In the Matter of:

COLEEN L. POWERS, **ARB CASE NO. 04-102**

COMPLAINANT, **ALJ CASE NO. 2004-AIR-6**

v. **DATE: February 17, 2005**

PINNACLE AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:
Coleen L. Powers, ***pro se, Memphis, Tennessee***

ORDER DENYING COMPLAINANT'S MOTION FOR RECONSDIERATION

The Complainant, Colleen L. Powers, has moved the Administrative Review Board to reconsider its Final Decision and Order in this case originally issued on December 30, 2004.[1] We have considered Powers's arguments in support of her Motion but we find no reason to depart from our original decision dismissing Powers's appeal.[2]

Powers initially argues that the Board erred in not permitting her to respond to the Motion to Strike Complainant's Opening Brief and to Dismiss her Appeal that

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[1] This case arose under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 1997), and its implementing regulations at 29 C.F.R. Part 1979 (2004). The Board reissued the Final Decision and Order on January 5, 2005, to correct an error in the Board's Docket Number. In all other respects the Final Decision and Order remained unchanged.

[2] *See New Mexico Nat'l Elec. Contractors Ass'n,* ARB No. 03-020, slip op. 2-3 (Oct. 19, 2004)(discussion of the Board's authority to reconsider a Final Decision and Order).

Respondent Pinnacle Airlines filed on October 29, 2004. Powers alleges that Pinnacle did not serve her with its Motion to Strike prior to November 30, 2004. When the Board issued its Order Suspending the Briefing Schedule on November 17, 2004, it was not aware of Powers's allegation that Pinnacle had not served her with its motion. But ultimately it was unnecessary for the Board to determine whether Pinnacle had timely served Powers with its motion for two reasons. First, the Board unambiguously informed Powers in its September 9, 2004 Order that if she failed to file a conforming brief by October 25, 2004, after the Board had given her ample opportunities to do so, the Board would dismiss her brief sua sponte, i.e., on its own motion. The Board does not take such an action lightly. But given the Board's experience with Powers,[3] the Board was convinced that absent the threat of this most serious sanction, there was little hope that Powers would timely file a conforming brief. The Board also concluded that absent the sanction, Powers would further waste the Board's limited resources and prolong the decision-making process for parties in other cases pending at the Board by requiring it to respond to round after round of groundless motions objecting to the Board's order that her opening brief, including incorporated documents, not exceed thirty pages and requesting further enlargements of time. Ultimately, even the threat of dismissal did not motivate Powers to file a conforming brief.

Pinnacle's motion to dismiss did not prompt the dismissal of Powers's appeal, nor did the Board rely upon Pinnacle's motion when it dismissed the appeal. The Board had simply reached the limit, after giving Powers fair warning, of its willingness to expend its time and resources on considering any more of Powers's excuses for her recalcitrant refusal to file a conforming brief.

Second, contrary to Powers's argument, the Board did, in fact, consider Powers's Complainant's/Crewmembers' *Supplemental Memorandum in Opposition* to the Exparte Motion Allegedly Filed by the Named Person, Pinnacle on October 29th, 2004 and their November 30, 2004 Response (Supplemental Motion).[4] But, as we stated in our Final Decision and Order, we found no reason to depart from the dismissal sanction.[5]

Powers also argues that it was incumbent upon the Board to grant her request in her Supplemental Motion to amend her brief to conform to the Board's Order by "chang[ing] any and all 'incorporated by reference' notations to be omitted and simply cited as the specific location in the record where the referenced document may be located for review." But as the Board discussed in its Final Decision and Order:

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[3] *See, e.g., Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004)(Board dismissed Powers's appeal for failure to file a conforming brief)(appeal to the United States Court of Appeals for the Sixth Circuit pending).

[4] *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-0006, slip op. at 6 n.7 (ARB Dec. 30, 2004, reissued Jan. 5, 2005).

[5] *Id.*

> Powers's incorporation by reference of her April 10, 2004 Motion to Amend and Alter the March 31, 2004 ALJ Order is the most blatant violation of the Board's page-limitation requirement. We also note, however, that Powers's effort to disguise her intention to incorporate by reference by "respectfully" referring the Board to previous documents also violates the plain meaning, if not the exact terms of our direction to Powers. One particularly blatant attempt to subvert the requirement occurs at page 25 of Powers's brief where she had originally written, "Ms. Powers' [sic] incorporates and adopts by reference her *February 17, 2004 Extraordinary Appeal* and her erred Feb. 15, 2004 *Motion to the ALJ to Certify Questions of Law*" but where she subsequently drew a line through "incorporates and adopts by reference" and wrote above it "respectfully refers to [her *February 17, 2004 Extraordinary Appeal*]" Cosmetic changes in terminology are not sufficient to satisfy the Board's requirement that Powers produce an opening brief of not more than 30 pages including all incorporated arguments. We also note Powers's practice of respectfully referring the Board to Complainant's Exhibits (C.E.). *See, e.g.*, opening brief at 26, 27. These exhibits are not evidentiary exhibits that the ALJ has entered into the record. Instead these "exhibits" so identified and numbered by Powers, herself, include motions and briefs that she has filed in this and other cases and which she cites not simply for the fact that she has filed them but for the Board's consideration of their contents in the context of her opening brief. Thus the citation of these "Complainant's Exhibits" is simply another attempt to circumvent the Board's page limitations.

Thus, correcting Powers's brief was not a matter of simply omitting the "incorporation by reference" notations. Furthermore, it was Powers's obligation, under the explicit terms of the Board's Order, to timely file a conforming brief; it was not the Board's responsibility to amend the brief for Powers. Powers's proposed solution was simply "too little, too late."

Finally, Powers argues that the Board does not have the authority to reject a non-conforming brief because to do so would be tantamount to "subtract[ing] from the administrative record." Powers's argument that the Board is powerless to impose page limitations on the briefs filed with it and to refuse to consider briefs that do not conform to the Board's limitations is groundless. But we will, of course, include a copy of the

proffered brief in the official administrative record so that it may be reviewed upon appeal of the Board's Final Decision and Order. Therefore, we **DENY** Powers's motion to reconsider our Final Decision and Order in this case.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge