ample precedent governing the Board's requirement that reconsideration must be sought within a short time. *See Henrich,* slip op. at 11-17.

Moreover, despite Powers' apparent belief otherwise, the Board had no obligation to inform her about its requirements governing reconsideration requests. Nonetheless, in a decision issued only a few months ago, the Board specifically drew Powers' attention to *Henrich* as a source of information about the Board's timeliness requirements. *See Powers v. Pinnacle Airlines, Inc.*, ARB 05-022, ALJ No. 2004-AIR-32, slip op. at 3 (ARB July 27, 2007). Insofar as Powers, a pro se litigant, failed to understand the Board's rules regarding timeliness, she must bear the consequences of her decision to proceed pro se. *See, e.g., Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28 slip op. at 10 (ARB Feb. 28, 2003) (noting that pro se litigant must bear "the risks of failure that attend [her] decision to forego expert assistance").

Thus, "[r]ather than explaining why [Powers] filed later than [s]he should have done, those two reasons merely indicate that [s]he believed [s]he would suffer no penalty if [s]he did not file within a short time. But [Powers'] own belief that a longer period was reasonable does

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permitted litigants 30 days to seek reconsideration, the BSCA did not describe that time period as short. *See Henrich,* slip op. at 11 n.24. Moreoever, in each of those instances the dismissal decision was issued sua sponte on the basis of mootness and the BSCA allowed not only parties but also "interested person[s]" to seek reconsideration. Thus it appears that the BSCA deliberately selected a longer time period in order to give non-parties ("interested person[s]") time to learn of the decision and object.

[7] We recognize that Powers asserts she did not receive our decision until September 7, 2007. Even if this is so, she still waited a full 27 days before submitting her petition. Thus, we have no need to decide here whether the "short" time period begins upon a decision's issuance or upon its receipt by a party, nor need we address whether the period includes only business days.

[8] 67 Fed. Reg. 64,272, 64,273 (Oct. 17, 2002).

not excuse [her] delay." *Henrich,* slip op. at 18.

Perhaps in an attempt to offer an additional reason for her delay, Powers also asserts that as of the date she filed her first petition, she "ha[d] not received anything from the ALJ in regard to the ARB's August 31, 2007 Order." Petition at 2 n.l. But the ALJ's schedule of communications does not determine whether the time period for reconsideration has passed.

Because Powers' proffered reasons do not justify her delay, we conclude that she has not shown good cause for that delay. Therefore, her petitions were untimely except insofar as either raised Rule 60(b)-type grounds,

Did Powers raise Rule 60(b)-type grounds for reconsideration?

Powers first argues that in applying Federal Rule of Civil Procedure 12(b)(6) during our discussion of whether Powers' complaint could conceivably state a claim, we wrongly "perform[ed] a 'review' that is based solely on Article III court civil rules of procedure with respect to whether a complaint 'states a claim.'" Petition at 15; *see also* Supplemental Petition at 5-10. This argument is a *rehearing*-type argument: it seeks "an alteration in the judgment, generally based upon factual, procedural, or legal error (including conflict with precedent or failure to recognize a change in the controlling law or regulation), or exceptional circumstances." *Henrich,* slip op. at 15. As we have explained, "few if any grounds for *rehearing* can justify *relief"* under Rule 60(b).[9] In particular, "a party cannot seek such relief based upon the contention that there was "an error of legal reasoning." *Henrich,* slip op. at 16. This argument is not a Rule 60(b)-type argument, and it is therefore untimely.

Powers next argues that we did not include "any mention or discussion whatsoever [of her] February 27, 2004 evidentiary exhibits . . . and this is unfavorably prejudicial and harmful

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[9] *Henrich,* slip op. at 16 n.31. As we stated in *Henrich,* "[T]he grounds justifying a Rule 60(b) petition for *relief from* a judgment are quite different from those justifying a petition seeking to *alter* that judgment [on rehearing]. The first and third Rule 60(b) grounds stem from errors or misconduct by *a party. See* FED. R. CIV. P. 60(b)(1) (permitting court to relieve party from judgment "for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect" by petitioner), 60(b)(3) (permitting relief for "(3) fraud ... misrepresentation, or other misconduct of an adverse party"). The second and fifth grounds allow relief from the judgment based upon incidents that occur *after* the entry of judgment. *See* FED. R. CIV. P. 60(b)(2) (permitting relief for "(2) newly discovered evidence"); 60(b)(5) (permitting relief when "(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application"). The fourth ground allows relief because the judgment never was valid in the first place. *See* FED. R. CIV. P. 60(b)(4) (permitting relief where "(4) the judgment is void"). Finally, Rule 60(b)'s catch-all ground permits relief when "there is a reason justifying relief," FED. R. CIV. P. 60(b)(6) — but few if any grounds for *rehearing* can justify *relief. See* 11 WRIGHT, MILLER & KANE, § 2863 (Rule 60(b) "does not allow relitigation of issues that have been resolved by the judgment.")." *Id.*

error." Petition at 16; *see also* Petition at 15 n. 10 (noting that the ARB's "omission . . . of the evidentiary exhibits anywhere in the August 31, 2007 order suggests the ARB does not have this evidence before it, which has again, [sic] contributed to unnecessary burden, unnecessary and additional error, undue delay, and violation of [her] right[] to due process"). This argument — which is, essentially, that we overlooked evidence that was before us — also is a rehearing-type argument rather than a Rule 60(b)-type argument. Therefore, it also is untimely.

Powers further argues that we "erroneously applied an incorrect standard of review" in addressing Powers' request for the "disqualification" and "reassignment" of the ALJ, Petition at 16, displayed "indifference with regard to the ALJ's willful neglect and refusal to rule on Powers' . . . motion" to the ALJ seeking the ALJ's recusal, Petition at 18 n.12 (emphases omitted), and ignored the ALJ's "repeated pre-judgments in advance of hearing both sides." Petition at 17; *see also* Supplemental Petition at 12 (explaining Powers' assertion that the ALJ demonstrated bias by "not disclos[ing] her May 7, 2004 receipt of PACE's faxed Motion to Dismiss" and by not affording Powers an opportunity to respond to that motion). Thus, in Powers' view, the ARB wrongly denied Powers' request for the "recusal" of the ALJ. Petition at 16-18. This argument combines an argument that we applied the wrong legal standard with an additional factual assertion not argued in Powers' original brief.[10] Because Powers made this factual assertion in her original pleadings, but simply did not cite it to support this particular argument — this factual assertion cannot even arguably constitute the "new evidence" needed for a Rule 60(b)(2)-type argument. Moreover, as we explained above, an argument that we applied the wrong legal standard is not a rehearing-type argument. Therefore, for the same reasons that we concluded that Powers' first two arguments were not Rule 60(b)-type arguments, we conclude that this third argument also is not a Rule 60(b)-type argument — and thus that it too is untimely.

Powers then "suggest[s] that the ARB re-open and examine all [the] ALJ[']s harmful reliance on inoperative OSHA findings and . . . admonish her accordingly." Petition at 18-19. Because our August 31, 2007 order already made clear that the ALJ erred in relying upon OSHA's "inoperative" order dismissing the named respondents from the case, it appears that this suggestion is intended as a request that we re-open and review the ALJ's other rulings "in all of her orders where . . . Powers is the Complainant." Petition at 18; *see also* Supplemental Petition at 11 n.7. Insofar as this invitation constitutes an argument, the argument is a rehearing-type argument: Powers is suggesting that the Board's prior decisions affirming the ALJ erred in overlooking the ALJ's errors. Therefore, this argument also is untimely.

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[10] Powers did not in her original brief and reply brief argue that the basis for her assertion of ALJ bias was the ALJ's purported failure to allow Powers to respond to PACE's motion to dismiss. *See* Brief at 23-26, Reply at 8-9. Although Powers did argue in her reply brief that "the material undisputed fact that the ALJ rendered her RDO without providing complainant an opportunity to respond to the untimely PACE Union May 7, 2004 Motion to Dismiss" constituted "reversible error," *see* Reply at 8-9, Powers did not argue that this "fact" also constituted evidence of ALJ bias — nor did Powers in either brief provide any evidence to rebut the presumption that because the ALJ in her May 7 order of dismissal did not mention having received PACE's May 7 motion, the ALJ had not in fact received that motion prior to issuing her decision.

Powers also "objects to the ARB's sole reliance and ex parte communication with adversary, named person PACE . . . because [she has] a due process right to proper and due notice to participate in any agency alleged "checking of the complete original record." Petition at 15 n.10 (emphases deleted). This argument appears to be an allegation of procedural error, and thus it appears to be a rehearing-type argument. If so, then it would be untimely. On the other hand, it is possible that this argument is based upon Rule 60(b)(6) (other grounds justifying relief). If so, then it appears to have been raised within a reasonable time. We need not determine whether this argument is a rehearing-type or a Rule 60(b)-type argument, however, because in any case the argument appears to be based upon a misunderstanding of the facts and thus does not meet the Board's threshold screening criteria for granting reconsideration.[11]

Finally, Powers argues that the ARB lacked subject matter jurisdiction to issue its Order because prior to the Order's issuance Powers had removed "all employment discrimination and retaliation claims" to federal district court. Petition at 2. As Powers explains, she filed on May 20, 2005 a Notice of Intent to file her SOX claim in federal court. Due to an apparent administrative oversight, no such Notice appears in the record of this case.[12] The various pleadings filed by Powers and other entities also did not discuss the potential impact of the Notice. Briefing had been completed on November 25, 2004, almost six months before the Notice was filed, and no supplemental pleadings were filed subsequent to the filing of the Notice. For these reasons, the Board was unaware of the Notice when it reached its original

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[11] Contrary to Powers' assertion, PACE did not participate in any "checking of the complete original record." Nor did PACE initiate any "ex parte" communications. Rather, as the August 31, 2007 Order of Remand explained, Board staff requested from PACE *duplicate* copies of certain pleadings so that the Board could consult those pleadings while the original record was unavailable and thus provide a quicker review of this case. PACE complied with the Board's request without providing any new documents or arguments. This purely administrative contact with the Board's staff did not give PACE any preferential opportunity to influence the Board's decision. Moreover, as the August 31 Order of Remand explained, before issuance of its decision the Board reviewed the complete original record — which by then had become available — and thus did not in any way "rel[y]" upon the duplicate documents provided by PACE. Although the Board regrets the administrative oversight that resulted in Powers not receiving a simultaneous copy of the Board's request for duplicate pleadings, that oversight alone does not provide any reason to alter the judgment or relieve Powers from it — particularly because the Board in its opinion disclosed the nature and extent of its staff's contact with PACE. Therefore, whether this argument is a rehearing-type argument or a Rule 60(b)-type argument, it does not meet the threshold screening criteria.

[12] Separate administrative records were created for this appeal and for the interlocutory appeal Powers had earlier filed, which at the time she filed her Notice had not yet been resolved; and the Notice also applied to *"all* former Crewmember Powers' pending cases before the US DOL ARB," *see* Supplemental Petition at 4 & n.3 (emphasis in original), and it is possible that the Notice was filed only in one of the other relevant records. Those other records are no longer available to the ARB.

decision. If the Board had discussed the impact of the Notice, or Powers had raised it in a supplemental pleading, then we might conclude that by raising it again Powers was making a rehearing-type argument asserting legal error by the Board; in which case we might conclude that the petition was filed too late to raise the argument again. Because the argument was neither raised nor discussed,[13] however, it is timely as a Rule 60(b)-type argument.

Rule 60(b)(4) allows relief from a judgment that was void when issued. If Powers is correct in arguing that the removal of her SOX claim caused the ARB to lack subject matter jurisdiction over any of her claims, then the decision might have been void when it was issued. Thus, Powers' subject matter jurisdiction argument is a Rule 60(b)-type argument.

As we have explained, a Rule 60(b)-type argument is timely if it is raised within a reasonable time. Without discussing the outer limits of a reasonable time in the event that subject matter jurisdiction is challenged, we have no hesitation in confirming that Powers has filed her petition well within a reasonable time. Therefore, this last argument is timely. In the next section we discuss whether this argument meets the threshold screening criteria for reconsideration.

Before turning to that discussion, for the avoidance of doubt we address two other issues that Powers raises in her petition. First, Powers "urge[s]" us "to carefully review [OSHA's] errors and to further act in whatever means necessary to promote OSHA compliance with its own Whistleblower Investigation Manual." Petition at 19; *see also* Supplemental Petition at 12. Because we have no authority to review or control OSHA's actions, we must ignore this request. Second, Powers argues that "OSHA was correct to include PACE" as a party, Petition at 13, and further argues that her claims against certain other defendants were not extinguished by the bankruptcy proceedings and that we erred in assuming that they were. *See* Petition at 5-13. Because the August 31, 2007 Order of Remand did not decide either of these issues,[14] we assume that these arguments are addressed to the ALJ (who was included as an addressee on Powers' petition). In case Powers intended us to address them, however, we note that because we explicitly left both of these issues to be decided by the ALJ on remand, neither issue constitutes Rule 60(b)-type grounds for reconsideration. Therefore, both are untimely.[15]

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[13] The argument is not waived, however, because subject matter jurisdiction may be challenged at any time.

[14] With regard to PACE, we first discussed the unclear circumstances of PACE's inclusion as a party. Order at 4-5. We then noted that "it is *possible* that PACE is not a proper party" and, without deciding whether PACE in fact was a proper party, we invited the ALJ on remand to determine, if appropriate (i.e., if the ALJ determined that PACE was not itself a party), whether PACE should be permitted to remain in the action for some other reason. Order at 8 (emphasis added). With regard to the possible extinguishment of Powers' claims by the operation of the bankruptcy laws, we first noted that several of the named parties had passed through bankruptcy, Order at 2, then noted that ordinarily this would operate to extinguish any claims, Order at 8, and then asked the ALJ to determine — by examining any relevant "evidence" that Powers might produce — whether Powers' particular claims had been extinguished, Order at 8.

[15] In her supplemental pleading Powers provides further argumentation related to her

B. Screening

As we recently explained, "before we will reconsider an argument, we must be convinced that there is reason to do so." *Henrich,* slip op. at 21. Thus, "the Board will reconsider its decisions only when a petitioner has demonstrated that he clears one or more of the standard screening hurdles used in the federal courts." *Henrich,* slip op. at 19.

As we explained in *Henrich,* "[t]he Board and its predecessors have summarized these screening hurdles in multiple ways." *Henrich,* slip op. at 19 (quoting various formulations employed in prior decisions). We noted that while "[s]everal recent decisions have employed a formulation first articulated in *Knox [v. U.S. Dep't. of the Interior,* ARB No. 03-040, ALJ No. 2001-CAA-03 (ARB Oct. 24, 2005),] [t]his formulation (which does not purport to list all reasons for reconsideration) does not include, in its list of circumstances justifying reconsideration, several circumstances specified as sufficient in past decisions." *Henrich,* slip op. at 19-20 (citations omitted). For example, we noted, the *Knox* formulation, unlike prior decisions, did not include "manifest errors of law or fact" as a reason justifying reconsideration. *Henrich,* slip op. at 19 n.37 (citing *Saporito v. Fla. Power & Light Co.*, 1989-ERA-7, 17, slip op. at 2 (Sec'y Feb. 16, 1995). It is clear, however, that the *Knox* formulation was not intended to nor did it overrule those prior decisions. *Knox* did not discuss or even cite any of those prior decisions, nor did *Knox* indicate in any way that it intended to create a new standard. Rather, *Knox* stated that the Board used the same "principles federal courts employ." *Knox* at 3. Therefore, we continue to draw from all applicable precedent in determining what arguments justify reconsideration.

Powers' argument that the Board lacked subject matter jurisdiction is an argument that the Board erred by implicitly assuming jurisdiction in issuing its order of remand. This alleged error clears the screening hurdle that the Secretary articulated in *Saporito:* "manifest errors of law or fact": if the Board did indeed lack subject matter jurisdiction over Powers' claims, then the issuance of its decision would have constituted a manifest error.[16] Because this argument clears the screening hurdle, it warrants reconsideration.

C. Reconsideration

As we have indicated, Powers argues that the Board lost jurisdiction over her entire

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position that the ALJ erred in issuing her order of dismissal (specifically, that the ALJ did not have authority to dismiss her complaint because the ALJ was required first to schedule a de novo hearing, and failed to do so), Supplemental Petition at 11-12, but we were not able to discern in this section any argument that the ARB had erred — let alone any argument based upon a Rule 60(b)-type claim. Therefore, we ignore this portion of the supplemental petition.

[16] This alleged error might also be characterized as a "failure to consider material facts presented to the [Board] before its decision." *Knox,* slip op. at 3. But an argument that the Board failed to consider such facts is a rehearing-type argument and thus — at this stage — untimely.

complaint when she removed the SOX portion of it to federal court, and further argues that the Board's order of remand was therefore void. Petition at 2.

The Board previously has recognized that once a complainant files a SOX complaint in federal district court, an "ALJ no longer has jurisdiction to enter any order in the case other than one dismissing it on the ground that" it has been removed. *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-65, slip op. at 5 (ARB Oct. 31, 2005).

But the Board also has held that upon removal of a complaint brought under both SOX and another statute, the Board "retain[s] jurisdiction" over those claims brought pursuant to the other statute. *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32, slip op. at 9 (ARB Jan. 31, 2006). Therefore the Board had jurisdiction to issue its order of remand at least with respect to the AIR 21 and environmental claims Powers asserted.

Regarding the SOX claim Powers asserted, we have determined that this claim should have been dismissed because Powers has flied a notice of removal to federal court, and the filing of such notice divests the ARB of jurisdiction over the claim.

Therefore, we revise our August 31, 2007 Order of Remand as follows:

We replace the second sentence of the second full paragraph on page 2 with the following passage:

> Because Powers has filed a notice of removal to federal court, we dismiss the SOX-based portion of her claim. *See* Notice of Intent, received May 24, 2005; *see also Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-65, slip op. at 5 (ARB Oct. 31, 2005) (filing of a Notice of Intent divests Board of jurisdiction and requires dismissal of claim). We retain jurisdiction of Powers' claims under the other seven acts under which Powers brings her complaint, see *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32, slip op. at 9 (ARB Jan. 31, 2006) (upon removal of a complaint brought under both SOX and another statute, the Board "retain[s] jurisdiction" over those claims brought pursuant to the other statute), and conclude that the ALJ may have erred in determining that the complaint does not state a claim under any of them.

In the first line of page 3, we replace the phrase "the SOX, AIR 21," with the phrase "AIR 21." In the third line of that page, we delete the phrase "18 U.S.C.A. § l514A (same, SOX);".

In the first full paragraph on page 7, we delete the phrase "SOX and" from the third line. We replace the first citation sentence with the following: "29 C.F.R. § 1979.108(a)(1) (AIR 21); *see* 29 C.F.R. § 1979.101 (AIR 21) (defining "named person" as "the person alleged to have violated the act)." We replace the second citation sentence with the following: *"See* 29 C.F.R. §

1979.109(a) (making Part 18 rules applicable to AIR 21 cases)."

In line 5 of page 13, we delete the phrase "the SOX and" and add to the beginning of the next sentence the phrase "Construed generously, as we must construe the complaint of a pro se litigant." We also move footnote 25 so that it appears at the end of this added phrase.

We delete the first full paragraph on page 13, the paragraph that continues from page 13 to page 14, and the first full paragraph on page 14.

In the first line of the second full paragraph on page 14, we replace the phrase "The ALJ also" with the phrase "For example, the ALJ".

In the first line of page 15, we replace the word "The" with the phrase "Moreover, the".

We also alter the following footnotes: In footnote 7, we delete the first reference. In line four of the second paragraph of footnote 16, we delete the phrase "and SOX," replace the word "provisions" with the word "provision," and replace the word "set" with the word "sets." In footnote 19, we delete the last reference. In footnote 24, we delete the first sentence. We delete footnotes 26, 27, and 29. Finally, from the first line of footnote 33 we delete the phrase ", SOX," and from the fourth line of that same footnote we delete the phrase ", 1980.110(a) (SOX)."

Finally, upon review of our opinion we noticed a phrase that could benefit from clarification. Therefore we replace the last phrase of the paragraph that ends at the top of page 13 with the phrase "when interpreted in light of ARB caselaw — most recently *Hirst* — reaffirming the continuing relevance of the "tangible consequences" standard." The reissued Order of Remand also corrects certain formatting inconsistencies in the previous Order.

The revised Order of Remand is attached.

SO ORDERED.

A. LOUISE OLIVER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge