In the Matter of:

CRAIG CUMMINGS, **ARB CASE NO. 04-043**

COMPLAINANT, **ALJ CASE NO. 03-STA-47**

v. **DATE: June 30, 2005**

USA TRUCK, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Craig Cummings, *pro se, Walnut Shade, Missouri*

ORDER DENYING RECONSIDERATION

This case was originally before us based on a complaint Craig Cummings (Cummings) filed alleging that his employer, USA Truck, Incorporated, violated the employee protection (whistleblower) provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), when it terminated his employment. After reviewing the record, we determined that the Administrative Law Judge (ALJ) properly held that Cummings failed to allege that he engaged in activity protected by the STAA.[1] Thus, in a Final Decision and Order dated April 26, 2005, we adopted the ALJ's holding, attached and incorporated the ALJ's

[1] Prior to the scheduled hearing, the ALJ issued a Show Cause Order which required Cummings to show cause why his complaint should not be dismissed for failure to state a cause of action. Ultimately, the ALJ determined that Cummings' allegation was not activity protected by the STAA and, therefore, dismissed the complaint for failure to state a cause of action without holding a hearing.

Recommended Order of Dismissal (R. O.), which was issued on January 9, 2004, and dismissed Cummings's complaint.

By letter postmarked May 24, 2005, Cummings filed an "Appeal" and "Petition," along with a proposed "Settlement" and "Final Judgment Rule." Cummings has submitted new evidence with his filings, which include a postcard from USA Truck Recruiting inquiring whether he would like to return to work, which Cummings alleges was mailed to him in March 2005. In addition, Cummings has submitted a tape cassette recording of an alleged May 18, 2005 interview between Cummings and a USA Truck Recruiter, indicating that USA Truck did not intend to rehire Cummings. In essence, Cummings contends that the new evidence should be construed as an admission of guilt or concession by USA Truck regarding Cummings's complaint in this case. Finally, Cummings again raises the same arguments that were considered and rejected by this Board in our prior decision.[2]

We construe complaints and papers filed by pro se complainants "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude. *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), *citing Hughes v. Rowe*, 449 U.S. 5 (1980). At the same time we are charged with a duty to remain impartial; we must "refrain from becoming an advocate for the pro se litigant." *Id.*[3]

In this case, we construe Cummings's filings as a request for reconsideration based on his newly submitted evidence. The ARB is authorized to reconsider earlier decisions. *Macktal v. Chao,* 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown and Root, Inc.,* ARB Nos. 98-112/122A, ALJ No. 86-ERA-23, slip op. at 2-6 (ARB Nov. 20, 1998). Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. *See generally* 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3986.1 (3d ed. 1999). A petition for rehearing should not reargue unsuccessful positions or assert an inconsistent position which may prove more successful, *United States v. Smith,* 781 F.2d 184 (10th Cir. 1986),

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[2] By letter postmarked June 10, 2005, Cummings subsequently supplemented his proposed "Final Judgment Rule" with a filing entitled "50 percent rule," seeking 50 percent of USA Truck's assets as proposed relief in this case.

[3] We recognize that while adjudicators must accord a pro se complainant "fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance." *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983). Affording a pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system. *See Young*, slip op. at 9, *citing Jessica Case, Note: Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L. J. 701 (2002).

and presenting new facts, even in reference to events that occur after initial hearing, is not appropriate on rehearing. *Armster v. United States Dist. Ct.,* 806 F.2d 1347, 1356-1357 (9th Cir. 1986) ("A panel is simply not capable of having *overlooked* or *misapprehended* 'points of . . . fact' occurring *subsequent* to its initial decision" thus rendering consideration of subsequent factual occurrences beyond the scope of a petition for rehearing.) (Emphasis in original).

Such a motion also is analogous to requesting reconsideration of a final judgment or appealable interlocutory order under Federal Rules of Civil Procedure 59 or 60(b). Amending judgments may be appropriate under Rule 59 to permit the moving party to present newly discovered or previously unavailable evidence. 11 CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d ed. 1995). Rule 59 amendments may not be used to relitigate issues or to raise arguments. *Id.; see Sequa Corp. v. GBJ Corp.,* 156 F.3d 136, 144 (2d Cir. 1998) ("Rule 59 is not a vehicle for relitigating old issues.")

Similar standards limit relief from a judgment under Rule 60(b). Relief is available under the rule in limited circumstances, e.g., newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59. WRIGHT, MILLER & KANE, §§ 2858-2864. Rule 60(b) relief is extraordinary, granted only in exceptional circumstances. *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking, Inc.,* 909 F.2d 1437, 1440 (10th Cir. 1990); *C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984).[4]

Pursuant to 29 C.F.R. § 1978.109(c)(1) (2004), the Board is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge." When considering whether to consider new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2004), which provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.34(c); *see e.g., Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 6-7 (ARB Jan. 31, 2001).

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[4] A court also may reconsider its decisions prior to final judgment under limited circumstances. These circumstances are (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision. *See, e.g., Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995); *Virgin Atl. Airways, Ltd. v. National Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir. 1992); *Weinstock v. Wilk,* 2004 WL 367618, at *1 (D. Conn. Feb. 25, 2004); *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.,* 215 F.R.D. 581, 582-586 (D. Ariz. 2003).

As we made clear previously in our Final Decision and Order, Cummings cannot prevail unless he can first show that he engaged in protected activity under the STAA. Though Cummings was pro se before the ALJ, the burden of first establishing, and ultimately proving, the necessary elements of a whistleblower claim is no less for pro se litigants than it is for litigants represented by counsel. *Young*, slip op. at 10. We agreed with the ALJ's determination that the record clearly demonstrates that Cummings did not allege a violation of the STAA.

The new evidence presented by Cummings on reconsideration does not alter the record or the ALJ's determination in regard to whether Cummings engaged in protected activity under the STAA. In addition, because Cummings again raises the same arguments that were considered and rejected by this Board in our prior decision, we will not address them again on reconsideration.[5] Accordingly, the request for reconsideration is **DENIED.**

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

[5] Pursuant to 29 C.F.R. § 1978.110(a), "[w]ithin 60 days after the issuance of a final order [of the Board] under § 1978.109, any person adversely affected or aggrieved by such order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the person resided on the date of the violation (49 U.S.C. 2305(d)(1)). We note that Missouri, where Cummings resides, is located within the jurisdiction of the United States Court of Appeals for the Eighth Circuit and Cummings was fired when he refused to drive while he was in Ohio, which is located within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.