



In the Matter of:

COLEEN L. POWERS,

ARB CASE NO. 06-078

COMPLAINANT,

**ALJ CASE NOS. 2006-AIR-004
2006-AIR-005**

v.

DATE: June 28, 2007

PINNACLE AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

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

For the Respondent:

Timothy S. Bland, Esq., *Ford & Harrison*, Memphis, Tennessee

FINAL DECISION AND ORDER

The Petitioner, Coleen L. Powers, has filed a complaint against the Respondent, Pinnacle Airlines, Inc.,¹ alleging that Pinnacle retaliated against her in violation of the

¹ In documents filed with the Department of Labor Administrative Law Judge (ALJ), whose decision is on appeal in this case, and with the Administrative Review Board, Powers listed “et al.” as additional unspecified complainants and NWA, INC; Pinnacle Airlines, Inc., d/b/a NWA Airlink as a contractor for NWA, INC.; Pinnacle Airlines Corporation; Pinnacle Airlines Corporation of Tennessee; NWA Airlink, Pinnacle Airlines, Inc., VP Marketing & Sales, Mr. Phil Reed; Mr. Phil Reed, An Individual; Mr. Phil Trenary, NWA Airlink Pinnacle President and CEO, Director of the Board, Pinnacle Airlines Corporation; Mr. Phil Trenary, An Individual; NWA Airlink Pinnacle Airlines, Inc., Memphis Director of In-Flight, Mr. Theodore Davies; Mr. Theodore Davies, An Individual; Pinnacle Airlines Inc., and Pinnacle Airlines Corporation, VP Human Resources and Board Member, Ms. Alice Pennington; Ms. Alice Pennington, an Individual; NWAC; NWA Incorporated; Mr. Doug

whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).² On March 3, 2006, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order Denying Complainant's Claims (R. D. & O.). The ALJ found that dismissal of Powers's complaint was appropriate pursuant to 29 C.F.R. § 18.6(2)(v) (2006) because she refused to cooperate in discovery and failed to comply with the ALJ's Orders directing her to do so.³ The ALJ denied Powers's Motion for Reconsideration.⁴

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under AIR 21.⁵ The issue before the Board is 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 format and page limitation requirements, gave her ample opportunities to file a brief conforming to these requirements and 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 is not double-spaced and 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.

Hall, an Individual; DLA Piper Rudnick, Gray Cary US LLP; PACE International Union; Ms. Teresa Brents, PACE Local 5-0772 President; Ms. Teresa Brents, An Individual; PACE International Union, Region VII International Rep., Mr. James N. Hendricks; Mr. James N. Hendricks, An Individual; Pollution Control Industries {"PCI"} of Tennessee, LLC; PCI, INC; Mr. John M. Newell, President, PCI, INC. and PCI of Tenn.; Weinburg Richmond LLP; Mr. Lawrence Karlin, An Individual; The Winchester Law Firm; Mr. Mark Grai, An Individual; Mesaba Airlines; MAIR Holdings Inc., et al as respondents. In an Order dated August 31, 2005, the ALJ found that the only proper complainant in this case is Powers and the only proper respondent is Pinnacle Airlines, Inc., her employer. Given our disposition of this case, it is not necessary for us to review the ALJ's Status Order.

² 49 U.S.C.A. § 42121 (West 2005 Supp.). AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. 29 C.F.R. § 1979.101 (2006). Air carriers, contractors and their subcontractors are prohibited from discharging or "otherwise discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)," engaged in the air carrier safety-related activities the statute covers. 49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102(a).

³ R. D. & O. at 14.

⁴ Order Denying Request for Reconsideration at 1.

⁵ Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110 (a).

BACKGROUND

On March 16, 2006, Powers filed “Complainants’ Petition for Review of ALJ March 03, 2006 ‘Recommended Decision & Order Denying the Complainant’s Claim’; Motion for Consolidation with ARB 05-022; Motion to Vacate/Reverse R. D. & O. and for Expedited Remand for Consolidated Denovo Hearing on the Merits w/Reassignment [sic] of ALJ; in the Alternative, Motion for Expedited Entry of Immediate Reinstatement and Order Directing Evidentiary Hearing on Crewmember Powers’ Damages.” On April 6, 2006, Powers filed “Complainant’s Amended Petition for Review of ALJ March 03, 2006, ‘Recommended Decision & Order Denying the Complainant’s Claim’ Including ALJ March 27, 2006 Order ‘Denying Request for Reconsideration.’”

The Board issued a Notice of Appeal and Order Establishing Briefing Schedule on April 19, 2006. This Order provided in pertinent part:

The Complainant may file an initial brief, not to exceed thirty (30) double-spaced typed pages, on or before **May 18, 2006**. . . .

All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10-character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1.25 inch top and bottom margins, printed on 8 ½ by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted. If a party fails to file a brief that complies with the requirements of this briefing order, the Board may refuse to file the brief, and if the brief is an initial brief, the Board may dismiss the appeal. See, e.g., *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-6 (ARB December 30, 2004).⁶

On May 24, 2006, the Board granted Powers’s request for an enlargement of time to file her opening brief. On June 19, 2006, Powers filed “Complainants’/Former Crewmember Powers’ Status Inquiry & Renewed June 04, 2006 Motion for DOL to Render Decisions on Pending Preliminary Motions Filed March 13, 15, & 16, 2006, April 06, 2006, May 16, 2006 & May 17, 2006; and, Complainants’ Motion to Hold Briefing Schedule in Abeyance Pending Decisions on These Preliminary Motion; in the

⁶ Notice of Appeal and Order Establishing Briefing at 1-2.

Alternative, Motion for Enlargement of Time Due to US DOL ARB Delays & Motion for Expansion of Page Limitations Due to US DOL Delays.” On July 6, 2006, the Board granted Powers’s request to hold the briefing schedule in abeyance pending resolution of outstanding motions and denied her request for an expanded page limitation of 120 pages. The Board then re-instated the briefing schedule providing in pertinent part:

The Complainant may file an initial brief, not to exceed thirty (30) double-spaced typed pages, on or before **August 7, 2006**. . . . In all other aspects, **including the number of pages allowed for each brief**, the Board’s April 19th order remains in effect.

The Board notes that the Complainant routinely files Motions to Reconsider Board Orders. Any such motion filed in response to this Order will not affect the briefing schedule established above. As indicated above, the Complainant’s failure to file a timely brief that complies with the Board’s briefing order may result in dismissal of her appeal.^{7]}

On August 8, 2006, the Board received Powers’s opening brief in this case. Although the Board had warned Powers that the filing of a Motion for Reconsideration would not suspend her obligation to file a timely brief that complies with the Board’s briefing order, she ignored the Board’s admonition and filed a brief that fails to comply with the briefing order. It is not double-spaced, it is in 11-point font, and at 40 pages, it exceeds the Board’s clearly stated page limits. Accordingly, on August 25, 2006, the Board suspended the briefing schedule and ordered Powers to show cause no later than September 8, 2006, why the Board should not dismiss her appeal because of her failure to comply with the Board’s briefing order.

In a “Motion for Equal Time to Respond to US DOL ARB General Counsel’s Prejudicial Order Postmarked Aug. 28, 2006 & Received Via Certified Mail on Sept. 5, 2006 with Former Crewmember Powers; Partial Objections & Partial Response to It; Motion for US DOL Sec’y Labor to Amend/Clarify April 19, 2006 and July 06, 2006 Prejudicial Orders, and Motion for Sec’y Labor to Certify Questions of Constitutional Law for Review Before the US Supreme Court, and Motion to Vacate the Prejudicial August 25, 2006 order **Forthwith & Immediately Resume** Briefing Schedule (with Exhibits A, B),” filed on September 8, 2006, Powers asserted that she was prejudiced by the fact that due to the time it took for her to receive the Board’s August 25th Order, she did not have the same amount of time to respond to it that the Respondent was accorded. Accordingly, we granted Powers’s request for additional time to respond to the Board’s August 25th Order and ordered her to file a response to the Board’s August 25th Order on or before fourteen days after she received this Order. The Board also cautioned Powers

⁷ Order at 2-4.

that “[n]o further enlargements of time will be granted to Powers to respond to the Board’s Order to Show Cause and failure to timely respond to this Order may result in the dismissal of the Complainant’s appeal.”

On October 9, 2006, Powers filed “**Supplemental Responses & Objections** to the US DOL Agency Prejudicial Orders Dated August 25, 2006 and July 06, 2006, *et al*; Powers’ **Response & Objections** to the Omission of Material Facts by Agency Counsel in Her Subsequent, Prejudicial, Erroneous **Sept. 14, 2006 Order**; and Powers’ **Renewed Sept. 08, 2006 Motion to Vacate** August 25, 2006 Order and **Immediately Resume Briefing Schedule & Issue Order of Immediate Reinstatement to Powers.**

Pinnacle filed a Motion for additional time to respond to Powers’s “Supplemental Responses . . .” and a Reply to Response to Show Cause Order. The Board granted the Motion for enlargement of time and accepted the reply. In response, Powers filed a “**Detailed Supported Objections & Rebuttal Reply** to Named Person Pinnacle Airlines, Inc.’s Unsupported, Non-Credible, & Undeniably Dilatory October 21, 2006 Service Copy of their Motion Titled “*Motion for Additional Time to Reply to Response to Show Cause Order*” and, Pursuant to Public Policy, Powers’ **Motion for Sanctions** Against Named Person Pinnacle for Their Repeated, Deliberate Delays” (w/ attached supporting evidence identified as EXHIBIT A). Then, on October 31, 2006, she filed “**Motion for Leave to File Her Detailed, Supported Objections & Rebuttal Reply** to Named Person Pinnacle Airlines, Inc.’s False Statements in Their Untimely Oct. 26, 2006 Service Document Titled, ‘*Reply to Show Cause Order*’, **And** Pursuant to **Public Policy**. Former Crewmember Powers’ **Motion to Strike** Pinnacle’s Untimely ‘Response’ with Powers’ Accompanying **Motion for Imposition of Sanctions** Against Named Person Pinnacle for Their Repeated Material Omissions & Their Repeated, Misleading, & False Statements Filed in this Matter” [W/ Accompanying Exhibits A-C]. Pinnacle filed a response to Powers’s Motion. Powers’s followed with a “**Rebuttal Reply** to Pinnacle’s **Untimely** Nov. 13, 2006 ‘Response’ to Powers’ October 31, 2006 Motions with Powers’ **Repeated** Accompanying Motion for Sec’y Labor to Rule on Powers’ July 28/29, 2006 Motions and for Entry of an Expedited Order that Grants All Powers’ Requested Statutory & Affirmative Relief Pursuant to Federal Law and Public Policy” and “**Objections** to Agency Counsel’s Confusing, Erred, Vague, and Prejudicial Nov. 13, 2006 Order Received Via Certified Mail on Nov. 21, 2006 with Former Crewmember Powers’ **Motion to Reconsider** and **VACATE** this Prejudicial Agency Counsel Order and for Entry of an AMENDED, Clarified Order (w/ Powers’ att. Exhibit A).”

DISCUSSION

The Board’s authority to effectively manage its docket, including authority to require compliance with Board briefing orders, is necessary to “achieve orderly and expeditious disposition of cases.”⁸ This Board has authority to issue sanctions, including

⁸ *Link v. Wabash*, 370 U.S. 626, 630-31 (1962).

dismissal, for a party's continued failure to comply with the Board's orders and briefing requirements.⁹

The Board recognizes that dismissal of an appeal for failure to file a conforming brief is a very serious sanction and we do not take it lightly. However, the Board's continued attempts to explicitly explain the Board's policy to Powers and to give her ample opportunities to file a conforming brief have been futile. In *Harris v. Callwood*, the Federal Court of Appeals for the Sixth Circuit concluded that such dismissals represent a harsh sanction to be carefully reviewed on appeal and held that, "in the absence of notice that dismissal is contemplated a district court should impose a penalty short of dismissal unless the derelict party has engaged in 'bad faith or contumacious conduct.'" ¹⁰

The Board specifically and explicitly warned Powers in both its Notice of Appeal and Order Establishing Briefing Schedule and its July 6th Order that it could dismiss her appeal if she failed to file a conforming brief. But even more tellingly, the Board has dismissed two appeals previously filed by Powers because she refused to file conforming briefs, and the Sixth Circuit Court of Appeals has upheld both dismissals.¹¹ Thus, there is not the slightest doubt that Powers had notice that if she refused to file a conforming brief, the Board would dismiss her appeal. Furthermore, in light of these previous dismissals, Powers's intransigent refusal to file a conforming brief could properly be described as nothing less than "contumacious." Moreover, it is absolutely clear that if

⁹ *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ-AIR-6 (ARB Dec. 30, 2004, Reissued Jan. 5, 2005), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006), *cert. denied*, 75 U.S.L.W. 3172 (U.S. Oct. 2, 2006)(No. 06-5474); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006), *cert. denied*, 75 U.S.L.W. 3172 (U.S. Oct. 2, 2006)(No. 06-5474); *Blodgett v. TVEC*, 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).

¹⁰ 844 F.2d 1254, 1256 (1988).

¹¹ *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ-AIR-6 (ARB Dec. 30, 2004, Reissued Jan. 5, 2005), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006), *cert. denied*, 75 U.S.L.W. 3172 (U.S. Oct. 2, 2006)(No. 06-5474); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006), *cert. denied*, 75 U.S.L.W. 3172 (U.S. Oct. 2, 2006)(No. 06-5474).

dismissal of previous appeals was not a sufficiently severe sanction to induce Powers to file a conforming brief, no lesser sanction would suffice to do so.

In response to the Order to Show Cause, Powers argues that although her brief is 40 pages long, it does not actually exceed the 30-page limit because it does not contain more than 30 pages of “text.” Instead, she states that several pages have more than 3 inches for bottom margins and several pages are tables showing the dates and titles of all ALJ Orders objected to and petitioned for review and “they do not fill a page with text.”¹²

The Board’s briefing order did not limit Powers’s brief to 40 pages of “text,” it limited the brief to thirty pages. It was Powers’s decision how she should most effectively use those pages to present her arguments. Furthermore, it is not the Board’s obligation to attempt to measure all of the margins in Powers’s brief in an effort to calculate whether the typed spaces added up to thirty pages; it was Powers’s obligation under the terms of the briefing order to present the Board with a brief not exceeding thirty pages.

Powers also argues that her use of single-spacing complies with Federal Rule of Appellate Procedure 32 allowing single spacing of footnotes. But, Powers’s brief is extensively single-spaced, even aside from footnotes and quotations (see e.g., all or portions of pages 5, 15-17, 22-28). Moreover, her statement that her brief is appropriately double-spaced is not true. In fact, as indicated by Microsoft Word paragraph formatting and reveal codes, the vast majority of the line-spacing of Powers’s brief is either single or 1.5, not double, and her font size is 11, not 12 as required by the Board’s briefing order.

Equally unpersuasive is Powers’s argument that the briefing order was not mandatory because it used the words “should” and “expected,” rather than “shall” or “must.” The Board had dismissed two previous Powers appeals because she refused to file briefs in conformance with the Board’s briefing order. She knew exactly what “should” and “expected” denoted and the consequence for her refusal to accept the Board’s requirements as mandatory.

CONCLUSION

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 in light of our explicit warning to her of the consequences of her failure to comply and her experience with such consequences in two previous cases, warrants sanctions in this case.

¹² Supplemental Responses & Objections at 7.

Accordingly, because Powers has failed to file an opening brief in conformance with the Board's Notice of Appeal and Order Establishing Briefing Schedule, we **DISMISS** her appeal.¹³

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

¹³ We note that Powers routinely petitions the Board for reconsideration of its orders. We repeat the admonition of a federal district court to Powers addressing this practice before that court: "The plaintiff is CAUTIONED that motions for reconsideration should be filed *only* when the Court clearly made a mistake of fact or law or when the factual situation has changed materially since the filing of the original motion. Repeated motions for reconsideration are not acceptable merely because a party disagrees with the Court's decision." *Powers v. NWA, Inc.*, No. 05-2468-B/P (W.D. Tenn. Apr. 13, 2006)(Order Denying Motion for Reconsideration).