In the Matter of:

BENJAMIN D. HECKMAN,

COMPLAINANT,

v.

M3 TRANSPORT LLC/SLT EXPRESSWAY, INC. and its successors-in-interest, LYONS CAPITAL, LLC,

RESPONDENTS.

ARB CASE NO. 16-083

ALJ CASE NOS. 2012-STA-059

DATE:

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Benjamin D. Heckman, *pro se*, Townshend, Vermont

For the Respondent:
Charles P. Keller, Esq.; Lisa M. Coulter, Esq.; Ashley Kasarjian, Esq.; *Snell & Wilmer L.L.P.*, Phoenix, Arizona

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*

ORDER DISMISSING INTERLOCUTORY APPEAL

In a letter dated July 23, 2016, Complainant Benjamin D. Heckman, requested the Administrative Review Board to review a number of actions a Department of Labor Administrative Law Judge (ALJ) took in adjudicating this case arising under the whistleblower protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) and its implementing regulations.[1]

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[1] 49 U.S.C.A. § 31105 (Thomson Reuters 2007 & Supp. 2016); 29 C.F.R. Part 1978 (2015).

The Secretary of Labor has delegated authority to issue final agency decisions in cases arising under the STAA to the Board. This authority also includes the consideration and disposition of interlocutory appeals—"to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."[2]

Because the ALJ has not yet issued a decision on the merits in this case, Heckman's petition is for interlocutory review (i.e., review of a non-final decision). But although the Board may accept interlocutory appeals in "exceptional" circumstances,[3] it is not the Board's general practice to accept petitions for review of an ALJ's non-final dispositions. In deciding whether to accept a petition for 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 and 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).[4] In *Plumley v. Federal Bureau of Prisons*,[5] the Secretary ultimately concluded 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."[6]

Nevertheless, even if a party has failed to obtain interlocutory certification, the ARB would consider reviewing an interlocutory order meeting the "collateral order" exception recognized by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*,[7] if the decision appealed belongs to that "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[8] To fall within the "collateral order" exception, the order appealed must "conclusively determine the

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2 77 Fed. Reg. 69,379, § 5(c)(66).

3 Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378, 5(c)(66) (Nov. 16, 2012).

4 *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).

5 1986-CAA-006 (Sec'y Apr. 29, 1987).

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

7 337 U.S. 541 (1949).

8 *Id.* at 546.

disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[9]

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.[10] Accordingly, the Board ordered Heckman to show cause why the Board should not dismiss his interlocutory appeal. Heckman has filed a response to this order urging the Board to accept his interlocutory appeal, and Respondents have filed replies requesting the Board to dismiss the appeal.

In his response to the Order to Show Cause, Heckman focused his argument on "the orders issued by ALJ Dorsey regarding discovery in this case, specifically relating to the disclosure of Qualcomm Messages" arguing that these orders give rise to "exceptional circumstances," and require an immediate appeal by the Board to advance this litigation.[11] Respondents reply that Heckman's appeal is untimely and fails to raise a certified question of law and that the interlocutory appeal does not raise a controlling question of law or any extraordinary issues warranting review that would materially advance the litigation.

We agree that Heckman has failed to establish that he is entitled to pursue an interlocutory appeal in this case. As Respondents have argued, Heckman's appeal, filed five months after the ALJ issued his February 23, 2016 Order, is neither timely, nor did Heckman obtain certification of the issue as provided in 28 U.S.C.A. § 1292(b). Furthermore the discovery issue Heckman raised is not a controlling legal issue, but instead questions the ALJ's discretionary determination, based upon findings of fact and law, unsuitable for interlocutory review. Furthermore, the Board has held that discovery orders are readily subject to review upon appeal and therefore generally are not considered to be appealable collateral orders.[12]

If Heckman believes that the ALJ's discovery orders constituted an abuse of discretion that prejudiced his case, he may so argue upon appeal, if and when, the ALJ issues a decision and order denying his complaint. Accordingly, as Heckman has not

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9 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

10 *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).

11 The only order that Heckman specifically identifies is an Order issued by the ALJ on February 23, 2016, entitled Order Denying the Complainant's Motions for Sanctions, Denying the Respondent's Motion to Strike, and Requiring a Response to the Complainant's Motion to Add a New Party (Order).

12 *Puckett v. TVA,* ARB No. 02-070, ALJ No. 2002-ERA-015, slip op. at 4-5 (Sept. 26, 2002).

demonstrated extraordinary circumstances that would constitute a basis for departing from our strong policy against interlocutory appeals, we decline his invitation to do so in this case.

As for the remainder of Heckman's "requests," we agree with Respondent that they are not appropriately requested in a petition for interlocutory appeal of the ALJ's discovery order. Therefore, Heckman's interlocutory appeal is **DENIED.**

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

ANUJ C. DESAI
Administrative Appeals Judge