In the Matter of:

MARK MONTGOMERY,

COMPLAINANT,

v.

JACK IN THE BOX,

RESPONDENT.

ARB CASE NO. 05-129

ALJ CASE NO. 2005-STA-006

DATE: June 13, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Larry Watts, Esq., Missouri City, Texas

For the Respondent:
J. Michael Colpoys, Esq., *Smith & Moore, PLLC,* Dallas, Texas
James W. Stubblefield, Esq., *Jack in the Box,* San Diego, California

ORDER DENYING RECONSIDERATION

On October 31, 2007, the Administrative Review Board (ARB or Board) issued a Final Decision and Order in this case arising under the employee protection section of the Surface Transportation Assistance Act (STAA or the Act).[1] The Board concluded that Mark Montgomery did not prove by a preponderance of the evidence that Jack in the Box discharged him because he engaged in STAA-protected activity.

[1] 49 U.S.C.A. § 31105(a) (West 1997). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2007). The STAA has been amended since Montgomery filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

On January 9, 2008, Montgomery filed a document with the caption "Complainant's Sixth Amended Motion for a New Trial" (Motion), which we construe as a motion for reconsideration of our Final Decision and Order.[2]

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.[3] Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure.[4] Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ."[5] A petition for rehearing should not reargue unsuccessful positions or assert an inconsistent position that may prove more successful.[6] Likewise, issues not presented in initial briefs or during oral argument are not appropriate subjects for rehearing.[7] But raising new issues on rehearing may be appropriate if supervening judicial decisions or legislation, not reasonably foreseen during initial argument, would alter the outcome.[8] Thus, the Board will reconsider a final decision if the movant demonstrates:

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[2] On November 27 and 28, 2007, Montgomery submitted to this Board two documents requesting "a new trial concerning the July 21, 2005, Recommended Decision and Order, and October 31, 2007 Final Decision and Order." In response, we issued an Order on December 3, 2007, allowing Montgomery to submit a motion describing how his case meets the Board's criteria for reconsideration of our final decision. The Motion before us is Montgomery's response to our December 3, 2007 Order.

[3] *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 1986-ERA-023, slip op. at 2-6 (ARB Nov. 20, 1998); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-006, slip op. at 1 (ARB Feb. 17, 2005). *Accord Thomas & Sons Bldg. Contractors*, ARB No. 98-164, ALJ No. 1996-DBA-033, slip op. at 2-4 (ARB June 8, 2001). *See also Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

[4] *Powers v. Pinnacle Airlines, Inc.*, ARB No. 06-078, ALJ Nos. 2006-AIR-004, 2006-AIR-005, slip op. at 3 (ARB Jan. 30, 2008).

[5] Fed. R. App. P. 40(a)(2).

[6] *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986).

[7] *Utahns for Better Transp. v. United States Dep't of Transp.*, 319 F.3d 1207, 1210 (10th Cir. 2003); *FDIC v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994); *American Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1264 (1st Cir. 1993).

[8] *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522, 523 n.1, 525-526 (5th Cir. 1989).

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[9]

We have examined Montgomery's motion and conclude that he has not demonstrated that any of the provisions of the Board's four-part test apply. Instead, the Motion rehashes arguments the Board has already considered and rejected. Accordingly, we **DENY** the Motion in its entirety.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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[9] *Powers, supra*; *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 2 (ARB July 24, 2006); *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 03-048, 03-184; ALJ Nos. 2002-CAA-005, 2003-ERA-010, slip op. at 2 (ARB May 17, 2006); *Saban v. Morrison-Knudsen*, ARB No. 03-143, ALJ No. 2003-PSI-001, slip op. at 2 (ARB May 17, 2006); *Halpern v. XL Capital, Ltd.*, ARB No 04-120, ALJ No. 2004-SOX-054, slip op. at 2 (ARB Apr. 4, 2006); *Getman v. Southwest Secs.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 1-2 (ARB Mar. 7, 2006); *Knox v. Dep't of the Interior*, ARB No. 03-040, ALJ No. 2001-LCA-003, slip op. at 3 (ARB Oct. 24, 2005).