



In the Matter of:

LUIS FERNANDEZ,

ARB CASE NO. 10-035

COMPLAINANT,

ALJ CASE NO. 2009-SOX-043

v.

DATE: March 4, 2010

**NAVISTAR INTERNATIONAL
CORPORATION, Y. MARC BELTON,
WILLIAM CATON, JOHN D. CORRENTI,
DAVID D. HARRISON,
ABBIE J. GRIFFIN, JAMES H. KEYES, and
DANIEL USTIAN,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

R. Scott Oswald, Esq., and Jason M. Zuckerman, Esq., *The Employment Law Group, P.C.*, Washington, D.C., and Michael L. Maduff, Esq., Aaron Maduff, Esq., and Walker Lawrence, Esq., *Maduff & Maduff, LLC*, Chicago, Illinois

For the Respondents:

Laurence H. Levine, Esq., and Maaike S. Almeida, Esq., *Laurence H. Levine Law Offices*, Chicago, Illinois, and Robin M. Hulshizer, Esq., and Catharine K. Dick, Esq., *Latham & Watkins LLP*, Chicago, Illinois

ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW

In a Petition for Interlocutory Review dated January 6, 2010, the Respondents, Navistar International Corporation et al. (Navistar), petition the Board in accordance with 28 U.S.C.A. § 1292(b) (Thomson/West 2006) for review of an Order Granting Complainant's Motion to Compel issued on October 16, 2009, and an Order Denying Respondents' Motion for

Reconsideration and Granting Request to Certify Issue for Interlocutory Appeal issued on December 7, 2009, of a United States Department of Labor Administrative Law Judge (ALJ).¹ This case involves a complaint filed pursuant to the whistleblower protection provisions at Section 806 of the Sarbanes-Oxley Act of 2002 (SOX).² In conjunction with its Petition for Interlocutory Review, Navistar has also filed a Motion for Leave to File Portions of Petition for Interlocutory Appeal under Seal *Instantly*.

BACKGROUND

The Complainant, Luis Fernandez, made a discovery request for the production of documents from Navistar in support of his complaint before the ALJ. Fernandez specifically asked that Navistar produce in camera an investigation report that counsel for Navistar's Audit Committee prepared in connection with an internal investigation of Navistar's accounting practices.³

The ALJ found that the report was relevant to the subject matter involved in this case.⁴ Thus, the ALJ held that the report must be produced pursuant to 29 C.F.R. § 18.14(a), unless the report is privileged.⁵

¹ Navistar timely submitted its Petition for Interlocutory Review pursuant to the Board's Order issued on December 18, 2009, granting Navistar's December 15, 2009 motion for an extension of time to file its petition until January 6, 2009.

² 18 U.S.C.A. § 1514A (Thomson Reuters Supp. 2009). Implementing regulations appear at 29 C.F.R. Part 1980 (2009). Prior to filing its Petition for Interlocutory Review on January 6, 2009, however, Navistar also filed a Motion for Stay of Appeal Proceedings before the Board. In support of its motion, Navistar notes that it has filed a suit in an Illinois state court involving the enforceability of a Waiver and Release agreement Fernandez signed when Navistar terminated his employment, before he filed the instant SOX complaint. Because the Waiver and Release agreement, in part, purports to release Navistar from any claim Fernandez may file under the SOX whistleblower provisions and as the state court held, in part, that the agreement is enforceable, Navistar argues that the state court's holding would bar Fernandez from pursuing his SOX complaint. Thus, the Petition for Interlocutory Appeal would be moot. Consequently, Navistar requests that its interlocutory appeal before the Board be stayed pending the full litigation of its state suit, including the outcome of any appeal or the expiration of the period for filing an appeal. In addition, Navistar has filed a Motion to Strike Complainant's Opposition to Respondent's Motion to Stay Appeal Proceedings or, in the Alternative, Motion for Leave to File Reply in Support of Motion to Stay Appeal Proceedings.

³ Order Granting Complainant's Motion to Compel at 1-2.

⁴ *Id.* at 4-6.

⁵ 29 C.F.R. § 18.14(a)(2009) states, in relevant part, that "the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding."

Next, the ALJ considered whether the report is privileged. The ALJ determined that Navistar intended to keep the report confidential and that it was prepared in anticipation of litigation. Thus, he concluded that both the attorney-client privilege and the work product privilege protects the report from disclosure, unless the privilege has been waived.⁶

Finally, the ALJ considered whether Navistar waived the attorney-client privilege and the work product privilege. Navistar had provided the report to the Securities and Exchange Commission (SEC), with a confidentiality agreement attached, as part of a SEC investigation of Navistar's accounting practices.⁷ Because Navistar disclosed the report to the SEC, a third party adversary, the ALJ determined that Navistar waived the attorney-client and work product privileges.⁸

INTERLOCUTORY REVIEW

Subsequently, Navistar requested that the ALJ certify to the Board for interlocutory review, based on the collateral order doctrine, the issue of whether Navistar waived the attorney-client and work product privileges when it disclosed the report to the SEC.⁹ Navistar relied on the Board's Order Granting Petition for Interlocutory Review in *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 2-4, 7 (ARB June 19, 2008).

The Board's June 19, 2008 Order in *Jordan* noted that the Secretary of Labor has determined that when an ALJ has issued an order, of which a party seeks interlocutory review, it is appropriate for the judge to follow the procedure established at 28 U.S.C.A. § 1292(b) for certifying questions of law for interlocutory appeal from federal district courts to appellate courts.¹⁰ Nevertheless, the Board further noted that an ALJ's certification is a relevant, but not the determinative, factor in the Board's decision whether to accept an interlocutory appeal for review.¹¹ The Board stated that it also applies the collateral order exception to finality requirement at 28 U.S.C.A. § 1291 (Thomson/West 2006).¹²

⁶ Order Granting Complainant's Motion to Compel at 7-13.

⁷ *Id.* at 2-3, 13.

⁸ *Id.* at 17-18.

⁹ Order Denying Respondents' Motion for Reconsideration and Granting Request to Certify Issue for Interlocutory Appeal at 3-5.

¹⁰ *Jordan*, ARB No. 06-105, slip op. at 2 (ARB June 19, 2008), citing *Plumley v. Federal Bureau of Prisons*, 1986-CAA-006 (Sec'y Apr. 29, 1987).

¹¹ *Jordan*, ARB No. 06-105, slip op. at 3 (ARB June 19, 2008).

¹² *Id.*

Relying on the Board's June 19, 2008 Order in *Jordan*, the ALJ granted Navistar's request and certified the issue of whether Navistar must produce the report, as it "meets the criteria for a collateral order exception to the finality requirement."¹³

However, the appropriate avenue for requesting interlocutory review in this case is not pursuant to the collateral order doctrine at 28 U.S.C.A. § 1291, but rather pursuant to the Board's discretionary authority to accept an interlocutory appeal based on a question of law pursuant to 28 U.S.C.A. § 1292(b). The United States Supreme Court recently held that the collateral order exception under 28 U.S.C.A. § 1291 "does not extend to disclosure orders which are adverse to the attorney client privilege," such as the ALJ's Order Granting Complainant's Motion to Compel in this case. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ___, 130 S. Ct. 599, 609 (2009). Specifically, the Supreme Court determined that "collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege,"¹⁴ noting that "[e]ffective appellate review can be had by other means."¹⁵ For instance, the Supreme Court held that a party may seek review of orders adverse to the attorney-client privilege by asking the trial court to certify, and the court of appeals to accept an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b)¹⁶ based on "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."¹⁷ In this case, *Mohawk Industries* applies because the ALJ and the Board stand in the same position as the trial court and the court of appeals, respectively. In addition, the Supreme Court further suggested that "protective orders are available to limit the spillover effects of disclosing sensitive information."¹⁸

Consistent with the Supreme Court's holding in *Mohawk Industries*, the Board ultimately clarified in its subsequent Order of Remand in *Jordan* that it granted the petition for interlocutory review in that case based on a question of law, in accord with the procedure established at 28 U.S.C.A. § 1292(b).¹⁹ *Jordan v. Sprint Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 3 (ARB Sept. 30, 2009); see *Gloss v. Marvell Semiconductor, Inc.*, ARB No. 10-033, ALJ No. 2009-SOX-011, slip op. at 3 (ARB Jan. 13, 2010). Similarly, the ALJ's order in

¹³ Order Denying Respondents' Motion for Reconsideration and Granting Request to Certify Issue for Interlocutory Appeal at 4-5.

¹⁴ *Mohawk Indus.*, 130 S. Ct. at 606.

¹⁵ *Id.* at 609.

¹⁶ *Id.* at 607.

¹⁷ 28 U.S.C.A. § 1292(b).

¹⁸ *Mohawk Indus.*, 130 S. Ct. at 608.

¹⁹ *Jordan*, ARB No. 06-105, slip op. at 2-4, 7 (ARB June 19, 2008).

this case is, in any event, in accord with the procedure established at 28 U.S.C.A. § 1292(b) for certifying interlocutory issues for appeal based on “a controlling question of law.”

ANALYSIS

Initially, in accord with the Supreme Court’s suggestion in *Mohawk Industries* and 29 C.F.R. § 18.46(a), we grant Navistar’s Motion for Leave to File Portions of Petition for Interlocutory Appeal under Seal *Instante*, sealing its Petition for Interlocutory Appeal filed before the Board on interlocutory review to preserve any potentially privileged materials or evidence.²⁰ Nevertheless, we decline Navistar’s petition for the Board to accept its interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b) based on “a controlling question of law.”

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SOX to the Administrative Review Board.²¹ Because the ALJ has not issued his final recommended decision and order in this matter, Navistar’s request that the Board review the ALJ’s order is an interlocutory appeal. The Secretary’s delegated authority to the Board includes the “discretionary authority to review interlocutory rulings in exceptional circumstances provided such review is not prohibited by statute.”²²

In this case, we exercise our discretion, as granted to the Board, and deny Navistar’s petition for interlocutory review pursuant to 28 U.S.C.A. § 1292(b). Exercising jurisdiction over the issue presented for interlocutory review at this time would not, in our estimation, expedite the litigation and resolution of this case.²³ Further, in accord with 29 C.F.R. § 18.46(a) and the Supreme Court’s suggestion in *Mohawk Industries*, we note that the ALJ acceded to the parties’ Stipulated Protective Order that the report at issue be kept confidential and used for the litigation of this case only.²⁴ Ultimately, the issue presented for interlocutory review can be addressed as

²⁰ 29 C.F.R. § 18.46(a) (it is within an ALJ’s discretion to issue “such protective, in camera, or other orders as in his or her judgment may be consistent with the objective of protecting privileged communications”).

²¹ Secretary’s Order No. 1-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

²² *Id.* at 3925. See *Johnson v. Siemens Building Techs.*, ARB No. 07-010, ALJ No. 2005-SOX-015, slip op. at 2 (ARB Jan. 19, 2007); see also *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7 (1st Cir. 2005)(the decision to accept an interlocutory appeal rests within the “discretion” of the court of appeals).

²³ See *Atlantic City Elec. Co. v. General Elec. Co.*, 337 F.2d 844 (2d Cir. 1964) (a court of appeals should determine whether an appeal would delay rather than advance the ultimate disposition of a case).

²⁴ Order Granting Complainant’s Motion to Compel at 19 n.9.

part of any subsequent appeal from the ALJ's final order on the merits of this case. Finally, we emphasize that our denial of Navistar's petition for interlocutory review should in no way be construed as expressing an opinion on the merits of the issue raised regarding waiver of the attorney-client and work product privileges in this case.

Accordingly, Navistar's Petition for Interlocutory Review is **DENIED** and we **REMAND** this case to the ALJ for adjudication.²⁵

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

²⁵ Inasmuch as we deny Navistar's Petition for Interlocutory Review, we need not address Navistar's Motion for Stay of Appeal Proceedings, as well as its Motion to Strike Complainant's Opposition to Respondent's Motion to Stay Appeal Proceedings or, in the Alternative, Motion for Leave to File Reply in Support of Motion to Stay Appeal Proceedings.