In the Matter of:

GREGORY A. FORD, **ARB CASE NO. 03-014**

COMPLAINANT, **ALJ CASE NO. 02-AIR-21**

v. **DATE: January 24, 2003**

NORTHWEST AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Lawrence R. Altman, Esq., ***Pillsbury Center, Minneapolis, Minnesota***

For the Respondent:
Timothy R. Thornton, Esq., ***Briggs and Morgan, Minneapolis, Minnesota***

FINAL ORDER DENYING INTERLOCUTORY APPEAL

Background

Petitioner Gregory A. Ford has filed a complaint against Respondent Northwest Airlines, Inc., alleging that Respondent 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), 49 U.S.C.A § 42121 (West 1997 & Supp. 2002). On October 18, 2002, a Department of Labor Administrative Law Judge (ALJ) issued an Order Granting Respondent's Motion to Dismiss Case in Part and Order of Remand to OSHA ("ALJ Order"). The ALJ partially granted Northwest's Motion to Dismiss, finding that Ford had failed to establish that his May 25, 1999 termination from employment, the alleged adverse action, occurred within ninety days of filing a complaint. However, the ALJ remanded the case to the Occupational Safety and Health Administration (OSHA) "to conduct an investigation into alleged retaliatory acts of blacklisting that occurred within ninety days of November 17, 1999; March 28, 2002; and

August 8, 2002, dates on which Ford allegedly filed complaints with the District Court for the Fourth Judicial District of Minnesota, OSHA and the ALJ, respectively." ALJ Order at 10.

Northwest Airlines filed a petition for review with the Administrative Review Board ("Board") challenging the ALJ's order of remand and arguing that the case should be dismissed in its entirety.

On December 3, 2002, the Board issued an order requiring Northwest to show cause why the Board should not dismiss its interlocutory appeal. The order permitted Ford to file a reply to Northwest's response to the order. Northwest filed its response on December 12, 2002, and Ford filed a reply on December 26, 2002. As explained below, we dismiss Northwest's interlocutory appeal.

Issue Presented

Whether the Board should dismiss Northwest's petition for review as an impermissible interlocutory appeal.

DISCUSSION

The litigation and administrative review procedures for whistleblower complaints under AIR 21 are found in 29 C.F.R. Part 1979. These rules do not provide for review of an ALJ's interlocutory order issued in the course of an administrative hearing. *Cf. Plumley v. Federal Bureau of Prisons*, 86-CAA-6, slip op. at 2. (Sec'y April 29, 1987) (discussing lack of interlocutory order review regulations under the environmental whistleblower provisions). In considering the appropriate procedure to follow in determining whether to entertain interlocutory appeals under the environmental whistleblower protection provisions,[1] the Secretary of Labor concluded that "[t]o the extent any situation is not provided for in [29 C.F.R. Part 24], the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18 . . . , and the Federal Rules of Civil Procedure apply." *Id.*

[1] The environmental whistleblower protection provisions are found in: the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A § 9610 (West 1995); the Federal Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act, 42 U.S.C.A. § 300(j)-9(i) (West 1991); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995); and the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998). *See also* Energy Reorganization Act, 42 U.S.C.A § 5851 (West 1995).

Similarly, under AIR 21 proceedings are conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, and in any situation not provided for or controlled by theses rules, by the Federal Rules of Civil Procedure. 29 C.F.R. § 1979.107(a), 29 C.F.R. § 18.1(a). In considering the proper procedure to be followed in cases in which a party requested interlocutory review, the Secretary in *Plumley* turned to 29 C.F.R. Part 18 for guidance and noted that 29 C.F.R. § 18.29(a) permits administrative law judges to "'take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts . . ..'" Slip op. at 2. The Secretary determined that in cases in which a party seeks interlocutory review of an administrative law judge's order, an appropriate action would be for the judge to follow the procedure established in 28 U.S.C.A. § 1292(b)(West 1993)[2] for certifying interlocutory questions for appeal from federal district courts to appellate courts. *Id.* In *Plumley*, the Secretary ultimately concluded that because no judge had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), "an appeal from an interlocutory order such as this may not be taken." (citations omitted). Given the substantial similarity between the environmental whistleblower and AIR 21 procedural regulations, we conclude that it is appropriate to apply the *Plumley* interlocutory review procedures to cases arising under AIR 21.

As Ford asserts, technically, the ALJ has not certified the interlocutory appeal in this case. Ford Reply at 1. Nevertheless, the ALJ did append to his decision a statement

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[2] This provision states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C.A. § 1292(b) (West 1993).

of the parties= appeal rights which indicated to the parties that if a petition for review was not timely filed with the Board, the ALJ=s decision would Abecome the final order of the Secretary." Thus, , in effect, the ALJ has certified the question for the Board=s consideration, and under the facts of this case, we will consider it to be so certified.[3]

However, Northwest, nevertheless, cannot prevail because, as we discuss below, it has failed to articulate any grounds warranting departure from our strong policy against such piecemeal appeals. *See e.g.*, *Puckett v. TVA*, ARB No. 02-070, ALJ No. 2002-ERA-15 (Sept. 26, 2002): *Greene v. EPA*, ARB No. 02-050, ALJ No. 02-SWD-1 (ARB Sept. 18, 2002); *Amato v. Assured Transportation 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). As we recently held in *Greene*, slip op. at 3, the Board's policy against interlocutory appeals incorporates 28 U.S.C.A. § 1291's final decision requirement, which provides that the federal appellate courts have jurisdiction "from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." Pursuant to § 1291, ordinarily, a party may not prosecute an appeal until the district court has issued a decision that, "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), the Supreme Court explained the rationale for the requirement that a party generally must raise all claims of error in one appeal at the conclusion of litigation before the trial court:

> [The rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

[3] However, the fact that the ALJ appended the notice of appeal rights to his order is not sufficient to convert his interlocutory order into a final order, as Northwest argues, because the Order of Remand does not "end[ ] the litigation on the merits and leave[ ] nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

449 U.S. at 374, quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). Accordingly, as we concluded in *Puckett*, the purpose of the finality requirement is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The ALJ who presides over the hearing phase of the litigation of an AIR 21 case is entitled to the same opportunity to issue independent decisions as a district court judge. Moreover, as the Supreme Court recognized in *Cobbledick*, permitting interlocutory appeals would not expedite the administrative adjudication process. Instead, meritorious appeals would languish while the Board was forced to adjudicate "a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick v. United States*, 309 at 325.

Nevertheless, the Supreme Court has recognized a "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." *Id.* In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court further refined the "collateral order" exception holding that to fall within the collateral order exception, the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468.

As we recognized in *Greene*, slip op. at 4, in determining whether to accept an interlocutory appeal, we must strictly construe the *Cohen* collateral appeal exception to avoid the serious "'hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation.'" *Corrugated Container Antitrust Litigation Steering Comm. v. Mead Corp.*, 614 F2d. 958, 961 n.2, *cert. denied*, 449 U.S. 888 (1980), quoting *Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1094 (5th Cir. 1977). Applying the collateral order test to the facts of this case, we conclude that the ALJ's remand order to which Northwest objects, does not fall within the exception's coverage.

The purpose of the remand order is to conduct an investigation into the complaints of blacklisting that allegedly form a basis of Ford's complaint. Thus the subject matter of the remand is not completely separate from the merits. In fact, it is possible that as a result of the investigation, the complaint will be resolved and no further adjudication by the ALJ or Board will be required. In any event, if ultimately Northwest is dissatisfied with either the results of the investigation or, if the complaint is upheld, with the ALJ's determination regarding the alleged protected activities falling within the ambit of the complaint, Northwest may raise these issues with Board upon the filing of a timely petition for review of the ALJ's final order.

Conclusion

Northwest's interlocutory appeal does not fall within the collateral order exception to the finality rule. Accordingly, we **DISMISS** Northwest's petition for review.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge