

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



IN THE MATTER OF:

RICO MITCHELL,

ARB CASE NO. 2025-0010

COMPLAINANT,

ALJ CASE NO. 2024-STA-00020

ALJ JOHN M. HERKE

v.

DATE: December 17, 2024

MANNING TRUCKING, INC.,

RESPONDENT.

Appearances:

**Before WARREN, Acting Chief Administrative Appeals Judge, and
THOMPSON, Administrative Appeals Judge**

ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW

PER CURIAM:

Complainant Rico Mitchell filed a complaint with the United States Department of Labor's (Department's) Occupational Safety and Health Administration (OSHA) on or about March 28, 2022, alleging that Respondent Manning Trucking, Inc., unlawfully retaliated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA).¹ OSHA dismissed the complaint on November 9, 2023, and Complainant requested a hearing with the Department's Office of Administrative Law Judges (OALJ). OALJ docketed the case on November 27, 2023, and assigned it to an Administrative Law Judge (ALJ) on December 5, 2023.

¹ 49 U.S.C. § 31105; 29 C.F.R. Part 1978 (2024).

On September 13, 2024, Complainant filed a Motion to Recuse (Motion) with the ALJ, asserting that the ALJ had “no intentions of fairly adjudicating this case,” and requesting that the ALJ recuse themselves from the proceedings. The ALJ gave Complainant the opportunity to supplement the Motion with affidavits, declarations, or other documents supporting his allegations, and conducted a hearing on October 24, 2024. The ALJ then issued a Ruling on Complainant’s Motion to Recuse ALJ (Ruling) on October 28, 2024, denying Complainant’s request for recusal. Complainant’s STAA claim remains pending with the ALJ.

On November 19, 2024, Complainant filed a petition for review of the ALJ’s Ruling with the Administrative Review Board (Board or ARB). Because the ALJ has not yet issued a decision fully disposing of all claims in Complainant’s complaint, the petition was for interlocutory review (i.e., review of a non-final decision).²

On November 27, 2024, the Board issued an Order to Show Cause, which ordered Complainant to show cause why the Board should not dismiss the interlocutory appeal. The Board also cautioned that a failure to timely respond within fourteen (14) calendar days may result in the dismissal of the appeal without further notice.

The Board denies Complainant’s petition for interlocutory review for the following reasons.

1. No Response to Order to Show Cause

Complainant did not file a response to the Order to Show Cause. The Board 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.³ Pursuant to this authority, the Board may dismiss an appeal in a case in which the petitioner

² *Gloss v. Tata Chems. N. Am.*, ARB No. 2022-0054, ALJ No. 2020-CAA-00008, slip op. at 2 (ARB Sept. 20, 2022) (citation omitted).

³ *Lewman v. Ken Brick Masonry Supply*, ARB No. 2007-0015, ALJ No. 2006-STA-00018, slip op. at 3 (ARB Oct. 31, 2007) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)).

fails to adequately explain their failure to comply with the Board's orders, including the Order to Show Cause.⁴

The Board gave Complainant the opportunity to explain why the Board should not dismiss the interlocutory appeal, and explicitly warned that failure to do so could result in dismissal of this appeal. Complainant did not file a response. Given Complainant's failure to respond to, and comply with, the Board's order, we deny the petition for interlocutory review.

2. Insufficient Grounds for Interlocutory Review of the ALJ's Ruling

In the alternative, Complainant has failed to meet the requirements for interlocutory review of the ALJ's Ruling.

The Board may consider and dispose of interlocutory appeals "in exceptional circumstances, provided such review is not prohibited by statute."⁵ The Board generally does not accept petitions for review of non-final orders issued by an ALJ. 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 in stages before the final order.⁶

When a party seeks interlocutory review of an ALJ's non-final order, the Board has elected to look to the interlocutory review procedures used by federal courts, including requesting the trial court certify issues involving a controlling question of law for immediate appeal in accordance with 28 U.S.C. § 1292(b).⁷ It does not appear that Complainant requested or received ALJ certification under 28 U.S.C. § 1292(b) in this case.

⁴ *Boch v. J.P. Morgan Secs.*, ARB No. 2022-0029, ALJ Nos. 2020-CFP-00002, 2020-SOX-00004, slip op. at 2 (ARB June 15, 2022) (citation omitted) (dismissing the appeal where the appealing party failed to respond to, and comply with, the Board's orders).

⁵ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

⁶ *Gunther v. Deltek, Inc.*, ARB Nos. 2012-0097, -0099, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012) (citations omitted).

⁷ *Kossen v. Asia Pac. Airlines*, ARB No. 2023-0041, ALJ No. 2023-AIR-00001, slip op. at 2-3 (ARB Aug. 22, 2023) (citations omitted).

If a party has failed to obtain ALJ certification, the Board may still consider reviewing an interlocutory order that meets the “collateral order” exception. The “collateral order” exception applies if the appealed decision 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: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment.⁹

Here, regardless of the results of an examination of the first two prongs of the “collateral order” exception test, we deny the appeal for its failure to establish the third element because the issue Complainant raises may be effectively reviewed on appeal from a final judgment. Complainant has not demonstrated that the ALJ’s Ruling on Complainant’s Motion to Recuse would be “effectively unreviewable on appeal” of a final judgment.¹⁰ Courts have routinely denied interlocutory appeals

⁸ *Gloss*, ARB No. 2022-0054, slip op. at 3 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

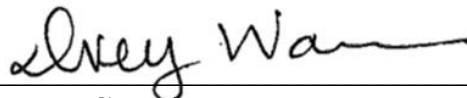
⁹ *Kossen*, ARB No. 2023-0041, slip op. at 3.

¹⁰ *See Priddle v. United Airlines, Inc.*, ARB No. 2021-0064, ALJ No. 2020-AIR-00013, slip op. at 8 (ARB Jan. 26, 2022) (Decision and Order Denying Interlocutory Appeal) (“To be effectively unreviewable, the right sought to be protected by the interlocutory appeal must be, for all practical and legal purposes, destroyed if it were not vindicated prior to final judgment.”) (internal quotations omitted).

regarding motions to recuse.¹¹ Accordingly, Complainant's interlocutory appeal does not meet the "collateral order" exception.

For the foregoing reasons, Complainant's petition for interlocutory review is **DENIED**.¹²

SO ORDERED.



IVEY S. WARREN
Acting Chief Administrative Appeals Judge



ANGELA W. THOMPSON
Administrative Appeals Judge

¹¹ See *Thompson v. Comm'r of Internal Revenue*, 742 F. App'x 316, 317 (9th Cir. 2018) (internal quotations omitted) (citing *In re Horton*, 621 F.2d 968, 970 (9th Cir. 1980)) ("We have held that a judge's decision not to disqualify his or her self cannot be appealed until a direct appeal is taken from a final decision adverse to the moving party.").

¹² In any appeal of this Order Denying Petition for Interlocutory Review that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the ARB.