



In the Matter of:

MARK JOHNSON,

ARB CASE NO. 2019-0024

COMPLAINANT,

ALJ CASE NO. 2018-STA-00028

v.

DATE: July 22, 2020

FEDEX GROUND PACKAGE
SYSTEM, INC., OSD TRANSPORT,
INC., and STEVE OLSON,

RESPONDENTS.

Appearances:

For the Complainant:

Peter L. Lavoie Esq. and Paul O. Taylor, Esq.; *Truckers Justice Center*;
Edina, Minnesota

For Respondent FedEx Ground Package System, Inc.:

Travis W. Vance, Esq.; *Fisher Phillips LLP*; Charlotte, North Carolina

DECISION AND ORDER DISMISSING INTERLOCUTORY APPEAL

This case arises under the Surface Transportation Assistance Act of 1982 (STAA).¹ Complainant Mark Johnson alleges that Respondents FedEx Ground Package System, Inc. (FedEx), OSD Transport, Inc. (OSD), and Steve Olson (Olson) violated the STAA by terminating his employment after he refused to drive a commercial vehicle in dangerous weather conditions. The complaint was referred to a United States Department of Labor Administrative Law Judge (ALJ).

On January 7, 2019, the ALJ issued a Decision and Order (D. & O.) granting FedEx's Motion for Summary Decision and dismissing FedEx from the action. Although the D. & O. dismissed Complainant's claims against FedEx, the Motion

¹ 49 U.S.C. § 31105(a) (2007).

for Summary Decision did not concern, and the D. & O. did not address, Complainant's claims against OSD or Olson, which remain pending before the ALJ.²

On January 18, 2019, Complainant filed a Petition for Review with the Administrative Review Board (ARB or Board) seeking review of the D. & O. But, because the D. & O. did not dismiss all parties and all claims, Complainant's petition is for interlocutory review.³

The Secretary of Labor and the Board have repeatedly held that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals.⁴ And, although the Secretary has given the Board discretion to consider interlocutory appeals, such discretion may only be exercised in "exceptional circumstances."⁵ When a party seeks review of an ALJ's interlocutory order, the Board has elected to look to the interlocutory review procedure provided in 28 U.S.C. § 1292(b), which requires certification from the deciding court before the interlocutory appeal may be heard.⁶ Absent certification, the ARB may also consider interlocutory appeals under the "collateral order" exception to finality.⁷

² On January 8, 2019, one day after issuing the D. & O., the ALJ ordered that the hearing be continued. Although the order indicated that the hearing would be rescheduled for a later date, the ALJ has not yet rescheduled the hearing.

³ *Turin v. AmTrust Fin. Servs., Inc.*, ARB No. 2017-0004, ALJ No. 2010-SOX-00018, slip op. at 2 (ARB Apr. 20, 2017) (citing *Elliott v. Archdiocese of New York*, 682 F.3d 213, 219 (3d Cir. 2012) ("Generally, an order which terminates fewer than all claims pending in an action or claims against fewer than all the parties to an action does not constitute a 'final' order for purposes of 28 U.S.C. § 1291.")); see also Fed. R. Civ. P. 54(b).

⁴ *Kim v. SK Hynix Memory Solutions*, ARB No. 2020-0020, ALJ No. 2019-SOX-00012, slip op. at 3 (ARB Jan. 28, 2020) (citing *Turin*, ARB No. 17-0004, slip op. at 3).

⁵ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186, § 5(b)(69) (Mar. 6, 2020).

⁶ *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2015); *Plumley v. Fed. Bureau of Prisons*, 1986-CAA-00006, slip op. at 2-3 (Sec'y Apr. 29, 1987) (declining to take an interlocutory appeal because the ALJ had not certified the question of law presented).

⁷ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Turin*, ARB No. 17-0004, slip op. at 3. The collateral order exception permits review of an interlocutory order where 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." *Cohen*, 337 U.S. at 546.

In light of the interlocutory nature of Complainant's appeal, the Board ordered Complainant to show cause why it should not dismiss his appeal.⁸ Complainant filed a response on June 3, 2020, agreeing that the appeal should be dismissed as interlocutory, and indicating that his Petition for Review was filed only in an abundance of caution in an attempt to preserve his appeal rights.

Having been presented with no exceptional circumstances which persuade the Board to consider Complainant's interlocutory appeal, and in light of Complainant's agreement that the appeal should be dismissed, the Board hereby **DISMISSES** Complainant's interlocutory appeal.

SO ORDERED.

FOR THE ADMINISTRATIVE REVIEW BOARD:

A large black rectangular redaction box covers the signature of the General Counsel.

Aubrey Gordon
General Counsel

NOTE: Questions regarding any case pending before the Board should be directed to the Board's staff. Telephone: (202) 693-6200; Facsimile (202) 693-6220

⁸ Order to Show Cause, issued May 5, 2020.