

**U.S. Department of Labor**

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



**IN THE MATTER OF:**

**ANDREW WYDERKA,**

**ARB CASE NO. 2025-0033**

**COMPLAINANT,**

**ALJ CASE NO. 2023-PSI-00001**

**ALJ WILLOW EDEN FORT**

**v.**

**DATE: February 24, 2025**

**ENERGY TRANSFER d/b/a SUNOCO  
LOGISTICS,**

**RESPONDENT.**

**Before WARREN, Administrative Appeals Judge, and ROLFE,  
Administrative Appeals Judge**

**DECISION AND ORDER DENYING INTERLOCUTORY APPEAL**

**PER CURIAM:**

This matter arises under the Pipeline Safety Improvement Act of 2002 (PSIA) and its implementing regulations.<sup>1</sup> While this case was pending before Administrative Law Judge (ALJ) Willow Eden Fort, Energy Transfer (Respondent) filed a Motion to Dismiss, alleging that the ALJ lacked subject-matter jurisdiction under *SEC v. Jarkesy*.<sup>2</sup> On January 15, 2025, the ALJ denied Respondent's Motion to Dismiss. On January 31, 2025, Respondent filed a Petition for Interlocutory Review requesting that the Administrative Review Board (Board) review the ALJ's denial of Respondent's Motion to Dismiss. On February 11, 2025, the ALJ certified, at Respondent's request, the "issue of whether Respondent is entitled to a jury trial

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<sup>1</sup> 49 U.S.C. § 60129; 29 C.F.R. Part 1981 (2024).

<sup>2</sup> 603 U.S. 109 (2024).

under the Seventh Amendment.”<sup>3</sup> Subsequently Respondent moved to amend its Petition for Interlocutory Review.

Pursuant to the authority delegated by the Secretary of Labor, the Board has “the discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute.”<sup>4</sup> When determining whether to accept an interlocutory appeal, the Board follows the procedures described in 28 U.S.C. § 1292(b).<sup>5</sup> Consideration of requests for interlocutory review is essentially a two-step process: (1) the ALJ must certify that the interlocutory order “involves 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,” and (2) when those elements are met, the Board then exercises its unfettered discretion in deciding whether to accept or reject the petition for review.<sup>6</sup>

Respondent contends that, as required for interlocutory review, there is a controlling question of law as to which there is substantial ground for difference of opinion because “jurisdiction is always a controlling question of law.”<sup>7</sup> Even if we were to accept this contention, the Board’s authority to hear interlocutory appeals remains entirely discretionary.<sup>8</sup> And even assuming -- without deciding -- Respondent’s appeal meets the § 1292(b) criteria, the nature of several of Respondent’s arguments compels us not to exercise our discretion to suspend the proceedings below and accept the appeal at this time.

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<sup>3</sup> Order Granting Respondent’s Expedited Motion for Order Permitting Appeal of Interlocutory Order at 4.

<sup>4</sup> 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).

<sup>5</sup> *Berg v. Nicholas Servs., LLC*, ARB No. 2025-0027, ALJ No. 2023-AIR-00012, slip op. at 2 (ARB Jan. 31, 2025) (citing *Kim v. SK Hynix Memory Sols.*, ARB No. 2020-0020, ALJ No. 2019-SOX-00012, slip op. at 3-4 (ARB Jan. 28, 2020)).

<sup>6</sup> *See Fagan v. Dep’t of the Navy*, ARB No. 2023-0006, ALJ No. 2021-CER-00001, slip op. at 6 (ARB Apr. 6, 2023).

<sup>7</sup> Motion for Leave to Amend Respondent’s Petition for Interlocutory Review at 2.

<sup>8</sup> *See, e.g., Berg*, ARB No. 2025-0027, slip op. at 3 (recognizing that that the Board exercises “unfettered discretion in deciding whether to accept or reject” a petition for interlocutory review.); *Fagan*, ARB No. 2023-0006, slip op. at 6 (recognizing that the Board’s decision of whether to exercise its discretion to hear an interlocutory appeal is a prudential matter).

Before the ALJ, Respondent challenged the facial constitutionality of both the PSIA and the Department's regulations governing whistleblower proceedings. Respondent, for example, argued the PSIA itself is unconstitutional because it allows complainants, but not respondents, to kickout to federal district court in violation of the nondelegation doctrine.<sup>9</sup> Respondent likewise argued Complainant's claims are legal in nature and involve private rights, such that the Seventh Amendment and Article III of the Constitution require them to be tried in district court before a jury -- and the Department's regulations do not include a right to a jury trial.<sup>10</sup>

Even if we ultimately agreed with Respondents -- *although we categorically do not reach the merits of Respondent's arguments in denying this petition at this time* -- the Board would not appear to have the authority provide a remedy for these challenges. In a recent decision, we clarified that although the Board may consider as applied constitutional challenges, the Board "may not [ ] consider facial challenges to the 'legality of a regulatory provision or the constitutionality of a statutory provision[.]'"<sup>11</sup> Indeed, the Board has long held it does not have the power to pass on the constitutional validity of the statutes and regulations it administers.<sup>12</sup> And the plain language of the Secretary's delegation of authority confirms as much: "[t]he Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor[.]"<sup>13</sup>

This limitation on the Board's authority to pass on the facial constitutionality of the statutes and regulations it administers, and the broader prohibition against ruling on the validity of the Department's appropriately promulgated regulations,

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<sup>9</sup> Motion to Dismiss for Lack of Subject-Matter Jurisdiction at 15-16.

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Next Level Sec. Serv., LLC*, ARB No. 2024-0028, ALJ No. 2021-FLS-00009, slip op. at 6 n.27 (ARB July 31, 2024).

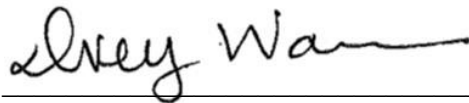
<sup>12</sup> *See, e.g., Minthorne v. Virginia*, ARB No. 2009-0098, ALJ Nos. 2009-CAA-00004, -00006, slip op. at 8-9 (ARB July 19, 2011) (observing that "it would be inappropriate for the ARB to pass upon the constitutionality of the [Clean Air Act]. Thus we will presume the constitutionality of the act[.]"); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Overdevest Nurseries, L.P.*, ARB No. 2016-0027, ALJ No. 2015-TAE-00008, slip op. at 15 (ARB Mar. 15, 2018) (recognizing that a challenge to the validity of a regulation "is not properly before the Board.").

<sup>13</sup> 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).

persuades us this is not the truly exceptional case that warrants ignoring our general practice not to accept piecemeal appeals and to reserve judgment on these issues until (and if) they reach us through the normal course of litigation.<sup>14</sup>

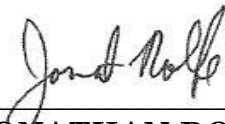
Accordingly, we **GRANT** Respondent's Motion for Leave to Amend and **DENY** Respondent's Petition for Interlocutory Review.

**SO ORDERED.**



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**IVEY S. WARREN**  
**Administrative Appeals Judge**



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**JONATHAN ROLFE**  
**Administrative Appeals Judge**

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<sup>14</sup> See *Gunther v. Deltek, Inc.*, ARB Nos. 2012-0097, -0099, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012) (“[T]he 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.”) (citations omitted).