



In the Matter of:

DARRYL THOMPSON,

ARB CASE NO. 06-061

COMPLAINANT,

ALJ CASE NO. 05-AIR-32

v.

DATE: June 30, 2006

BAA INDIANAPOLIS, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:

Kim F. Ebert, Esq. and Kristin B. Keltner, Esq., *Ogletree, Deakins, Nash, Smoak & Stuart, P.C.*

**FINAL DECISION AND ORDER DISMISSING
INTERLOCUTORY APPEAL**

BACKGROUND

The Complainant, Darryl Thompson, has filed a complaint alleging that the Respondent, BAA Indianapolis LLC, has retaliated against him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ The complaint was referred to a Department of Labor Administrative Law Judge (ALJ) for hearing and initial administrative adjudication.

Under contract with the Indianapolis Airport Authority, BAA's primary functions include maintaining required Federal Aviation Authority certifications for six airport

¹ 49 U.S.C.A. § 42121(a) (West 2005 Supp.).

facilities that the Indianapolis Airport Authority owns, increasing terminal revenue through management of the airport's parking and concessions, and providing administrative support. On November 16, 2005, BAA filed a Motion for Summary Judgment with the ALJ alleging that it is not subject to AIR 21's whistleblower protection provisions. In particular, BAA argued that it is not an air carrier and does not contract or subcontract with any air carrier to provide safety sensitive functions.²

The ALJ denied BAA's motion. The ALJ concluded:

I find that BAA, as an entity charged with maintaining the safety and security of the landing areas, indirectly provides air transportation, and thus falls squarely within the definition of "air carrier" in AIR 21. . . . [W]hat [legislative] history there is clearly evinces the intent of Congress to insure that persons who are in a position to observe safety violations or concerns are free to report those concerns to the appropriate authorities without fear of jeopardizing their livelihood.[³]

In response, BAA filed a Motion to Certify Interlocutory Order for Appeal and to Stay Proceedings During Pendency of Appeal. The ALJ granted BAA's Motion and BAA

² Air 21 provides in pertinent part:

(a) Discrimination Against Airline Employees.--No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)[engaged in protected activity].

49 U.S.C.A. § 42121(a) (West 2005 Supp.). AIR 21 regulations define "air carrier" and "contractor:"

Air carrier means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

Contractor means a company that performs safety-sensitive functions by contract for an air carrier.

29 C.F.R. § 1979.101 (2005).

³ Order Denying Motion for Summary Judgment and Scheduling Hearing (O. D. M.) at 3.

filed a petition for interlocutory review with the Administrative Review Board.⁴ The Board issued an order on February 17, 2006, permitting Thompson to respond to BAA's motion but he chose not to respond. Accordingly, we must decide whether to accept BAA's appeal. Because BAA has failed to provide a convincing reason to depart from the Board's well-established policy against accepting piecemeal appeals, we will not accept its interlocutory appeal.

DISCUSSION

The Secretary and the Board have held many times that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals.⁵ In *Greene v. EPA Chief Susan Biro, United States Env'tl. Prot. Agency*,⁶ the Board examined two principles underlying the Board's policy against accepting appeals from interlocutory orders. First, the Board addressed an administrative law judge's authority to request the Board to review an interlocutory order that turns on an unsettled question of law. The Board explained that an administrative law judge may resort to procedural rules applicable to the Federal district courts in circumstances that the Part 18 Rules of Practice and Procedure for Department of Labor Administrative Law Judges do not specifically address.⁷ Under limited circumstances, federal district court judges are authorized to certify questions for review by Federal appellate courts at an interlocutory stage of a civil proceeding.⁸ An administrative law judge's certification of such a question is a relevant,

⁴ The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under AIR 21 to the Board. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Secretary's delegated authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." *Id.* at 64,273.

⁵ See e.g., *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ 03-SOX-15 (ARB May 13, 2004); *Hibler v. Exelon Generation Co., LLC*, ARB No. 03-106, ALJ No. 2003-ERA-9 (Feb. 26, 2004); *Amato v. Assured Transp. and Delivery, Inc.*, ARB No. 98-167, ALJ No. 98-TSC-6 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.*, ARB No. 99-097; ALJ No. 99-ERA-17 (ARB Sept. 16, 1999); *Carter v. B & W Nuclear Technologies, Inc.*, ALJ No. 94- ERA-13 (Sec'y Sept. 28, 1994).

⁶ ARB No. 02-050, ALJ No. 02-SWD-1 (Sept. 18, 2002).

⁷ *Greene*, slip op. at 2-3 (citing *Plumley v. Fed. Bureau of Prisons*, No. 86-CAA-6 (Sec'y Apr. 29, 1987)). See also 29 C.F.R. §§ 18.1(a), 18.29(a).

⁸ 28 U.S.C.A. § 1292(b) (West 1993). See *Plumley*, slip op. at 2.

but not the determinative, factor in the Board's decision whether to accept the interlocutory appeal for review.⁹

The second principle that the Board discussed in *Greene* is the final decision requirement that applies to the Federal appellate courts.¹⁰ The Board's general rule against accepting appeals from interlocutory orders parallels the standard that federal courts have developed in interpreting section 1291. Similar to the federal appellate courts, the Board applies the finality requirement in the interest of "combin[ing] in one review all stages of the proceeding that effectively may be reviewed and corrected if and when" the administrative law judge issues a decision on the merits of the case.¹¹ The Board also applies the collateral order exception to finality and will hear appeals from orders rendered in the course of the proceeding before the administrative law judge that meet certain criteria. Specifically, the collateral order exception permits the review of orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment."¹²

Threshold jurisdictional issue or issue of SOX coverage

In determining whether to accept an interlocutory appeal, we strictly construe the collateral appeal exception to avoid the serious "hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation."¹³

In support of its petition for review, BAA argues that its appeal presents a "threshold jurisdictional issue"¹⁴ that is "particularly well-suited for interlocutory appeal."¹⁵ BAA is incorrect. BAA seeks interlocutory review of the issue whether BAA

⁹ See *Ford v. Northwest Airlines*, ARB No. 03-014, ALJ No. 02-AIR-21, slip op. at 2-3 (ARB Jan. 24, 2003); *Greene*, slip op. at 2-3.

¹⁰ See 28 U.S.C.A. § 1291 (West 2001).

¹¹ See *Greene*, slip op. at 4 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

¹² *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); see *Greene*, slip op. at 4.

¹³ *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 n.2 (5th Cir. 1980), quoting *Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1094 (5th Cir. 1977).

¹⁴ Respondent BAA Indianapolis, LLC's Petition to the Administrative Review Board for Permission to Appeal (Pet.) at 2.

¹⁵ *Id.* at 8.

is an “air carrier or contractor or subcontractor of an air carrier.”¹⁶ In asserting that this is a threshold jurisdictional issue, BAA has confused the Labor Department’s subject matter jurisdiction over a whistleblower complaint with the wholly separate question whether BAA is a covered employer under AIR 21.¹⁷ As we recognized in *Sasse*, “A court is said to have jurisdiction, in the sense that its erroneous action is voidable only, not void, when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court’s action is not obviously frivolous.”¹⁸ Moreover,

[j]urisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.[¹⁹]

By filing a complaint alleging a violation of AIR 21’s whistleblower protection provisions, Thompson properly invoked the Department of Labor’s jurisdiction to adjudicate the complaint. Furthermore, BAA does not contend that Thompson’s arguments are frivolous or without color or merit. In fact, BAA admitted that “reasonable minds could substantially differ as to whether the definition of ‘air carrier’ in 49 U.S.C. § 40102(2) captures airports”²⁰ Thus, even if we should ultimately agree with BAA that it is not an “air carrier or contractor or subcontractor of an air carrier”

¹⁶ 49 U.S.C.A. § 42121(a).

¹⁷ Accord *Sasse v. United States Dep’t of Justice*, ARB No. 99-053, ALJ No. 98-CAA-7, slip op. at 3-4 (ARB Aug. 31, 2000). See also *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 1355-1359 (9th Cir. 1981); *OFCCP v. Keebler Co.*, ARB No. 97-127, ALJ No. 87-OFC-20, slip op. at 10 (ARB Dec. 21, 1999).

¹⁸ Slip op. at 3, citing *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 591 (D.C. Cir.).

¹⁹ *Bell v. Hood*, 327 U.S. 678, 682 (1946).

²⁰ Pet. at 10.

such finding would not divest the Department of Labor of jurisdiction to hear and decide the case.

Collateral order criterion – reviewability on appeal

BAA, in its attempt to meet the collateral order exception, argues that the issue whether it falls within SOX's coverage will be effectively unreviewable on appeal.²¹ Again, BAA is incorrect. Should Thompson prevail before the ALJ, the question whether BAA is a covered employer will be fully reviewable on appeal. Apparently recognizing this weakness in its argument, BAA turns this criterion on its head and argues not that the issue will be effectively unreviewable if it loses before the ALJ, but instead, that it will be effectively unreviewable if it wins. BAA argues, "if the opportunity to appeal is denied now and BAA later succeeds on the merits, **it will be satisfied with the result and will not exercise its opportunity to appeal that final order.**"²² Even assuming, as has BAA, that it would have standing to appeal the ALJ's recommended decision should it prevail,²³ choosing not to appeal an issue would not render that issue unreviewable. As the Supreme Court has repeatedly held, "the general rule [is] that an order is effectively unreviewable only where the order at issue involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial."²⁴ The assumption underlying BAA's argument, that BAA could appeal the ALJ's coverage decision should Thompson prevail and obtain a meaningful decision that would fully protect its rights, establishes that the legal and practical value of such rights will not be destroyed if not vindicated before trial. Thus, we practice appellate restraint to assure that if, and when, the coverage question at issue here is presented to the Board for disposition, it is presented in an appeal in which all parties have an incentive to fully and vigorously litigate it and the Board's disposition of the issue is necessary to the resolution of the case.

²¹ *Id.* at 13.

²² Pet. at 13 (emphasis added).

²³ Asking the Board to decide an issue that could not affect the outcome of the case would, in essence, be asking the Board for an advisory opinion, but the Board has a well-established policy against issuing such opinions. *See e.g., Agee v. ABF Freight Sys., Inc.*, ARB No. 04-182, ALJ No. 04-STA-40 (ARB Dec. 12, 2005); *Edmonds v. Tennessee Valley Auth.*, ARB No. 05-02, ALJ No. 04-CAA-15 (ARB July 22, 2005); *Migliore v. Rhode Island Dep't of Env't'l Mgmt.*, ARB No. 99-118; ALJ Nos. 98-SWD-3, 99-SWD-1, 2 (ARB July 11, 2003); *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10 (ARB Jan. 31, 2001).

²⁴ *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-499 (May 22, 1989)(internal quotations and citations omitted).

BAA has not satisfied the collateral order exception to the finality rule nor has it presented the Board with any reason to depart from its well-established precedent eschewing interlocutory review. Accordingly, in the interest of the efficient administration of justice and to forestall unnecessarily prolonged litigation, we **DENY** BAA's petition for interlocutory review and **REMAND** the case to the ALJ for further adjudication.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge