No. 21-71368

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL JAY NOVICK,

Petitioner,

v.

MORGAN STANLEY SMITH BARNEY, LLC, MORGAN STANLEY SMITH BARNEY FA NOTES HOLDINGS, LLC, and UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board

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STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary of Labor would gladly participate in any oral argument that the Court schedules in this matter, the Secretary believes that oral argument is unnecessary, as this Court can resolve the issues presented on the papers.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Pages**

Cases cont.

Cases cont.

Statutes

Code of Federal Regulations

Rules

Other Authorities

JURISDICTIONAL STATEMENT

This case arises under the anti-retaliation provisions of the Sarbanes-Oxley ("SOX") Act, 18 U.S.C. § 1514A(a), and its implementing regulations, 29 C.F.R. § 1980. Petitioner Michael Jay Novick has sought review of the Final Decision and Order of the Administrative Review Board ("Board" or "ARB") entered in *Michael J. Novick v. Morgan Stanley Smith Barney, LLC et al.*, No. 2021-0024 (ARB July 16, 2021).[1] ER-27–30.[2] The Secretary of Labor ("Secretary") had subject matter jurisdiction under 18 U.S.C. § 1514A(b)(1)(A) based on a complaint Novick filed with the Occupational Safety and Health Administration ("OSHA") against his former employer, Morgan Stanley Smith Barney, LLC, and Morgan Stanley Smith Barney FA Notes Holdings, LLC (collectively, "Morgan Stanley" or "the Respondents").[3]

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[1] The Secretary has jurisdiction over employee complaints under the SOX Act. 18 U.S.C. § 1514A(b)(1)(A). The Secretary has delegated adjudicative authority to the ARB to provide the final agency determination under the SOX Act. *See* Sec'y's Order No. 01-2020, Delegation of Auth. and Assignment of Responsibility to the Admin. Rev. Bd. § 5(b), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[2] Consistent with the Petitioner's Corrected Opening Brief, references to the Petitioner's Excerpts of Record, filed with this Court in conjunction with Petitioner's Corrected Opening Brief, are noted as "ER." References to Novick's Corrected Opening Brief are indicated as "Pet. Br."

[3] The Secretary has delegated authority and assigned responsibility to administer the SOX Act to OSHA. Sec'y's Order No. 08-2020, Delegation of Auth. and Assignment of Responsibility to the Assistant Sec'y for Occupational Safety and Health, § 4(A)(1), 85 Fed. Reg. 182 (Sept. 18, 2020).

On July 16, 2021, the Department of Labor ARB dismissed Novick's appeal of his SOX complaint for failure to timely prosecute. ER-27–30. This Court has jurisdiction because Novick resides, and the alleged violation occurred, in Nevada. Pet. Br. at 1, 9; 18 U.S.C. § 1514A(b)(2) (citing 49 U.S.C. § 42121(b)).

STATEMENT OF THE ISSUES

Whether the ARB reasonably exercised its discretion when it dismissed Novick's Petition for Review and refused to grant reconsideration because Novick failed to file a timely opening brief in conformance with the Board's Order Establishing Briefing Schedule and failed to adequately respond to the Board's show cause order after being warned that such failure could result in dismissal of his case without further notice.

STATEMENT OF THE CASE

A. Nature of the Case

This case arises out of a complaint Novick filed under the anti-retaliation provisions of SOX following his termination from Morgan Stanley. Pet. Br. at 9. Sarbanes-Oxley protects employees who report fraudulent activity, such as mail fraud, securities fraud, bank fraud, wire, radio, or television fraud, violation of any Securities and Exchange Commission rule or regulation, "or any provision of Federal law relating to fraud against shareholders" from retaliation. *See* 18 U.S.C. 1514A(a). An employee who believes that they have been subject to retaliation in violation of SOX

may file a complaint with the Secretary through OSHA. *See* 29 C.F.R. § 1980.103. OSHA investigates the complaint and issues a determination ordering appropriate relief or dismissing the complaint. *Id.* §§ 1980.103-.105. Either the employee or employer may file objections to OSHA's determination and may request a *de novo* hearing before a Department of Labor Administrative Law Judge ("ALJ"). *Id.* § 1980.106. The ALJ's decision is subject to discretionary review by the ARB, which generally issues the final decision of the Secretary. *Id.* § 1980.110.[4] After receiving a petition for review of the ALJ's decision, the ARB "will specify the terms under which any briefs are to be filed." 29 C.F.R. § 24.110(b).

B. Procedural History

Novick was employed as a financial advisor for Morgan Stanley prior to his termination in 2014. ER-28. Novick alleges Morgan Stanley fired him in retaliation for reporting securities fraud. *Id.* at 28, 44, 160. Several months after his termination, Morgan Stanley filed a claim against Novick in arbitration for the unpaid balance of two promissory notes that were executed during his employment. *Id.* at 28. Novick brought eight counterclaims in arbitration, alleging that Morgan Stanley illegally retaliated against him in violation of SOX for engaging in protected activity. *Id.* at

[4] Under the 2020 Secretary's Order delegating authority to the Board, the Secretary has discretion to review a Board decision. *See* Sec'y's Order No. 01-2020, at ¶ 6. If the Secretary does not exercise this authority, the Board's decision becomes a final decision of the Secretary.

160. The arbitrators found in favor of Morgan Stanley and dismissed Novick's retaliation counterclaims. *Id.* at 160–61. A Nevada state court subsequently affirmed the arbitration decision. *Id.* at 101, 103.

On April 10, 2015, Novick filed a complaint with OSHA alleging unlawful retaliation in violation of SOX. Pet. Br. at 9. OSHA issued Findings on March 16, 2020, dismissing Novick's complaint under the doctrine of collateral estoppel due to the prior arbitration decision. ER-159–61. On appeal, an ALJ granted Morgan Stanley's motion for summary decision. *Id.* at 98–99.

On March 29, 2021, Novick timely filed a petition for review with the ARB. *Id.* at 90–97. The ARB ordered a briefing schedule on April 2, 2021, which required Novick to file an opening brief within 28 days. *Id.* at 88. On April 27, 2021, Novick requested an extension of fourteen days to file his opening brief. *Id.* at 85–87. The ARB granted Novick's extension, ordering Novick to file his opening brief by May 20, 2021. *Id.* at 84.

Novick did not timely file his brief with the Board or request another extension. *Id.* at 30. On June 9, 2021, the ARB issued an Order to Show Cause, which stated that if the Board did not receive Novick's response to this order by June 18, 2021, the Board might dismiss the appeal without further notice. *Id.* at 82–83. Novick filed his response to the Order to Show Cause on June 21, 2021 and filed his

opening brief on June 22, 2021. *Id.* at 30, 38–81.[5] In his June 21, 2021 response to the Board's show cause order, Novick argued that the one-month delay in filing his opening brief was "relatively minor" and stated that he "needed more time than [he] had thought [he] would to write [his] first ever appellate brief." ER-73–74. Novick described how he was unable to retain counsel after his attorney withdrew in 2017 due to a terminal illness. *Id.* at 74–81. Novick also raised a variety of objections to the conduct and decisions of prior factfinders in his case. *Id.*

Morgan Stanley filed a motion to strike Novick's untimely opening brief and dismiss Novick's case for failure to timely prosecute. *Id.* at 31–34. Novick filed a four-page response on July 6, 2021, opposing Morgan Stanley's motion to dismiss. *Id.* at 35–39. Novick reiterated his earlier arguments that his failure to comply with the briefing order was of "relatively short duration," that there was "relatively minor prejudice" to Morgan Stanley, that he was pursuing legal representation, and that he did not know how long it would take him to write an appellate brief. *Id.* at 37. Citing the propositions that dismissal is a harsh remedy and that policy favors deciding

[5] Subsequent to the Board's Order to Show Cause, on June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, Pub. L. No. 117-17, 135 Stat. 287 (2021), making Juneteenth a federal holiday to be observed on June 19. However, because June 19, 2021 was a Saturday, Juneteenth was officially observed on Friday, June 18, 2021. As under the Federal Rules of Appellate Procedure, the Board calculates time so that if the last day of the period is a Saturday, Sunday, or legal holiday, "the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." 29 C.F.R. § 26.2.

cases on their merits, Novick argued that dismissal was only warranted where the party never filed a brief or engaged in bad faith. *Id.* at 36–37. Novick also argued that Morgan Stanley falsely characterized his corrected opening brief and disagreed with Morgan Stanley's argument that he did not timely file his response to the Board's show cause order, citing that the new Juneteenth federal holiday occurred on June 18. *Id.* at 38.

On July 16, 2021, the Board dismissed Novick's appeal for failure to timely prosecute. *Id.* at 27–30. The Board cited ARB precedent for the proposition that it has the "inherent power to dismiss a case for failure to prosecute in an effort to control its docket and to promote the efficient disposition of its cases," and that it can dismiss a complaint when a complainant does not "adequately explain his failure to comply with the Board's briefing schedule." *Id.* at 29–30. The Board concluded that while Novick provided "some explanation of his difficulties, he has not provided good cause to excuse his failure to timely file his brief." *Id.* at 30. The Board cited the fact that Novick "demonstrated his understanding of how to request an extension" when he did so on April 27, 2021, but did not request another extension or seek leave from the Board to file a late brief. *Id.*

Novick filed a Petition for Reconsideration before the Board. *Id.* at 9–26. The Board denied reconsideration. *Id.* at 6–8. In doing so, the Board noted that it is authorized to reconsider a decision if the moving party demonstrates one of the following four factors exists:

> (i) material differences in fact or law from that presented to the Board of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the Board's decision, (iii) a change in the law after the Board's decision, and (iv) failure to consider material facts presented to the Board before its decision.

Id. at 7. In this case, the Board found reconsideration was not warranted because Novick's request simply repeated the arguments he had already made in responding to the Order to Show Cause. *Id.* at 7–8. Additionally, to the extent Novick may have been confused about his ability to seek an extension when he did not know how much time he would need to complete his brief, the Board noted that he "made no attempt to contact the Board on or before May 20, 2021, to request an extension of time to file his brief beyond the deadline." *Id.* at 8. Accordingly, the Board denied reconsideration. This appeal followed.

SUMMARY OF ARGUMENT

The ARB, like the federal courts, has the inherent authority to manage its docket to achieve orderly and expeditious disposition of cases. In this case, the Board set a briefing schedule and, in its discretion, gave Novick an extension to file his opening brief. After Novick failed to file his opening brief and after waiting several

weeks following the deadline, the Board issued an Order to Show Cause giving the Novick the opportunity to justify his delay and warning Novick that noncompliance with its briefing schedule could result in dismissal of his case. Novick then filed his brief on June 22 along with an explanation filed June 21 for his delay. At no point between the May 20 deadline to file the brief on extension and June 21 did Novick contact the Board to inquire about requesting another extension or leave to file his brief out of time. The Board reasonably found his explanations for the delay—that he was pro se, did not realize how long it would take to write his brief, and was not sure how to ask for an extension when he did not know how much time he would need—insufficient to provide good cause to excuse his more than one month delay in filing his opening brief. Despite being given ample opportunity to comply with the Board's briefing schedule and despite having previously demonstrated that he could timely request an extension from the Board, Novick unreasonably disregarded the Board's briefing schedule deadline. The Board acted within its permissible range of discretion when it chose to dismiss Novick's case for failure to timely prosecute and declined to reconsider that decision. This Court should affirm the ARB's decision and deny Novick's petition for review.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA"), 5 U.S.C. § 706, governs judicial review of ARB decisions under the Sarbanes-Oxley Act's anti-retaliation provisions.

See 18 U.S.C. § 1514A(b)(2) (stating that the standard of review set forth in 49 U.S.C. § 42121(b) applies to review of the Secretary's decisions under SOX); 49 U.S.C. § 42121(b)(4)(A); *see also Lawson v. FMR LLC*, 571 U.S. 429, 437 (2014) (ARB determinations on SOX § 1514A claims are reviewable in federal court under the APA's standards).

Under this narrow and deferential standard, courts must affirm the ARB's legal conclusions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and must uphold findings of fact unless they are unsupported by substantial evidence. 5 U.S.C. § 706(2)(A); *see Coppinger-Martin v. Solis*, 627 F.3d 745, 748 (9th Cir. 2010); *Calmat Co. v. U.S. Dep't of Lab.*, 364 F.3d 1117, 1121 (9th Cir. 2004) (citing 5 U.S.C. 706(2)); *Lockert v. U.S. Dep't of Lab.*, 867 F.2d 513, 516–17 (9th Cir. 1989). This is a "highly deferential standard of review." *Roofing Contractors v. Chao*, 300 F. App'x 518, 521 (9th Cir. 2008). A court may reverse an agency decision under this standard "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010). Because the Board has the authority to specify the terms on which briefs are to be filed and to manage its own docket, the

relevant standard for reviewing the Board's decision to dismiss this case for failure to timely file an opening brief is abuse of discretion. *See Durham v. Dep't of Lab.,* 515 F. App'x 382, 383 (6th Cir. 2013).

Although SOX is silent with respect to the Board's reconsideration authority, the Board "has the inherent and implied authority to hear motions for reconsideration." *Johnson v. U.S. Dep't of Lab.*, 814 F. App'x 490, 493 (11th Cir. 2020); *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002); *Henrich v. Ecolab, Inc.*, No. 05-030, 2007 WL 1578490, at *1 (ARB May 30, 2007). ARB decisions on motions for reconsideration are reviewed under the arbitrary and capricious or abuse of discretion standard. *See Hasan v. U.S. Dep't of Lab.*, 396 F. App'x 887, 889 (3d Cir. 2010).

ARGUMENT

In granting Morgan Stanley's motion to dismiss Novick's appeal for failure to timely prosecute his action and in failing to reconsider its dismissal decision, the Board appropriately exercised its discretion to impose sanctions on a noncompliant party and to deny Novick's motion for reconsideration. For the reasons explained in further detail below, this Court should affirm the ARB and deny Novick's petition for review.

I. The ARB Acted Within Its Discretion in Dismissing Novick's Appeal Because Novick Failed to Prosecute His Appeal of His SOX Claim

A. Novick Disregarded the Board's Briefing Schedule with No Credible Excuse, and the Board Did Not Abuse Its Discretion in Dismissing His Appeal

The Administrative Review Board has the authority to "specify the terms under which any briefs are to be filed." 29 C.F.R. § 24.110(b); *accord* Fed. R. App. P. 31(c) (permitting federal appellate courts to dismiss an appeal for failure to file a conforming brief); Fed. R. Civ. P. 41(b) (permitting federal courts to dismiss a complaint for failure to comply with court orders). The Board has the inherent "power to control its docket via dismissal . . . similar in all significant respects to that vested in the courts," *Consol. Coal Co. v. Gooding*, 703 F.2d 230, 232 (6th Cir. 1983); *see also Link v. Wabash*, 370 U.S. 626, 630–31 (1962) ("The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

The ARB routinely dismisses appeals for lack of timely prosecution when a petitioner fails to timely file a brief or adequately respond to the Board's show cause order within the unambiguous deadlines set by the Board. *See, e.g.*, *Newport v. Siemens Generation Serv. Co.*, No. 10-005, 2010 WL 707761, at *1, 3 (ARB Feb. 24, 2010) (complainant's response to the Board's show cause order failed to demonstrate good cause for his failure to timely file opening brief); *Durham v. Tenn. Valley*

Auth., No. 11-044, 2011 WL 4915764, at *1 (ARB Sept. 27, 2011), *aff'd Durham v. Dep't of Lab.,* 515 F. App'x 382, 383 (6th Cir. 2013) (same). This Court has affirmed the ARB's discretion to do so. *See Seuring v. Delta Air Lines, Inc.*, 831 F. App'x 277 (9th Cir. 2020) (ARB did not abuse its discretion in declining to accept an untimely amended petition filed one day after the Board's deadline); *accord Durham v. Dep't of Lab.*, 515 F. App'x 382, 383 (6th Cir. 2013) (ARB did not abuse its discretion in dismissing appeal where petitioner failed to timely file opening brief or to show good cause); *Ellison v. U.S. Dep't of Lab.*, 384 F. App'x 860, 861 (11th Cir. 2010) (ARB did not abuse its discretion in dismissing appeal where complainant's opening brief was filed four days after the Board's scheduling order deadline).

The Board reasonably used its discretion to dismiss Novick's appeal where, after having been granted one extension, he failed to file his opening brief by the briefing schedule deadline. ER-30, 84. Even after being warned that the Board might dismiss his appeal, he did not contact the Board until he filed his response to the Order and gave inadequate explanations for his delay in the response. *Id.* at 30, 38–83.

As the Board concluded, Novick "did not adequately explain his failure to comply with the Board's briefing schedule." *Id.* at 29–30. Novick's June 21, 2021 response to the Board's show-cause order and his July 6, 2021 response to Morgan Stanley's motion to dismiss were insufficient. In neither response does Novick assert

that he was unaware of his obligation to file an opening brief with the ARB, the deadline, or the consequences for failing to do so. To the contrary, by requesting an initial extension, Novick demonstrated his awareness of the Board's briefing schedule and of the processes for requesting additional time. Novick did not allege any specific facts establishing that he did not have sufficient time to file an opening brief by the extended briefing schedule deadline, nor did he seek an additional extension of time. For this reason, Novick's explanation that he did not know how much additional time he needed to write his brief as a pro se litigant, *id.* at 73–74, is unavailing.

Ultimately, Novick's response to the show cause order consisted of generalized and inconsistent statements that fell far short of the type of showing necessary to constitute "good cause" for missing a significant appellate deadline. The ARB acted within its discretion when it dismissed the petition.

B. Novick's Arguments Do Not Support Reversal for Abuse of Discretion

On appeal, Novick has set forth a number of reasons why the ARB's order should be reversed. Novick argues that the ARB should not have dismissed his case because he ultimately filed a brief, because dismissal is a harsh remedy, and because, as a pro se litigant, he did not realize how long it would take him to write his opening brief. Pet. Br. at 15–17.

However, courts have routinely affirmed the ARB's dismissal of appeals for failure to prosecute where a litigant has filed an untimely brief. *See Ellison v. U.S.*

Dep't of Lab., 384 F. App'x 860, 861 (11th Cir. 2010) (upholding ARB dismissal where appellant's brief was filed four days after the ARB's scheduling order deadline); *Consol. Coal Co.*, 703 F.2d at 231 (upholding Benefits Review Board dismissal where appellant's brief was filed only after the Board dismissed the appeal). Nor does the Board abuse its discretion in dismissing an appeal for failure to timely prosecute simply because an appellant is pro se. *See Seuring*, 831 F. App'x at 277 (affirming ARB's decision not to accept a pro se petitioner's untimely amended initial brief). Ultimately, applying the relevant abuse of discretion standard, the Board acted reasonably and within its permissible range of discretion by issuing a show-cause order three weeks after the extended briefing schedule deadline, and then dismissing Novick's appeal only when Novick failed to present a credible and compelling excuse for his delay.

Novick also cites several inapposite standards of review, including the five-factor abuse of discretion test this Court applies when reviewing a district court's dismissal for failure to comply with a court order and the grounds for relief from a final judgment, order, or proceeding under Fed. R. Civ. P. 60(b)(1) for mistake, inadvertence, surprise, or excusable neglect. Pet. Br. at 22–23. Neither of these standards are applicable to this Court's review of an ARB decision. As described in Section I.A, under the relevant abuse of discretion standard, the Board acted reasonably in dismissing Novick's case. This Court has not applied those factors to an ARB

decision or to any comparable administrative dismissal. However, under the five-factor test, or indeed any "abuse of discretion" standard, the Board acted reasonably in dismissing Novick's case.

1. *The Ninth Circuit's* Thompson *Factors Do Not Directly Apply to This Case and, in any Event, Under the* Thompson *Factors the Board Appropriately Exercised Its Discretion*

Novick cites the five-factor test, derived from *Thompson v. Hous. Auth.*, 782 F.2d 829, 832 (9th Cir. 1986), that the Ninth Circuit applies when reviewing a district court's dismissal for failure to comply with a court order:

> (1) the public's interest in expeditious resolution of litigation,
> (2) the court's need to manage its docket,
> (3) the risk of prejudice to the other party,
> (4) the public policy favoring the disposition of cases on their merits, and
> (5) the availability of less drastic sanctions.

This Court has not applied the five-factor *Thompson* test to ARB dismissals. However, even if it were the applicable standard, Novick has not established that the Board has "committed a clear error of judgment" required to disturb the Board's ruling. *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976) (internal quotation marks omitted). Although beneficial to the reviewing court, a district court "is not required to make specific findings on each of the essential factors." *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir.1994). If a district court does not, the Ninth Circuit reviews the record independently to determine whether the district court abused its discretion. *Id.*

The first two factors, the public interest in expeditious resolution of litigation and the court's need to manage its docket, are often reviewed in conjunction, with deference given to the district court, "since it knows when its docket may become unmanageable." *See In re Eisen*, 31 F.3d at 1452. Like a district court, the Board is "best situated to decide when delay in a particular case interferes with docket management and the public interest." *See Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984) (district court's dismissal of a case with a "not particularly lengthy" four-week delay was not abuse of discretion). The Board's decision indicates that, had it been applying the *Thompson* factors explicitly, it would have determined the first two factors weighed in favor of dismissing Novick's appeal. ER-29. Such a determination is well within the Board's reasonable exercise of its discretion.

As for the third *Thompson* factor, Novick argues that the ARB made no finding of prejudice to Morgan Stanley. Pet. Br. at 25. Notably, this Court has upheld dismissal of district court cases even where there is "no evidence of prejudice to the defendants." *Ash*, 739 F.2d at 496. The extent of prejudice to the defendant becomes important where a plaintiff has "an explanation that excuses or justifies his failure." *Nealey v. Transportacion Maritima Mexicana*, 662 F.2d 1275, 1280 (9th Cir. 1980). Novick did not present such an explanation to the Board, as it concluded in its order dismissing his appeal. ER-30. Moreover, Novick does not rebut the presumption of

prejudice that attaches to unreasonable delay, *see In re Eisen*, 31 F.3d at 1453, claiming only that any prejudice Morgan Stanley might incur is offset by the financial value of the deferred compensation at issue in Novick's underlying anti-retaliation complaint. Pet. Br. at 25. In fact, delay in filing an opening brief "is a particularly serious failure to prosecute because it affects all the defendant's preparations." *Cf. Anderson*, 542 F.2d at 525. For these reasons, the fact that the ARB did not explicitly find prejudice to the appellees does not support reversal for abuse of discretion.

Novick also cites the fourth *Thompson* factor, the public policy of deciding cases on their merits. This factor does not require extensive consideration, as it is a "general matter[] of policy" that always weighs in the opposite direction from the public's interest in expeditious resolution of litigation. *Garcia v. City of Orange*, 928 F.2d 1136 (9th Cir. 1991).

Finally, Novick argues that the Board did not consider less drastic sanctions. Pet. Br. at 26–27. But the ARB "need not exhaust every sanction short of dismissal," it must only "explore possible and meaningful alternatives," including warning the plaintiff and establishing a schedule for compliance. *See Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986). Here, the Board gave Novick an opportunity to show cause and explicitly warned him that failure to comply with the briefing order could lead to dismissal. ER-82–83; *see Malone v. U.S. Postal Serv.*, 833 F.2d 128,

132 (9th Cir. 1987) ("warning a plaintiff that failure to obey a court order will result in dismissal can suffice to meet the 'consideration of alternatives' requirement").

Novick's assertion that he was not warned that his appeal could be dismissed, Pet. Br. at 17, is flatly contradicted by the Board's show cause order, which states that the Board "has authority to issue sanctions, including dismissal, for a party's failure to comply with the Board's orders and briefing requirements." ER-82. The Board did warn Novick that failure to comply with the briefing order could result in dismissal and gave him the opportunity to present a compelling explanation for why his failure to comply should be excused. *See Malone*, 833 F.2d at 132 n.1 ("providing plaintiff with a second or third chance following a procedural default is a lenient sanction, which, when met with further default, may justify imposition of the ultimate sanction of dismissal with prejudice") (internal quotation marks omitted).

None of the cases Novick cites in which district court dismissals were reversed for failure to consider lesser sanctions require reversal here. Pet. Br. at 26–27 (citing *Raiford v. Pounds* 640 F.2d 944 (9th Cir. 1981), *Tolbert v. Leighton*, 623 F.2d 585 (9th Cir. 1980), and *Indus. Bldg. Materials, Inc. v. Interchem. Corp.*, 437 F.2d 1339 (9th Cir. 1970)). These cases involved, respectively, a plaintiff's failure to file a pretrial order, to attend a single pretrial conference, and to comply with discovery orders. *Raiford*, 640 F.2d at 945; *Tolbert*, 623 F.2d at 586; *Indus. Bldg. Materials, Inc.*, 437 F.2d at 1338. In each case, the Court concluded that dismissal was an abuse of

discretion where the district court did not consider alternative sanctions of lesser severity. *Raiford*, 640 F.2d at 945; *Tolbert*, 623 F.2d at 586; *Indus. Bldg. Materials, Inc.*, 437 F.2d at 1338. Moreover, in *Tolbert*, the district court also failed to warn counsel of the risk of dismissal. 623 F.2d at 586–87.

Here, given Novick's failure to file an opening brief, a show cause order was the only lesser sanction reasonably available to the Board. At such an early stage in the appeal, there were no costs or fees to assign, no claims of defenses to preclude, and no counsel to sanction. *See Malone*, 833 F.2d at 132 n.1. Any formal reprimands or fines the Board might have authority to issue would seem inapposite where the petitioner had yet to file an opening brief. The Board's decision to dismiss the case after imposing the lesser sanction of a warning was not an abuse of discretion.

2. Other Ninth Circuit Case Law Is Inapposite

In addition to the five-factor *Thompson* test, Novick cites other caselaw governing the Ninth Circuit review of a district court's dismissal of cases for failure to prosecute. Like the *Thompson* test, this caselaw has not been applied to the review of an ARB or comparable administrative order, but even if it were applicable, the facts of this case would still not merit reversal.

Novick cites Ninth Circuit caselaw that delay must be unreasonable in order for a district court to dismiss a case for failure to prosecute, *In re Eisen*, 31 F.3d at 1451, and argues that the Board did not find his delay was unreasonable, Pet. Br. at

18. However, a plaintiff in district court "has the ultimate burden of persuasion" as to the excuse for his own delay." *Nealey*, 662 F.2d at 1280. A reviewing court "will give deference to the district court to decide what is unreasonable." *Id.* Here, the Board dismissed Novick's appeal after he filed his opening brief a month late and failed to offer a compelling explanation for the delay. ER-28–30. This Circuit has upheld dismissal of district court cases with comparable delays. *See Ash*, 739 F.2d at 496 (district court's dismissal of a case with a "not particularly lengthy" four-week delay was not abuse of discretion). Novick also did not provide a particularly compelling excuse for his delay, simply asserting that it was "relatively minor" and that he needed more time than he anticipated. ER-73–74.

Novick also cites caselaw on "excusable neglect" as grounds for relief for a final judgment under Fed. R. Civ. P. 60(b)(1) or in bankruptcy court. Pet. Br. at 22 (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 394 (1993)). Under the *Pioneer* test, excusable neglect depends on four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings (3) the reason for the delay; and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395. Factors one through three are substantially similar to the factors in the *Thompson* test and the unreasonable delay analysis, discussed previously in Sec. I.A. Novick argues that because the ARB did not show that he failed to act in good faith, its decision should be reversed. Pet. Br. at 17, 26.

In making this argument, Novick ignores that the ARB is not required to find bad faith to dismiss a case for failure to file an opening brief. *See Durham v. Dep't of Lab.*, 515 F. App'x 382, 383 (6th Cir. 2013) (rejecting a standard of review requiring bad faith for an ARB dismissal for failure to prosecute); *Ellison v. Washington Demilitarization Co.*, No. 08-119, 2009 WL 891353 at *5 (ARB Mar. 16, 2009), *aff'd Ellison v. U.S. Dep't of Lab.*, 384 F. App'x 860 (11th Cir. 2010) (bad faith is not a prerequisite where a party has notice that the ARB is contemplating dismissal).

As discussed above, the Board found that Novick did not provide good cause to excuse his failure to comply with its briefing schedule. ER-30. Dismissing Novick's appeal only after Novick demonstrated his awareness with the process of requesting an extension, still failed to meet the deadline on extension, and received a warning that the Board might dismiss his case – was not an abuse of the Board's discretion.

II. The ARB Acted Within Its Discretion in Denying Novick's Motion for Reconsideration

Reconsideration of an ARB decision is appropriate only in "limited circumstances." *Getman v. Sw. Sec., Inc.*, No. 04-059, 2006 WL 3246901, at *1 (ARB Mar. 7, 2006). Specifically, the Board will not grant a motion for reconsideration unless the movant demonstrates either: (i) material differences in fact or law from that presented to the Board of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the Board's

decision, (iii) a change in the law after the Board's decision, or (iv) failure to consider material facts presented to the Board before its decision. *Wimer-Gonzales v. J.C. Penney Corp.*, No. 10-148, 2012 WL 694503, at *2 (ARB Feb. 7, 2012); *Kirk v. Rooney Trucking Inc.*, No. 14-035, 2016 WL 1389926, at *2 (Mar. 24, 2016). This four-prong inquiry mirrors the principles employed by federal courts. *Getman*, 2006 WL 3246901 at *1.

Arguments that the Board "clearly rejected . . . generally do not justify reconsideration." *Henrich v*, 2007 WL 1578490, at *8; *see also Brown v. Sec'y of Lab.*, 739 F. App'x 978, 980 (11th Cir. 2018) (affirming ARB denial of motion for reconsideration that "was simply an attempt to relitigate" the petitioner's position). In ruling on a motion for reconsideration, it is unnecessary for the Board to address any such arguments that "merely reiterate points raised in [the] original appeal to the Board and which the Board rejected." *Getman*, 2006 WL 3246901 at *1.

The Board correctly concluded that most of Novick's arguments simply rehashed those that were addressed in the Board's July 16 order and therefore did not merit reconsideration. ER-8. Novick did not argue in his motion for reconsideration that there had been a change in law or new material facts after the Board's decision, nor did Novick identify any material difference in fact or law from that presented to the Board of which Novick could not have known through reasonable diligence. *See Wimer-Gonzales*, 2012 WL 694503 at *2. Novick attempted to argue

that the Board allegedly failed to consider that Novick was not warned that his appeal would be "dismissed for failing to request another extension or for failing to seek leave from the Board to file a late brief." ER-20–21, 25. However, the Board's July 16 order explicitly considered the warnings Novick received before his appeal was dismissed. *Id.* at 28–29. Therefore, the Board correctly concluded that that Novick failed to raise any of the four grounds for reconsideration. The Board's denial of reconsideration was squarely in line with Board precedent and was not an abuse of discretion.

III. Novick's Merits Arguments Are Improper

When reviewing an appeal of a dismissal for failure to prosecute, the underlying merits of the case "are not properly before" the appellate court. *Spychala v. Rushen*, 872 F.2d 430 (9th Cir. 1989).

In his appeal to this Court, Novick raises several issues that are not germane to the ARB's dismissal of his case: that the ALJ erred in denying remand to OSHA, that OSHA unlawfully withheld findings in other unrelated SOX whistleblower investigations, that the arbitration that was the basis for the ALJ's dismissal of his complaint violated Novick's constitutional right to due process, and that a District Court judge enforcing the arbitration order was biased. Pet. Br. at 13, 29–35. Novick also argues that the ALJ erred in denying remand. Pet. Br. at 13. However, this Court's review is limited to the ARB's dismissal of Novick's appeal for failure to

timely prosecute. If this Court were to find that the ARB abused its discretion by dismissing Novick's appeal, the proper remedy would be to remand to the Board for consideration of the merits. At this stage, however, Novick's arguments about the merits of his anti-retaliation complaint or the actions of other factfinders are improper.

CONCLUSION

This Court should affirm the ARB and deny Novick's petition for review.

Respectfully submitted,

Date: November 15, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Ninth Circuit R. 32(a) because, excluding the parts of the brief exempted by Fed R. App. P. 32(f), this brief contains 6,017 words.

This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type-style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word 365 using plain roman style, with exceptions for case names and emphasis, and using Times New Roman 14-point font, which is a proportionately spaced font, including serifs.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 15, 2022. Service of the foregoing will be accomplished by the CM/ECF system for all participants in the case.

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