



In the Matter of:

ROBERT STEVEN MAWHINNEY,
COMPLAINANT,

ARB CASE NO. 15-013

ALJ CASE NO. 2012-AIR-014

v.

DATE: February 3, 2015

TRANSPORTATION WORKERS UNION,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:

Robert Steven Mawhinney, *pro se*, LaJolla, California

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

**DECISION AND ORDER ON RECONSIDERATION DENYING
INTERLOCUTORY APPEAL**

Complainant Robert Steven Mawhinney has filed an interlocutory appeal of a Department of Labor Administrative Law Judge’s Order on Remand, in which the Administrative Law Judge (ALJ) deferred ruling on Mawhinney’s request that a hearing date be scheduled in case No. 2012-AIR-014, until the Administrative Review Board ruled on a related case currently pending before the Board (ARB No. 14-060, ALJ No. 2012-AIR-017).¹ On December 16, 2014, the Board issued an Order requiring

¹ The ALJ determined, “Because it is unknown at this point whether that case [ALJ No. 2012-AIR-017] will also be remanded for additional proceedings, it would not be

Mawhinney to show cause why the Board should not dismiss his interlocutory appeal. On January 21, 2015, the Board dismissed Mawhinney's interlocutory appeal because the Board believed that he had failed to timely file a response to it. It was subsequently determined that Mawhinney did in fact timely file a response. Accordingly, the Board, sua sponte, decided to reconsider its decision dismissing Mawhinney's interlocutory appeal, in light of his response to the show cause order.

DISCUSSION

The Secretary of Labor has delegated authority to issue final administrative decisions in cases arising under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,² under which this case arises, to the Administrative Review Board.³ The Secretary's delegated authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."⁴ Because the ALJ has not issued a final Decision and Order in this matter fully disposing of Mawhinney's complaint, his request that the Board review the ALJ's Order is an interlocutory appeal.

Where an ALJ has issued an order of which the party seeks interlocutory review, the ARB has elected to look to the procedures providing for certification of issues involving a controlling question of law as to which there is substantial ground for difference of opinion, an immediate appeal of which would materially advance the ultimate termination of the litigation, as set forth in 28 U.S.C.A. § 1292(b) (Thomson/West 2006), to determine whether to accept an interlocutory appeal for review.⁵ In *Plumley v. Federal Bureau of Prisons*,⁶ the Secretary ultimately concluded

efficient to schedule a hearing – the length of the hearing, number of witnesses, identities of witnesses, and many other logistical issues depend on whether a hearing will be held only on this case or on both cases." *Mawhinney v. Transportation Workers Union*, No. 2012-AIR-014, slip op. at 1 (Nov. 19, 2014). Nevertheless, the ALJ ordered that discovery should proceed in the interim. *Id.* at 1-2.

² 49 U.S.C.A. § 42121 (Thomson/West 2007)(AIR 21). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2013).

³ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

⁴ *Id.* at § 5(c)(48).

⁵ *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-065, slip op. at 5 (ARB Oct. 31, 2005); *Plumley v. Federal Bureau of Prisons*, 1986-CAA-006 (Sec'y Apr. 29, 1987).

that because no ALJ had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), “an appeal from an interlocutory order such as this may not be taken.”⁷ Furthermore, the Secretary of Labor and the Board have held many times that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals.⁸

Mawhinney proffers two grounds for his request for interlocutory review. First he alleges that the ALJ has denied him due process “to reiterate and/or amend the argument(s) that the named Respondents can be held individually liable” and that the ALJ has excluded RSMawhinney from input and consideration after the USDOL-ARB ‘Decision and Order Vacating and Remanding’ of September 18, 2014 and prior to the ‘Order of Remand’ of November 19, 2014.’⁹ Secondly, he alleges that the ALJ has engaged in ex parte communications with Respondent and the Board.¹⁰

Mawhinney has neither obtained the ALJ’s certification of the questions at issue, nor has he demonstrated exceptional circumstances sufficient to invoke the Board’s interlocutory review of the issues presented. Furthermore, the Board may fully consider and dispose of both issues he has presented, upon appeal of the ALJ’s final order in this case, should that be necessary.¹¹ Accordingly, we find no basis for accepting the interlocutory appeal in this case.

⁶ 1986-CAA-006 (Sec’y Apr. 29, 1987).

⁷ *Id.*, slip op. at 3 (citation omitted).

⁸ Order to Show Cause, slip op. at 3 (ARB Dec. 16, 2014). *See e.g.*, *Gunther v. Deltek*, ARB Nos. 12-097, 12-099; ALJ No. 2010-SOX-049, (ARB Sept. 11, 2012); *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-015 (ARB May 13, 2004); *Hibler v. Exelon Generation Co., LLC*, ARB No. 03-106, ALJ No. 2003-ERA-009 (ARB Feb. 26, 2004); *Amato v. Assured Transp. & Delivery, Inc.*, ARB No. 98-167, ALJ No. 1998-TSC-006 (ARB Jan. 31, 2000).

⁹ Complainant’s Response to Show Cause Order (Resp.) at 2.

¹⁰ *Id.* at 3.

¹¹ We note in particular that the Board is very reluctant to interfere with an ALJ’s control over procedural and discovery issues. *Pragasam v. Wellness Home Healthcare Inc.*, ARB No. 11-017, ALJ No. 2010-LCA-018, slip op. at 6 (ARB Apr. 12, 2011). *See also Local No. 44 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada*, 886 F.2d 1320 (9th Cir. 1989) (unpubl.); *Baltuff v. United States*, 35 F.2d 507 (9th Cir.1929)(appellate bodies do not generally have authority to review interlocutory denials of interlocutory motions for recusal).

Accordingly, we **DENY** Mawhinney's petition for interlocutory review.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge