



In the Matter of:

**SAM HERCHAK,**

**ARB CASE NO. 03-057**

**COMPLAINANT,**

**ALJ CASE NO. 02-AIR-12**

**v.**

**DATE: May 14, 2003**

**AMERICA WEST AIRLINES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**James W. Howard, Esq., Joshua D. Moya, Esq., Meyers, Taber & Meyers, P.C., Phoenix, Arizona**

*For the Respondent:*

**Richard S. Cohen, Esq., Stephanie M. Cerasano, Esq., Lewis and Roca LLP, Phoenix, Arizona**

**FINAL DECISION AND ORDER  
DISMISSING PETITION FOR REVIEW**

**Background**

This case arose when the complainant, Sam Herchak, filed a complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 1997)(Cum. Ann. P. P. 2002), alleging that his employer, America West Airlines, Inc. (America West), retaliated against him because he communicated safety and regulatory concerns both to America West and to the Federal Aviation Administration. An Occupational Safety and Health Administration (OSHA) investigation determined that the complaint had merit. America West filed a request for a hearing by a Department of Labor Administrative Law Judge (ALJ).

After a hearing and post-hearing briefs, the ALJ concluded that the disciplinary actions of

which Herchak complained were the result of his history of communication problems and confrontations with others and not of any protected activity on his part. *Herchak v. America West Airlines, Inc.*, 2002-AIR-12 (ALJ Jan. 27, 2003).

The ALJ issued his Decision and Order Denying Relief (D. & O.) on January 27, 2003. Pursuant to the applicable regulations:

The decision of the administrative law judge shall become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Administrative Review Board . . . . Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, a petition must be received within 15 days of the date of the decision of the administrative law judge.

29 C.F.R. § 1979.110(a)(2002).<sup>1</sup> The Administrative Review Board received Herchak's Petition for Review on February 12, 2003, 16 days after the date of the D. & O. Accordingly, on February 20, 2003, the Board issued an Order to Show Cause requiring Herchak to demonstrate why the Board should not dismiss his appeal for failure to file a timely petition for review and permitting America West to reply to Herchak's response.

### **Issues Presented**

- 1) Whether Herchak timely filed his petition for review.
- 2) Whether Herchak has carried his burden of establishing that he is entitled to equitable tolling of the limitations period.

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<sup>1</sup> On April 1, 2002, OSHA published the interim final rules applicable to this case. 67 Fed. Reg. 15454. OSHA subsequently filed final rules effective March 21, 2003. These rules provide that a petition for review must be filed within ten business days of the date of the administrative law judge's decision, however, "the date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt." 29 C.F.R. § 1979.110, 68 Fed. Reg. 14100 (March 21, 2003). It is not necessary for the Board to determine whether Herchak's petition for review would have been timely under the amended regulations, and furthermore, Herchak has neither argued that the amended regulations are applicable to this case, nor that his petition would be timely thereunder.

## Discussion

### 1. Herchak's petition for review was not timely filed.

In response to the Order to Show Cause, Herchak argues that he timely filed his petition for review because it “would not make sense to require an appeal fifteen (15) days after the date of decision.” Response to Order to Show Cause (Resp.) at 2. Instead, Herchak avers that he had 20 days from the date of mailing of the decision to file his petition for review. *Id.* In support of this argument Herchak relies upon 29 C.F.R. § 1979.107(a) and 29 C.F.R. § 18.40(c)(3).

The first of the regulations upon which Herchak relies, 29 C.F.R. § 1979.107(a), provides, “Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at part 18 of title 29 of the Code of Federal Regulations.” The second regulation provides, “Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.” 29 C.F.R. § 18.4(c)(3).

In reply, America West argues that 29 C.F.R. § 1979.107 is captioned “Hearings” and therefore, the Part 18 ALJ regulations referred to in 20 C.F.R. § 1979.107 apply only to hearing procedures, not appellate procedures. Reply re Show Cause Order (Reply) at 1-2. America West also notes that the Part 18 Rules specifically provide that they do not apply to procedures for appeals. *See* 29 C.F.R. § 18.58 (“The procedures for appeals shall be as provided by the statute or regulation under which hearing jurisdiction is conferred.”).

Herchak's argument that he had 20 days from the date of mailing of the ALJ's Decision and Order is not persuasive. First, the plain language of the regulation provides that to be effective, a petition for review “must be received within 15 days of the date of the decision of the administrative law judge.” 29 C.F.R. § 1979.110(a). The Board has consistently interpreted the “must be received” requirement in the regulations governing the filing of petitions for review in the environmental whistleblower cases over which the Board has jurisdiction<sup>2</sup> literally -- to be effective, the petition must be received within the period prescribed.<sup>3</sup> *See, e.g., Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 2 (ARB Aug. 27, 2002)(appeal pending); *Hemingway v. Northeast Utilities*, ARB No.

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<sup>2</sup> See 29 C.F.R. § 24.1(a) for a list of these statutes.

<sup>3</sup> In the environmental whistleblower cases this period is ten business days. 29 C.F.R. § 24.8(a).

00-074, ALJ Nos. 99-ERA-014, 015, 4-5 (ARB Aug. 31, 2000). Given the regulation's plain language, there is simply no room to argue that any other time frame applies.

Secondly, America West's argument that the "proceedings" to which 29 C.F.R. § 1979.107(a) pertains are "Hearings" is persuasive, especially in light of 29 C.F.R. § 18.58, which specifically provides that the procedures for appeals are governed by the statute under which the appeal is taken.

Third, even if 29 C.F.R. § 1979.107(a) does apply to appellate procedures in general, the rule specifically states that it applies "[e]xcept as provided in this part." Therefore, to the extent that 29 C.F.R. § 1979.110(a) provides a time limitation for filing that differs from 29 C.F.R. § 18.4(c), 29 C.F.R. § 1979.110(a) governs.

Fourth, even if, 29 C.F.R. § 18.4(c) could be interpreting as applying to appellate procedures, it would be inapplicable to the filing of a petition for review. This regulation provides that it is applicable "[w]henver a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party." 29 C.F.R. § 18.4(c). However 29 C.F.R. § 1979.110(a) provides that to be effective the petition must be filed within 15 days of the date of the decision, **not** within 15 days of the date upon which the decision was served upon "said party." Thus, 29 C.F.R. § 18.4, by its terms is not applicable to the filing of a petition for review.

Therefore, we reject Herchak's argument that he timely filed his petition for review.

## **2. Herchak has not carried his burden of establishing his entitlement to equitable tolling.**

In the alternative, Herchak argues that the Board should exercise its discretion to excuse the untimely filing because it was Airborne Express's fault that the petition was not delivered timely. Resp. at 3.

The regulation establishing a fifteen-day limitations period for filing a petition for review with the ARB from an AIR 21 ALJ decision, like the ten-day limitations period for filing a petition for review under the environmental whistleblower acts, is an internal procedural rule adopted to expedite the administrative resolution of cases. 29 C.F.R. § 1979.100(b). *Accord Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 3; *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999). Because this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the ARB, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review. *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-

ERA-19, slip op. at 3; *Duncan v. Sacramento Metropolitan Air Quality Management District*, ARB No. 99-01, ALJ No. 97-CAA-121 (ARB Sept. 1, 1999). *Accord American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970).

The Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4; *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2. In *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. The court recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

*Id.* at 20 (citation omitted). Herchak's inability to satisfy one of these elements is not necessarily fatal to his claim, however courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). See also *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984) (*pro se* party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence). Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting tolling identifies a factor that might justify such tolling, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. at 152.

Herchak bears the burden of justifying the application of equitable tolling principles. *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). Ignorance of the law will generally not support a finding of entitlement to equitable tolling, especially in a case in which a party is represented by counsel. *Accord Wakefield v. Railroad Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4-5.

Herchak has not alleged that America West actively misled him or that he filed the precise statutory claim in the wrong forum. His only defense is that Airborne failed to deliver on

time. As America West argues, Herchak states that Airborne breached its agreement and failed to deliver, however there is no evidence that Herchak delivered the petition to Airborne in time to invoke the overnight guarantee. Given the plain language of 29 C.F.R. § 1979.110(a), Herchak knew or should have known that it was imperative that the Board receive the petition by the 15th day, however, Herchak made no effort to determine whether Airborne timely delivered the petition. If Herchak had simply inquired of the Board (or of Airborne) whether the Board had received the document, he could easily have rectified the failure to deliver by simply faxing a copy of the petition. *Cf. Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 405 (party who unsuccessfully argued that she was entitled to equitable tolling because her filing was delayed due to overseas mail, failed to explain why she could not have used telephone or facsimile). The failure to inquire of either the Board or Airborne whether the document had been delivered when the preservation of Herchak's right to appeal was dependent upon timely receipt is evidence of a lack of due diligence.<sup>4</sup>

In any event, Airborne's failure to deliver does not constitute an **extraordinary** event that precluded the timely filing. What precluded the timely filing was either Herchak's reliance on an untenable interpretation of the regulations or his failure to make a simple phone call to determine if the Board had received his petition. Furthermore, while we recognize that Herchak is not personally responsible for this failure, as the Board recently held in *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6:

Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is

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<sup>4</sup> Of course, if Herchak believed that he had 20 days from receipt to file his petition, he may not have been unduly concerned whether Airborne delivered the package on February 11th. However, as America West points out, the attempt to send the petition overnight on February 10th, the 14th day, does strongly suggest that Herchak was aware that his petition was due on February 11th and that his argument that the petition was timely filed was simply a *post hoc* rationalization for his failure to file the petition in accordance with 29 C.F.R. § 1979.110(a).

considered to have “notice of all fact, notice of which can be charged upon the attorney.”

*Link v. Wabash Railroad Company*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).<sup>5</sup>

Accordingly, finding that Herchak did not timely file the petition and finding no grounds justifying equitable tolling of the limitations period, we **DISMISS** Herchak’s petition for review.

**SO ORDERED.**

**WAYNE C. BEYER**

**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**

**Chief Administrative Appeals Judge**

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<sup>5</sup> The Court did note, however, “[I]f an attorney’s conduct falls substantially below what is reasonable under the circumstances, the client’s remedy is against the attorney in a suit for malpractice.” 370 U.S. at 634 n.10.