In the Matter of:

EDDIE L. HUTCHINS, **ARB CASE NO. 05-065**

COMPLAINANT, **ALJ CASE NO. 2004-STA-009**

v. **DATE: January 31, 2008**

TNT LOGISTICS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION PERMITTING WITHDRAWAL OF OBJECTIONS AND AFFIRMING OSHA'S FINDINGS

Eddie L. Hutchins complained that TNT Logistics violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified,[1] and its implementing regulations,[2] when it terminated his employment on April 21, 2003. On October 10, 2003, after a full investigation, the Occupational Safety and Health Administration (OSHA) found that the case had no

[1] 49 U.S.C.A. § 31105 (West 1997). STAA section 405 provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. The STAA has been amended since Hutchins filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide here whether the amended provisions are applicable to this complaint because even if the amendments applied, they are not at issue in this case and thus would not affect our decision.

[2] 29 C.F.R. Part 1978 (2007).

merit.[3] Hutchins objected to OSHA's findings and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).[4]

The ALJ scheduled the case for hearing in 2004, but the ALJ postponed the hearing when Hutchins informed him that he wished to pursue binding arbitration provided by his union contract and that the arbitration could resolve all issues involved in his STAA complaint.[5] In a letter dated January 7, 2005, Hutchins wrote to the ALJ that the arbitrator's decision on December 1, 2004, was fully favorable to him and that TNT had reinstated him.[6] Hutchins asked "'that his case be DISMISSED'" because he saw "'no reason to take up your time and that of the courts.'"[7] TNT did not object to Hutchins's request.

The ALJ acknowledged that the STAA and its regulations do not specifically provide for withdrawal of a complaint once the case has been referred to an administrative law judge for hearing, but the regulations do provide:

> At any time before the findings or order become final, a party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Administrative Review Board, United States Department of Labor. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.[8]

The ALJ construed Hutchins's letter as a withdrawal of his objections to OSHA's findings and entered an order affirming OSHA's findings on the Secretary of Labor's behalf and dismissing the claim with prejudice.[9] The ALJ explained:

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3 *See* 29 C.F.R. § 1978.103.

4 *See* 29 C.F.R. § 1978.105.

5 Recommended Order of Dismissal (R. D.) at 1.

6 *Id*.

7 *Id*.

8 29 C.F.R. § 1978.111(c).

9 R. D. at 2.

> The proper procedure in this circumstance is to construe the complainant's notice to the effect that he is dropping his charges against Respondent as a withdrawal of Complainant's objection to the Secretary's Preliminary Findings, and to issue an order reinstating and affirming those findings. *Hall v. Yellow Freight Systems*, 1993-STA-24 (Sec'y July 1, 1993); *Snow v. TNT Redstar Express, Inc.*, 1991-STA-44 (Sec'y Mar. 13, 1992). Thus, Complainant's letter of January 7, 2005, to which no objection was filed by Respondent, shall be construed as a withdrawal of complainant's objection to the Preliminary Findings. If the case is before the administrative law judge, the judge's order becomes the final administrative order in this case, and there is no need for review of the order by the Secretary. *Underwood v. Blue Springs Hatchery*, 1987-STA-21, Order to Show Cause, Issued September 23, 1987.[10]

Nevertheless, despite the ALJ's assertion that "there is no need for review of the order by the Secretary," the ALJ included the following "**NOTICE**:"

> This Recommended Order of Dismissal and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor . . . . The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Order of Dismissal within thirty days of the issuance of this Recommended Order of Dismissal unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).[11]

Upon receiving the R. D. and file from the ALJ, the Board issued a Notice of Review and Briefing Schedule, informing the parties of their right to file briefs in support of or in opposition to the R. D., within thirty days from the date on which the ALJ issued the R. D.[12] Neither party filed a brief.

The Board's requirement that the ALJ comply with the automatic review

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10 R. D. at 2.

11 *Id*.

12 *See* 29 C.F.R. § 1978.109(c)(2).

regulations and that the Board issue the final administrative decisions in cases in which a party wishes to withdraw his or her objections to the Secretary's findings is well established.[13] This requirement is based on the Secretary's delegation of authority to the Board to issue final agency decisions in cases arising under the STAA and the plain language of the STAA's interpretive regulations. Neither the regulation requiring the ALJ to immediately forward his or her decision together with the record for the Board's review[14] nor the regulation requiring the Board to issue a final decision and order based on such decision and record,[15] specifically except cases in which the ALJ has approved a party's withdrawal of objections to the Secretary's findings. Furthermore, 29 C.F.R. § 1978.111(c), the regulation providing for such withdrawals, directs the ALJ to affirm any portion of the findings or preliminary order with respect to which the objection is withdrawn but does not state that the ALJ shall issue the final administrative order. In contrast, the only regulation that specifically addresses the issuance of the final administrative order, once a party has requested a hearing and the case has been forwarded to an ALJ,[16] specifically directs the Administrative Review Board to issue such decision and order.

In fact, rather than supporting the position that the ALJ issues the final administrative order in withdrawal cases, the withdrawal regulation addresses the ALJ's affirmance of only those **portions** of the findings or preliminary order with respect to which the objection is withdrawn.[17] Thus the regulation does not even appear to contemplate the issuance of the final agency order by the ALJ. The Secretary's delegation of authority to the Board requires it to adhere to the Code of Federal

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13 *See e.g, Ferguson v. Schlumberger Tech. Corp.,* ARB No. 06-093, ALJ No. 2006-STA-011, (ARB Aug. 25, 2006); *Holmes v. Roadway Express, Inc.,* ARB No. 05-112, ALJ No. 2005-STA-030 (ARB Apr. 28, 2006); *Pardis v. B & I Auto Supply,* ARB No. 05-103, ALJ No. 2005-STA-017 (ARB Mar. 27, 2006); *Davis v. Fonda Kaye, Inc.,* ARB No. 05-152, ALJ No. 2005-STA-042 (ARB Sept. 27, 2005); *Palmer v. G.W. Lumber & Millwork, Inc.,* ARB No. 04-141, ALJ No. 2004-STA-045 (ARB Sept. 27, 2005); *Wallace v. R. & L. Carriers,* ARB No. 04-098; ALJ No. 2002-STA-040 (ARB Aug. 30, 2005); *Sabin v. Yellow Freight Sys., Inc.,* ARB No. 04-032, ALJ No. 2003-STA-005 (ARB July 29, 2005); *Elliot v. Chris Truck Line,* ARB No. 04-132, ALJ No. 2002-STA-043 (ARB Jan. 28, 2005); *Hardy v. Envil. Restoration, LLC.,* ARB No. 05-019, ALJ No. 2004-STA-020 (ARB Jan. 11, 2005); *Berna v. USF Dugan, Inc.,* ARB No. 04-121, ALJ No. 2003-STA-007 (ARB Oct. 27, 2004); *Pavon v. United Parcel Serv.,* ARB No. 04-127, ALJ No. 2003-STA-046 (ARB Oct. 27, 2004).

14 29 C.F.R. § 1978.109(a).

15 29 C.F.R. § 1978.109(c)(1).

16 *Id.*

17 29 C.F.R. § 1978.111(c).

Regulations.[18] These regulations require the Board to "issue a final agency decision based on the record and the decision and order of the administrative law judge."[19] The Board's decision in this case is issued in compliance with the regulations the Board is obligated to observe.

The Board's interpretation is also consistent with the STAA's unique automatic review procedure. The STAA regulations provide for review of an ALJ's decision by the Board regardless whether either party requests or even desires such review.[20] The automatic review provision is fully consonant with the fact that the majority of STAA litigants are not represented by counsel and results in the parties being given an extra measure of protection warranted by their pro se status and the safety concerns underlying the STAA's enactment. If the regulations were interpreted to permit the ALJ's order to become the final administrative order, the parties would not only be denied automatic review, they would be denied any review whatsoever.[21] In the absence of regulations or procedural rules specifically addressing review of decisions permitting withdrawal of objections, a total denial of review is not consistent with a regulatory scheme that is predicated upon the determination that review is of such importance that it is mandated whether requested or not.[22]

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[18] Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272, 64,273 4(c) (Oct. 17, 2002).

[19] 29 C.F.R. § 1978.109(c).

[20] 29 C.F.R. § 1978.109(a).

[21] Under the concurring opinion's rationale, the denial of review would also extend to cases in which the parties object to an ALJ's approval or denial of a settlement agreement, as the settlement provisions, like the withdrawal provisions, are found in 29 C.F.R. § 1978.111.

[22] The concurring opinion suggests that in circumstances in which the ALJ has erred and that we might believe that justice required us to review a withdrawal order – for example, if an ALJ had mistakenly identified as a withdrawal a written communication that the complainant had not intended as a withdrawal, or had mistakenly approved a withdrawal based solely upon an oral statement, that we could simply invoke 29 C.F.R. § 1978.115, which allows the Board, in special circumstances, with three days notice to the parties to, "waive any rule or issue such orders as justice or the administration of section 405 requires." But such an ad hoc approach to review is simply inconsistent with the extraordinary protection the Department's regulations afford to STAA whistleblower litigants as exemplified by the automatic review provisions. Furthermore, it is one thing to waive a rule or issue an order, but quite another to arrogate to the Board the jurisdiction to review an order that the concurrence asserts is otherwise final and not subject to review. The automatic review procedure is the only mechanism established by the STAA's regulations for obtaining review of an ALJ decision. The concurrence points to no other authority that would permit the Board to review an ALJ order. If the automatic review regulations do not apply to these orders, as argued by the concurrence, then by what authority does the Board review the ALJ's withdrawal orders?

The ALJ, in support of his assertion that his order permitting withdrawal becomes the final administrative order in the case cites an Order to Show Cause that the Secretary issued on September 23, 1987, in *Underwood v. Blue Springs Hatchery*.[23] This Order states:

> Section 1978.111(c) also does not require, when the case is before the ALJ, my approval of the withdrawal. Rather, an ALJ's order issued pursuant to that section becomes the final administrative order in the case, and there is no need for the case to be submitted for my review.[[24]]

Neither this Order, nor subsequent decisions adopting this conclusion provided a rationale for it.[[25]] Thus, in the absence of a rationale for the conclusion and given the basis for our determination that the Board is required to issue the final administrative

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The concurrence analogizes to the procedure for obtaining reconsideration of Board decisions. But this Board has recognized that "[t]he Administrative Review Board . . . has inherent authority to reconsider its decisions, so long as that authority has not been limited by a statute or regulatory provision." *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 2 (May 30, 2007). The concurrence points to no such authority of the Board to review a decision issued by an ALJ (other than the automatic review provision). Furthermore, asking a body that has heard a case to reconsider its decision is a much more obvious proposition than contacting the Board to complain of an ALJ's Order, given the ALJ's affirmation in the decision that he or she has issued the final (i.e., not subject to appeal) decision for the Department and the lack of any regulations suggesting that requesting such consideration is either appropriate or possible Thus the circumstances under which justice required review would most likely remain unremedied.

[23] 1987-STA-021. The concurring opinion assumes, without discussion, that an Order to Show Cause, a procedural order that does not resolve the case, has the same precedential value as a final order.

[24] Slip op. at 2.

[25] *See Hall v. Yellow Freight Sys.*, No. 1993-STA-024 (ARB July 1, 1993); *Shown v. Wilson Truck Corp.*, 1992-STA-006 (Sec'y Apr. 30, 1992); *Snow v. TNT Red Star Express, Inc.*, 1991-STA-044 (Sec'y Mar. 13, 1992); *Mysinger v. Rent-A-Driver*, 1990-STA-023 (Sec'y Sept. 21, 1990); *Creech v. Salem Carriers, Inc.*, 1988-STA-029 (Sec'y Sept. 27, 1988). The decision to review the ALJ's R.O. in this case is fully consistent with *Underwood* in one regard - the Secretary's decision that it was appropriate to review the ALJ's order once it was referred to him as if the withdrawal had occurred while the case was on review. *See Underwood*, Show Cause Order at 2.

order explained above, we decline to follow it.[26]

Accordingly, the ALJ's decision and the record have been reviewed and accordingly, we **AFFIRM** the ALJ's R.D. granting Hutchins's request to withdraw his objections to the Secretary's preliminary findings and affirming those findings denying his complaint as provided in 29 C.F.R. § 1978.111(c).

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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[26] The concurring opinion relies on "the Department's highlighting of *Underwood* in the Preamble to the Final Regulation" citing 53 FR 47,676, 47,680 (Nov. 25, 1988)" as support for it position. The Preamble's reference to *Underwood* was in response to the comment of an attorney who was concerned that § 1978.111(c) "unduly restricted settlement attempts since the subsection requires the ALJ or the Secretary to affirm any portion of the findings or order with respect to which objection is withdrawn." 53 FR 47,680. Responding to this concern, the Preamble states,

> OSHA's purpose in promulgating this rule was to cover unilateral withdrawals of objections to findings and an order where a party has determined on his or her own that he or she no longer wishes to pursue an objection and it is not intended to cover a settlement agreement. The Secretary in Underwood v. Blue Springs Hatchery, 87-STA-21, Order to Show Cause, issued September 23, 1987, has also ruled that § 1978.111(c) covers the withdrawal of complaint after the filing of objections. If the Parties, including the Assistant Secretary, agree, a settlement which includes a withdrawal of objections without admitting liability may be reached without engaging the provisions in § 1978.111(c). Such a settlement falls not under § 1978.111(c) but rather § 1978.111(d), where settlements are to be tri-partite as required by the statute.

Id. Thus, the Preamble did not address the issue the concurring opinion raises, i.e., whether withdrawal orders are subject to the STAA regulations' automatic review provision. Furthermore, applying the automatic review provision to withdrawals under 29 C.F.R. § 1978.111(c) is fully consistent with the Preamble's statement that, "The Secretary in Underwood v. Blue Springs Hatchery . . . has . . . ruled that § 1978.111(c) covers the withdrawal of complaint after the filing of objections."

Judge Oliver concurs separately:

Concurring in the result only:[*]

I concur with my colleagues' assessment that the proper disposition of this case is a final order dismissing Hutchins' complaint. I get there by a shorter route, however, because in my view the ALJ's order was a final order, and we need not and should not act in this case except to say so.

1. An order issued under the authority of 29 C.F.R. § 1978.111(c) is a final order

The Department's regulations implementing the Surface Transportation Assistance Act (STAA) provide that after a hearing has been requested, a

> party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge ***or***, if the case is on review, with the Administrative Review Board, United States Department of Labor. The judge ***or*** the Administrative Review Board, ***as the case may be***, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.

29 C.F.R. § 1978.111(c) (emphases added). By its terms section 111(c) plainly requires that if a withdrawal occurs while a case is pending before an ALJ, then the ALJ "shall" affirm OSHA's findings. Neither section 111, nor any other, requires the ARB to review such an ALJ order of affirmance.

2. The Secretary established the above interpretation in Underwood*, a decision that has not been overturned*

After this provision was published as part of the Department's Interim Final Regulation implementing the STAA,[27] Secretary Brock interpreted it to mean that "an ALJ's order issued pursuant to this section [111(c)] becomes the *final* administrative order in the case." *Underwood v. Blue Springs Hatchery*.[28] The Secretary emphasized

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[*] Although Judge Oliver is no longer serving on the ARB as of the publication date of this decision, she filed this concurrence during her tenure as an ARB Member.

[27] *See* 51 Fed. Reg. 42091, 42094 (Nov. 26, 1986).

[28] 1987-STA-21, slip op. at 2 (Sec'y Show Cause Order issued September 23, 1987) (emphasis added). The provision interpreted by Secretary Brock was identical to the current provision except that "Secretary" was used in place of "Administrative Review Board." *See* 51 FR 42091, 42094 (Nov. 26, 1986); *see also* 61 FR 19982, 19987 (May 3, 1996) (changing "Secretary" to "Administrative Review Board" in numerous regulations including this one).

that because the ALJ's order was final, "Section 1978.111(c) . . . does not require, when the case is before the ALJ, my approval of that withdrawal."[29] The Department then highlighted *Underwood*'s interpretation by citing it in the Preamble to the Final Regulation.[30]

The ARB is required to "adhere to the rules of decision and precedent applicable" to the STAA "until and unless the Board or other authority explicitly reverses such rules of decision or precedent."[31] *Underwood* is a "precedent" directly applicable to this case. Because it has not been "explicitly reverse[d],"[32] *Underwood*'s interpretation – that an ALJ's order approving a withdrawal is the final order – continues to bind us until and unless *Underwood* is overturned.

My colleagues state that "the Board's requirement that the ALJ comply with the automatic review provisions and that the Board issue the final administrative decisions [sic] in cases in which a party wishes to withdrawal [sic] his or her objections to the Secretary's findings is well established." Opinion at 4 (citing 11 decisions issued

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[29] *Underwood*, Show Cause Order at 2. Although *Underwood* is not available to the public electronically, perhaps because it was a Show Cause Order rather than a final decision, it is publicly available in Department of Labor's library. Moreover, this particular statement was often quoted by subsequent Secretarial decisions reaffirming the precedent established by *Underwood*.

[30] *See* 53 FR 47676, 47680 (Nov. 25, 1988) (citing *Underwood* in order to explain the proper interpretation of the scope of the regulation's withdrawal provision).

[31] Secretary's Order 1-2002, 67 FR 64272, 64273 (Oct. 17, 2002).

[32] Several subsequent decisions appear inconsistent with *Underwood*. A line of three cases mistakenly follows the logic of *Hester v. Blue Bell*, 1986-STA-11 (Sec'y July 9, 1986), which relied upon Federal Rule of Civil Procedure 41. *See Transportation Services, Inc.*, 1988-STA-7 (Sec'y June 24, 1988) (applying Rule 41); *Monroe v. QJ Transfer and Storage*, 1989-STA-4 (Sec'y July 11, 1989) (same); *A/S & Sharp v. Helwig & Sons, Inc.*, 1990-STA-30 (Dep. Sec'y Dec. 14, 1990) (same). Because *Hester* was issued before the publication of 29 C.F.R. § 1978.111(c), *Hester* should no longer have been followed once that provision had been published and interpreted in *Underwood*. Three other cases also diverge from *Underwood*'s approach: they are *Hadley v. Southeast Cooperative Service Co.*, 1986-STA-24 (Sec'y Apr. 6, 1988) (declining to adopt ALJ's order dismissing case, because complainant's response to Secretary's Show Cause order convinced Secretary that complainant had not intended to drop the case); *Slaughter v. Pie Nationwide*, 1989-STA-13 (Sec'y Feb. 23, 1990) (reviewing and adopting ALJ's "recommended" order of dismissal based upon complainant's withdrawal, but without noting that ALJ need not have forwarded the order); and *Lizotte v. Road and Sea Transport, Inc.*, 1995-STA-13 (Sec'y July 26, 1995) (citing "29 C.F.R. 24.5(e)(4)(ii)" – a provision that *Underwood* states is "inapplicable" to STAA cases, *see Underwood*, Show Cause Order at 1). Because none of these decisions cite or distinguish *Underwood*, however, none of them can be considered an "explicit" reversal of it.

between 2004 and 2006).[33] But not one of the eleven decisions cited in support of this assertion – nor any of the ARB's other relevant decisions – even acknowledges *Underwood*, let alone "explicitly reverses" its interpretation that a decision issued under 29 C.F.R. § 1978.111(c) is a final order and thus need not and should not be reviewed. Thus, each of those eleven decisions appears illegitimate insofar as it purports to review ALJ decisions based on any assertion that such review was required.

3. The attempt to overturn Underwood *does not and should not succeed*

My colleagues now attempt to overturn *Underwood* and thus provide an after-the-fact justification for these hitherto inappropriate decisions, but my colleagues' opinion has neither legal force nor the power of persuasion.[34]

My colleagues' opinion states, for the first time in any ARB decision, that they "decline to follow" *Underwood.* Opinion at 6. But on a Board with more than three Members, two Members do not suffice to overturn a binding precedent. My colleagues' apparent belief that it is possible, and appropriate, for two Members to overturn a decision of the Secretary, or of a Board majority, thus further demonstrates a disturbing disregard for fundamental principles of jurisprudence. Although the Board itself has never ruled upon the appropriate procedure for overturning prior cases, such principles of jurisprudence dictate the illogic of allowing a mere two members of a four- or five-Member Board to overturn a decision previously reached by a majority of that Board. It is true that some federal circuits employ a procedure to permit panels to overrule binding circuit precedent – but those circuits generally require that such decisions first be circulated to all active judges, in order to allow the opportunity for objection.[35] No such procedure has been employed here. Indeed, in more than a decade of operation the ARB

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[33] Although this concurrence quotes from the latest version of my colleagues' opinion that has been made available for review, it is possible that certain quotations and references to that opinion may have become out-of-date insofar as any further alterations in my colleagues' opinion were made subsequent to this concurrence being filed.

[34] My colleagues note that "as a general rule the Board will not consider an issue that has not been raised and briefed by the parties," and that the Board is departing from that rule in this case. Opinion at 4. Of course, as we clarified only recently, the STAA is unique in that "the regulations implementing the STAA require us to review every decision issued under section 109(a), even if no party files a brief." *Minne and Privott v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-26, slip op. at 7 (Oct. 31, 2007). The reason we need not act in the present instance is not because the parties did not file briefs, but because the ALJ's decision was not issued under section 109(a).

[35] *See, e.g., Saban v. U.S. Dep't of Labor*, __ F. 3d. __, 2007 WL 4233516, at *2 (7th Cir. 2007) (noting panel decision's compliance with Seventh Circuit Rule 40(e), requiring that panel decisions overruling a circuit precedent be "circulated . . . to the full court in advance of publication").

has not yet managed to articulate or even develop any formal mechanism for recognizing inconsistency or overruling prior decisions.[36] Therefore, in my view, a prior holding cannot be overturned except by agreement of a majority of active Members, and the attempt to overturn *Underwood* should not be considered to have succeeded.

Moreover, *Underwood* ought not be overturned because it was correctly decided. My colleagues' first argument for overturning it – namely, that *Underwood* did not "provide[] a rationale" – is either disingenuous or reflects a disturbing inability to interpret this short and clear decision, which states quite clearly that its conclusion is based upon the plain language of section 111. In any case, because a purported lack of rationale is not in itself a reason to overturn a precedent, let us examine the other arguments upon which my colleagues appear to rely. These arguments are not persuasive, in my view, for the following reasons.

a. Underwood *correctly interprets the regulation*

My colleagues take the position that an ALJ order issued pursuant to 29 C.F.R. § 111(c) is not a final order but instead is subject to review by the ARB. This position, first taken in late 2004,[37] appears to rely upon the supposition that the STAA contains an "automatic review" requirement and that the ARB must issue "the final administrative order" in each and every case filed by a complainant. Opinion at 4. Unfortunately, this

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[36] This lack may help explain some otherwise puzzling aspects of ARB jurisprudence. For example, in 2004 two Board Members issued a decision correctly noting the Supreme Court's injunction that "jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action." *Pacific Stevedoring, Inc. v. Boyang, Ltd.*, ARB No. 03-041, ALJ No. 2002-ACM-1, slip op. at 7 (ARB June 30, 2004). Nonetheless, on the same day, one of those same Board Members (together with a third) issued another decision affirming an ALJ's conclusion that there was *no* "jurisdiction" because the complainant had "failed to state a cause of action." *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-09 and -11, slip op. at 8-9. The inconsistency between these decisions appears not to have been recognized for almost a year. Moreover, the decision that ultimately "clarif[ied]" the issue failed to admit that *Culligan*'s holding was inconsistent with the holding in *Pacific Stevedoring*. *See Devers v. Kaiser-Hill Co.*, ARB 03-13, ALJ No. 2001-SWD-3, slip op. at 4 n.3 (ARB Mar. 31, 2005). Instead, that later decision – despite being written by the same two Board Members who had decided *Culligan* – described *Culligan* as having held what *Pacific Stevedoring* had held. *See id.* (asserting that *Culligan* had held that the ARB "*ha[d] jurisdiction* to decide that the complainant's case must be dismissed") (emphasis added).

[37] The first withdrawal decisions expressing this view were *Foley v. J. B. Hunt Transportation, Inc.*, ARB No. 04-080, ALJ No. 2004-STA-14 (ARB Oct. 27, 2004), slip op. at 1-2; *A/S and Boyd v. Palmentere Brothers Cartage Service, Inc.*, ARB No. 04-135, ALJ No. 2003-STA-40, slip op at 1-2 (ARB Oct. 27, 2004); and *Pavon v. United Parcel Service*, ARB No. 04-127, ALJ 2003-STA-46, slip op. at 1-2 (ARB Oct. 27, 2004).

supposition – also quite a recent position[38] – stems from a bizarre interpretation of the regulation that is not sustainable upon examination.

First, my colleagues argue that "[n]either the regulation requiring the ALJ to immediately forward his or her decision together with record [sic] for the Board's review [here the opinion cites section 109(a)] nor the regulation requiring the Board to issue a final decision and order based on such decision and record [here the opinion cites section 109(c)(1)] specifically except cases in which in which the ALJ has approved a party's withdrawal of objections to the Secretary's findings." Opinion at 5.[39]

This argument rests in large part upon a significant error that may explain my colleagues' otherwise incomprehensible interpretation.

The error is as follows: My colleagues assert that section 109(c) "requir[es] the Board to issue a final decision and order" in every STAA case.[40] But a glance at the

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[38] The Board's first decision taking this position appears to have been issued in May 2001. *See* n.13 and section c, below.

[39] Section 109(a) states: "The administrative law judge shall issue a decision within 30 days after the close of the record. . . . The decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee." 29 C.F.R. § 1978.109(a). Section 109(c)(1) states: "Within 120 days after issuance of the administrative law judge's decision and order, the Administrative Review Board, United States Department of Labor, shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c)(1). Section 109(c)(5) adds a requirement that "[t]he final decision and order of the Administrative Review Board, United States Department of Labor shall be served upon all parties to the proceeding." 29 C.F.R. § 1978.109(c)(5).

[40] The Board first made this assertion in the 2001 decision that initiated the Board's recent practice of reviewing settlement cases, and further relied upon it in the 2004 withdrawal decision that initiated the Board's recent practice of reviewing withdrawal cases. *See Cook v. Shaffer Trucking, Inc.,* ARB No. 01-051, ALJ No. 2000-STA-17, slip op. at 2 (ARB May 30, 2001) (noting that the Board issued the "Final Order in this [settlement] case" "[p]ursuant to 29 C.F.R. § 1978.109(c)"); *Boyd v. Palmentere Brothers Cartage Service, Inc.*, ARB No. 04-135, ALJ No. 2003-STA-40, slip op. at 1 (ARB Oct. 27, 2004) (asserting, in a withdrawal case, that "[t]he ALJ's Order is subject to the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)").

By now, the error appears to have become boilerplate. *See, e.g., Myers v. Sunstone II LLP*, ARB No. 08-002, ALJ No. 2007-STA-25, slip op. at 2 & n.6 (ARB Oct. 16, 2007) (citing to section "109(c)(1)" to support the proposition that "the case is now before us pursuant to the STAA's automatic review provisions"); *LaRocque v. 4-D Trucking Co.,*, ARB No. 07-117, ALJ No. 2007-STA-32, slip op. at 2 (ARB Oct. 31, 2007) (citing to "29 C.F.R. § 1978.109(c)(2)" to prove proposition that "[a]ccording to the STAA's implementing

regulation reveals that section 109(c) has only two functions: first, it provides a time limitation for the Board's decision ("within 120 days after issuance of the [ALJ's] decision and order"), and second, it designates the materials upon which the Board may rely in making its decision ("the record and the decision and order of the [ALJ]") and thereby prohibits the Board from accepting additional evidence at the review stage.

In fact, it is section 109(a) that authorizes the Board to review ALJ decisions. It does so by instructing ALJs that the decisions they have reached "shall be forwarded . . . for review by the Secretary or . . . designee." It seems clear that this the forwarding requirement applies only to those decisions reached by ALJs under the authority of section 109(a).

But an ALJ recognizes a complainant's withdrawal, and affirms the underlying OSHA findings, pursuant to authority given in section 111(c). An ALJ order issued pursuant to section 111 thus differs from an ALJ decision made under the authority of section 109, and requirements pertaining to ALJ decisions made pursuant to section 109 do not apply to ALJ orders issued pursuant to the authority of section 111.

My colleagues do not provide any reason for their unusual interpretation enlarging the review requirement in section 109(a), apart from their assumption – based upon their misreading of section 109(c) – that the ARB is required to issue the final administrative order in every STAA case to which objections are made.

Moreover, both the statute and section 110 of Part 1978 provide compelling evidence against my colleagues' interpretation. The statute provides that "[a] person adversely affected by an order issued *after a hearing*" may obtain judicial review by the appropriate United States Court of Appeals. 49 U.S.C. § 31105(c) (emphasis added). Part 1978 implements this authorization by specifying that judicial review is available for "a final order *issued under § 1978.109*." 29 C.F.R. § 1978.110(a). Presumably, section 110 uses this broader language in order to allow review of final orders issued in cases that had been on the path towards a hearing, even if the hearing itself did not take place due to, for example, a grant of summary decision. Withdrawal (and settlement) situations are different in that the litigants voluntarily step off the path towards a hearing.

By specifying that review is available only for those final orders "issued under [section] 109," section 110 implies that there are other final orders issued by the ARB for which judicial review is not available. (The specification should not be taken as a reference to OSHA orders that had become final due to the absence of objections, because those orders are already covered by section 105's specification that those orders are "not subject to judicial review." Interpreting section 110 to imply reference to OSHA

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regulations, the Administrative Review Board (ARB or Board) issues the final decision and order in this case").

orders would make this part of section 105 superfluous – a consequence to be avoided, if possible, when interpreting regulations.[41])

One obvious place to find such other final orders is, of course, section 111. Indeed, my colleagues have taken the position that judicial review is not available for ARB orders affirming OSHA findings, yet this position is possible only by recognizing that such orders are not "issued under" section 109. And if such ARB orders are not issued pursuant to the authority in section 109, then neither are ALJ orders affirming OSHA findings – in which case such orders are not subject to section 109's requirement to forward to the ARB those orders that *are* issued under section 109.

My colleagues next argue that section 111(c) "does not state that the ALJ shall issue the final administrative order" because it only "directs the ALJ to affirm any *portion* of the findings or preliminary order with respect to which the objection is withdrawn." Opinion at 4 (emphasis added).

I agree that if an objection were withdrawn only with respect to a "portion" of findings or a preliminary order, then the ALJ would remain obligated to reach a decision under 109 regarding the remaining portion (and the ARB would be obligated to review that decision). But if the "portion" with respect to which objection is withdrawn is in fact the entire portion, then section 111(c) requires the ALJ to "affirm" that entire portion – in which case there is no remaining portion, and thus no need for either an ALJ decision under 109 or an ARB review of such a decision.

My colleagues then argue that section 109 is "the only regulation that specifically addresses the issuance of *the* final administrative order" and – after asserting again that section 109 "specifically directs the Administrative Review Board to issue such decision and order" – appear to conclude that the ARB therefore also has an obligation to review all orders issued pursuant to section 111. Opinion at 4-5 (emphasis added).

My colleagues' argument here rests not only upon their error in believing that section 109 requires the ARB to issue all final administrative orders once an objection has been made, but also upon a further error. Section 109 is not "the only regulation" that "specifically addresses the issuance" of a final order. To the contrary, section 105 states plainly that when "no timely objection is filed with respect to . . . findings or a preliminary order, such findings or preliminary order, as the case may be, shall become *final* and are not subject to judicial review." Section 105(b)(2) (emphasis added). Part 1978 as a whole thus clearly contemplates situations in which the Department's findings or preliminary orders can become final without the involvement of the ARB. There is

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[41] *See, e.g., APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003) ("[A] basic tenet of . . . regulatory construction, [is] that [a regulation] should be construed so as to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error") (citations and internal quotations omitted).

simply no requirement that the ARB issue "the final order" with regard to every complaint brought before the Department.

Because Part 1978 authorizes the Department to issue certain final orders without the ARB's involvement, there is simply no basis for stretching the requirement that the ARB review every decision reached *pursuant to section 109* into a broader requirement that the ARB *also* review every order issued pursuant to section 111. Indeed, even if such a reading were possible if section 109 were interpreted in isolation, regulations should be interpreted as a whole.[42] When Part 1978 is interpreted as a whole, it provides no textual basis for my colleagues' mistaken conclusion that section 109 governs section 111.

Section 109's failure to "specifically except" section 111 orders from section 109's forwarding requirement is thus hardly surprising. Reduced to its essence, my colleagues' assertion is that despite all the factors discussed above, section 109's failure to mention section 111 means that section 109 governs section 111. But section 109's silence in this regard is not sufficient, in my view, to alter the interpretation that arises both from the texts of the statute and regulation and from the Secretary's decision in *Underwood*. Therefore, my colleagues' reliance upon section 109 does not suffice to demonstrate that the ALJ should review decisions made pursuant to section 111.

b. Underwood *was highlighted with approval by the Preamble to the Final Regulation*

My colleagues' disregard for *Underwood* is unaffected by the Department's highlighting of *Underwood* in the Preamble to the Final Regulation. My colleagues view that Preamble as irrelevant because "it did not address *the issue whether* withdrawal orders are subject to the STAA regulations' automatic review provision." Opinion at 7 n.27 (emphasis added).

Acknowledging that there may be "an issue whether" withdrawal orders are subject to what my colleagues refer to as the "automatic review provision" (i.e., section 109) appears to be a slight retreat from the position taken in the rest of the opinion, which does not acknowledge any other viewpoint. But my colleagues do not appear to have contemplated the possibility that the Preamble did not "address" this "issue" because it never occurred to the drafters of the Preamble that the ARB would one day attempt to apply to orders issued pursuant to section 111 the requirements that by their terms apply

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[42] *See, e.g.*, 73 CJS Public Admin. Law & Proc. § 211 (2005) ("The court should read a regulation as an entirety, and should harmonize the various parts and provisions of the entire regulation and given them effect, if possible."); *see also Jay v. Boyd*, 351 U.S. 345, 360 (1956) (Court must read regulation "so as to give effect, if possible, to all its provisions"); *Miller v. AT&T Corp.*, 250 F.3d 820, 832 (4th Cir. 2001) (explaining requirement that in interpreting regulations, "[w]henever possible, this court must reconcile apparently conflicting provisions"). See also footnote 15.

only to decisions issued pursuant to section 109. Nor does it seem to have occurred to my colleagues that if the Department had believed that *Underwood's* interpretation was wrong because the Interim Final Rule actually had been intended to mandate "automatic review" of affirmance orders premised upon withdrawals, then the Preamble to the Final Rule certainly would not have cited *Underwood* without pointing out this error. Moreover, if the Department had believed that *Underwood* was wrong, then the Final Rule might well have been altered in order to clarify that ARB review of such ALJ orders was indeed required. To the contrary, however, section 111(c) was not substantively changed either by the Final Rule or by the alterations occasioned by the creation of the ARB in 1996.[43]

Indeed, the Preamble's citation of *Underwood* may raise *Underwood*'s status from that of mere Board decision to that of official Department interpretative rule.[44] If so, then even the full Board does not have the authority to alter *Underwood*.[45]

c. The regulations governing settlement are consistent with Underwood *rather than with my colleagues' analysis*

My colleagues' next argument appears to be the concern that "under the concurring opinion's rationale . . . the denial of review would apparently also extend to cases in which the parties object to an ALJ's approval or denial of a settlement agreement, as the settlement provisions, like the withdrawal provisions, are found in 29 C.F.R. § 1978.111." Opinion at 5 n.22.

Let me confirm that my colleagues' understanding of the concurrence is correct: the settlement regulation quite plainly states that a case "may be settled if the participating parties agree to a settlement and such settlement is approved by the Administrative Review Board, United States Department of Labor, ***or*** the ALJ." Section 111(d)(1) (emphasis added). The regulation adds that a copy of the settlement agreement must be filed "with the ALJ ***or*** the Administrative Review Board, United States Department of Labor, ***as the case may be***." *Id.* (emphases added). Therefore, for the same reasons discussed above, it is clear that an ALJ's approval of a settlement need not be reviewed by the ARB. An ALJ's *disapproval* of a settlement would lead to a hearing (unless the parties responded by submitting an approvable settlement) and thus also

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[43] *Compare* 51 Fed. Reg. 42091, 42094 (Nov. 21, 1986) (Interim Final Rule) *with* 53 Fed. Reg. 47676, 47680 (Nov. 25, 1988) (Final Rule); 61 Fed. Reg. 19982, 19986 (May 3, 1996) (alterations upon creating the ARB).

[44] *See, e.g., Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D. C. Cir. 1991) ("preamble passage" to regulation was itself "interpretative rule").

[45] *See* Secretary's Order 1-2002. 67 Fed. Reg. 64272, 64273 (specifying that Board must "observe the provisions" of the "Code of Federal Regulations").

would not be reviewed by the ARB, because an ALJ's settlement denial would not warrant interlocutory review.

Indeed, the Secretary reached just this conclusion in *Thompson v. G&W Transportation*, 1990-STA-25 (Sec'y Oct. 24, 1990), which stated:

> The ALJ erred in issuing a *recommended* order of dismissal. Section 1978.111(d)(2) of the regulations implementing the STAA, 29 C.F.R. Part 1978[,] provides:
>
> > Adjudicatory settlement. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the parties agree to a settlement and such settlement is approved by the Secretary of Labor or the ALJ. A copy of the settlement shall be filed with the ALJ or the Secretary as the case may be.
>
> Since the parties settled the case while the complaint was being adjudicated, the ALJ should have reviewed the settlement, determined if its terms were fair, adequate and reasonable, and, if he so concluded, issued a *final* order of dismissal.

Slip op. at 2 (emphases added). During the next eleven years, only two decisions departed from this conclusion. One apparently did so by mistake,[46] and the other did so due to extraordinary circumstances while nonetheless explicitly reaffirming *Thompson* as the proper interpretation of the regulation.[47]

Then in 2001 the Board issued *Cook v. Shaffer Trucking, Inc.*, ARB No. 01-051, ALJ No. 2000-STA-17 (ARB May 30, 2001), which purported to take jurisdiction of and review an ALJ's decision approving a settlement. The entirety of the Board's explanation in *Cook* for its departure from more than a decade of consistent precedent reaffirming the Secretary's initial textually-based interpretation of the regulation was as follows: "Pursuant to 29 C.F.R. §§ 1978.109(c) and 1978.111(d)(2), we hereby issue the Final Order in this case."

Cook did not acknowledge the eleven years during which the ARB had issued dozens of case notices telling ALJs not to forward settlement approvals for review, and

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[46] *See LeBlanc v. Fogleman Truck Lines*, 1989-STA-8 (Sec'y July 26, 1990), which does not discuss *Thompson* and does not itself appear to have been cited by any subsequent case.

[47] *See Tankersley v. Triple Crown Services, Inc.*, 1992-STA-8, slip op. at 1 n.1 (Sec'y Oct. 17, 1994) (reaffirming *Thompson* as "ordinarily" applicable to settlement cases, but taking jurisdiction "in view of the circumstances and disagreement here").

ALJs had closed many more cases without forwarding their orders to the Secretary for approval. Nor did *Cook* acknowledge the Secretary's prior interpretation of the regulation, let alone attempt to explain the basis for the Board's sudden conclusion that the regulation should be interpreted differently – even though the Board's new conclusion was not possible unless the Board had concluded, for some reason, that the Secretary's interpretation was wrong.[48]

Thus, *Cook* hardly qualifies as an explicit reversal of *Thompson*, nor as the type of reasoned explanation required for an agency that changes its interpretive position, particularly in light of the requirement that an altered interpretation has a higher burden of persuasion than an initial one. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (noting that "an agency's interpretation of a regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view").

No case subsequent to *Cook* has even attempted any explanation or reversal. Therefore, the Board appears to violate applicable precedent – and thereby depart from both Secretary's Order 1-2002 and fundamental principles of appellate jurisprudence –

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[48] Such paucity of reasoning has been found unacceptable by various reviewing courts. *See, e.g., Pegasus Consulting Group v. ARB*, Civil Action No. 05-5161 (D.N.J. June 27, 2007), slip op. at 14, 16 (unpublished) (reversing the ARB's decision because "the ARB's finding that [a statute] mirrored the invalidated [interpretative regulation for that statute] is not warranted and this Court is troubled by what is, in effect, a finding of 'no harm, no foul' by the ARB," and because the ARB's "failure to provide any meaningful analysis whatsoever for its decision to uphold the ALJ's determination on alternative statutory grounds is the very definition of arbitrary and capricious administrative agency action"); *Knox v. U.S. Dep't of Labor*, Case No. 06-1726, slip op. at 5, 8 (4th Cir., May 23, 2007) (unpublished) (remanding because the ARB had "concluded, without elaboration, that 'Knox neither argues nor does the record contain any evidence that DOI was violating any EPA regulations'" even though Knox "ha[d], in fact, presented some evidence that arguably tends to establish that he informed DOI officials about his concern that DOI work-practice standards had been violated," and instructing that on remand the ARB "should reconsider the entire record in light of Knox's contention" and "should specifically explain its findings and legal conclusions"); *Knox v. U.S. Dep't of Labor*, at 434 F.3d. 721, 725 n.4 (4th Cir. 2006) (remanding because ARB had "applied a different standard than formally announced and thus breached the required of reasoned decisonmaking under the APA," noting that "it is hard to imagine a more violent breach of that requirement [of reasoned decisionmaking] than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced") (brackets in original); *Roadway Exp., Inc. v. ARB*, 116 Fed. Appx. 674, 675, 679 (6th Cir. 2004) (unpublished) (remanding because Board had "failed to explain its reasoning," "did not address Eash I in its decision," and thus had reached "different results in nearly identical cases").

each time it purports to review a settlement (or withdrawal) already approved by an ALJ.[49]

Because my colleagues do not now attempt to distinguish or overturn *Thompson*, their arguments for overturning *Underwood* are incomprehensible unless one takes the position – as my colleagues apparently do – that *Thompson* already has been overturned by *Cook*. Because *Cook* patently failed to overturn *Thompson*, however, this position is wholly insupportable and thus cannot form any basis for reversing *Underwood*.

d. There is no other basis that can justify overturning Underwood *(or* Thompson*) and thereby departing both from the text of the regulations and from the Preamble*

My colleagues appear to believe that because the ARB has been delegated authority by the Secretary to review "appeals from administrative decisions," Secretary's Order 1-2002, 64272, 64272, and because the STAA says that settlements must be "made by the Secretary," *see* 49 U.S.C. § 31105 (b)(2)(C), then there is some kind of uber-requirement that the ARB should review all ALJ orders affirming OSHA findings after a withdrawal or settlement. The problem with this analysis is that the statute uses the term "the Secretary" to refer to the Department as a whole[50] – so any statutory requirement for participation by "the Secretary" is satisfied by review by the Secretary's ALJs. Therefore, the terminology of the statute, and the requirements in the Secretary's Order, do not shed any additional light upon the meaning of the regulation.

Lacking any persuasive legal justification, my colleagues fall back upon policy as a basis for their conclusion that *Underwood* should be overturned. My colleagues' first attempt to offer such a policy basis rests upon the same error discussed in section 3(a). Specifically, my colleagues argue that "a total denial of review is not consistent with a

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[49] Indeed, "[a]n agency's failure to come to grips with conflicting precedent is an inexcusable departure from the essential requirement of reasoned decisionmaking." *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (citing *Columbia Broad.Sys. v. FCC*, 454 F.2d 1-18, 1027 (D.C. Cir. 1971)) (vacating agency's 2002 decision as arbitrary and capricious because it did not provide satisfactory explanation for agency's departure from position held by agency for thirteen years; although 2002 decision cited as authority a 1998 decision (*Ikela*), *Ikela* had failed to provide any explanation for its own divergence from the thirteen-year line of controlling precedent, and thus *Ikela* did not constitute a controlling precedent justifying 2002 decision's choice to follow *Ikela* rather than thirteen-year line of precedent); *see also Thompson v. DOL*, 885 F.2d 551, 557 (9th Cir. 1989) ("It is an elemental tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them.").

[50] For example, the statute also says that "the Secretary shall conduct an investigation," 49 U.S.C. § 31105(b)(2)(A) and that if a violator does not comply with an enforcement order, then "the Secretary shall bring a civil action to enforce the order," *id.* at 31105(d). These obligations are currently undertaken by the Occupational Safety and Health Administration (OSHA) and by the Office of the Solicitor, respectively.

regulatory scheme that is predicated upon the determination that review is of such importance that it is mandated whether requested or not." Opinion at 5 (citing section 109) & n.23.

But my colleagues' argument that there is such a "regulatory scheme" is based only upon the mistaken belief that section 109 requires that the ARB engage in "automatic review" of all ALJ decisions – and there is no such requirement. Rather, as discussed above, section 109 requires ARB review only of those decisions issued pursuant to section 109. Because there is no broader "regulatory scheme" requiring ARB review of all ALJ orders, no policy concern is posed by the purported incompatibility of the texts of Part 1978 or section 111 with such a scheme.

As a further policy basis in support of the argument that the ARB ought to review all ALJ orders issued under section 111, my colleagues suggest if an ALJ erroneously determined a litigant had withdrawn objections when he had not, then few "pro se litigants would even consider contacting the Board, to complain of an ALJ's order, given the ALJ's affirmation in the decision that he or she had issued the **final** (i.e., not subject to appeal) decision for the Department and the lack of any regulations suggesting that requesting such consideration was either appropriate or possible." Opinion at 5 n.23 (emphasis in original).

This suggestion appears to depend upon the assumption – incorrect, in my view – that pro se litigants will not seek reconsideration and ask the ALJ to correct mistaken rulings.

Moreover, this suggestion also rests upon an error – namely, the assertion that no "regulations" even "suggest[]" that such an appeal is possible. Section 115 states that "[i]n special circumstances not contemplated by the provisions of these rules, or for good cause shown, the judge or the Secretary on review may, upon application, after three days notice to all parties and intervenors, waive any rule or issue such orders as justice or the administration of section 405 requires." This section appears perfectly designed to address the unlikely but possible eventuality that, for example, an ALJ might mistakenly misidentify as withdrawal a communication that was not intended as such, or might decline to alter such a mistaken judgment upon reconsideration. Thus to assert, as my colleagues do, that there are no "regulations suggesting that such" review by the ARB is either "appropriate or possible" reflects a rather demeaning assessment of the ability of litigants to understand this simple provision. Nor is Part 1978 so excessively long that a litigant could not find this provision. With only fifteen sections and covering a mere six pages, it is short indeed by government standards.

My colleagues' related concern, that pro se litigants might not realize they could appeal an order designated as "final," is belied by the Board's own experience. The Board's own orders are frequently designated "final" upon issuance, and neither the Board nor the regulations provide any indication that reconsideration is possible – yet the Board regularly receives petitions for reconsideration, most frequently from pro se litigants. *See, e.g., Henrich v. Ecolab, Inc.*, ARB No. 5-30, ALJ No. 2004-SOX-51, slip

op. at nn.23 & 27 (providing partial list of petitions for reconsideration filed in last few years, most of which were filed by pro se litigants).

Another possible policy rationale – albeit an unstated and even, perhaps, unconscious one – may be the desire to boost the Board's institutional power and perceived effectiveness by increasing the number of decisions issued. My colleagues do not appear concerned that this increase forces settlement participants to wait longer for the finality and financial settlements to which they are entitled by the terms of the regulation and the Secretary's precedents. Nor do my colleagues appear concerned that the expenditure of the Board's resources upon unneeded reviews of settlements and withdrawals contributes to the multi-year delays that other litigants continue to suffer while waiting for decisions in their own cases. Indeed, settlements and withdrawals have constituted an ever-increasing portion of the Board's published decisions in recent years: such cases constituted over twenty-five percent of the decisions issued by the Board during the last twelve months (December 2006-November 2007), over twenty percent of those issued in the previous twelve months, and just under twenty percent of those issued in the twelve months before that.[51] If the Board spends very little time preparing these decisions, then it is difficult to believe that the Board's involvement is very useful – but expending any resources at all upon these decisions takes away from the Board's efforts to reduce its substantial backlog.

My colleagues would likely disclaim this motivation, arguing instead that their review of ALJ settlement approvals and withdrawal-based affirmances serves the laudable goal of ensuring review of all ALJ orders and thereby protecting vulnerable litigants from possible ALJ error. But as I have noted, there are already mechanisms to protect litigants in such an occurrence: litigants can seek reconsideration from the ALJ, or litigants can rely upon section 115, which – because it authorizes the Board to "waive any rule or issue such orders as justice or the administration of section 405 requires" – authorizes the Board to correct an erroneous ALJ order by issuing an order requiring the ALJ to return the case to the path towards a hearing.

My colleagues appear particularly concerned that litigants who do not realize that the ALJ has erred, and they have thus suffered an injustice, might fail to take advantage of these mechanisms. But if any injustices that may be occurring are so slight that they pass unnoticed by any party, then it seems excessive to attempt to correct those injustices by rewriting the regulation so that it requires the ARB to review every settlement and every withdrawal case.

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[51] These percentages, which do not include those settlements reached and withdrawals sought while cases were pending before the ARB, were calculated based upon an analysis of those published decisions of the ARB available on the DOL's website at www.oalj.dol.gov/PUBLIC/ARB/REFERENCES/CASELISTS/ARBINDEX.HTM. Because that website lists re-issued cases and errata notices as separate decisions, these percentages likely somewhat underestimate the total percentage of settlement and withdrawal reviews.

Indeed, because an ARB-level review of a settlement or withdrawal does not guarantee freedom from error and injustice – particularly when no litigant has sought review or participated in the case at the ARB level – my colleagues are inflicting delays and continued uncertainty upon litigants solely in order to replace the possibility of ALJ error with the possibility of ARB error. Indeed, one might argue that there is a higher probability of error at the ARB level. The ARB, unlike the ALJ, has no personal dealings with the litigants and so faces more difficulty in assessing whether withdrawals and settlements raise any issues such as coercion. Moreover, because the ARB does not hold any conferences with the litigants and does not routinely review the underlying records in settlement cases, the ARB is less well placed than the ALJ to assess the relative strength of the parties and thus determine whether a settlement is "fair, adequate and reasonable."

Finally, this last policy argument has no bounds. If addressing possible ALJ error can justify a second, ARB-level review of settlements and withdrawals despite the regulatory text and Secretarial precedent making clear that such review is not necessary, then addressing such possible error also can justify the ARB's unwarranted review of unappealed legal judgments and even factual findings made by ALJs – as indeed it appears to do for my colleagues, who too frequently engage in such review even while reciting the requirement to avoid doing so.[52]

Because these last two policy arguments thus boil down to an unreflective faith in the ARB and lack of confidence in the ALJs and litigants, in my view these arguments do not justify my colleagues' attempt to rewrite the regulation to require ARB oversight even of those ALJ orders firmly committed by the Department of Labor to ALJ discretion.

Indeed, the texts of Part 1978 (as discussed above in section 3a) and section 111(c) itself are quite plain. The term "or" is clearly used as a disjunctive.[53] When used as a disjunctive, the term "or" conveys that the reference is to one, or alternatively to the other, but *not* to both. To re-interpret the requirement that *either* the ALJ *or* ARB must affirm the OSHA findings as a requirement that *both* the ALJ *and* the ARB must issue an

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[52] *See, e.g., Pegasus*, slip op. at 15 "[T]he basic notion of due process warrants a ruling by this Court that the ARB may not *sua sponte* find Pegasus culpable for violations of statutory provisions with which it was never charged . . . . The ARB's decision to base its ruling on the statute is nothing more than an after the fact justification for an improperly prosecuted action."); *see also Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-22 and 27, slip op. at 11-16 (ARB July 31, 2007) (Oliver, dissenting).

[53] Although the term "or" is sometimes used in other ways – for example, to indicate that a second phrase is either synonymous with, or a correction of, a first phrase – there can be no real argument that the disjunctive meaning is clearly the one intended here.

order affirming those findings thus requires a significant departure from the text.[54] So even if my colleagues' policy arguments were persuasive (which they are not), reliance upon such policy arguments to trump the regulatory text is inconsistent with the Supreme Court's injunction that when law's text "is plain," analysis stops and "the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms."[55] Contrary to my colleagues' implicit assertion, allowing ALJs to approve settlements and affirm OSHA findings without ARB involvement hardly qualifies as an "absurd" outcome.

4. The ARB should not review an ALJ's final order issued pursuant to section 1978.111(c)

One might argue that although the ALJ was not required to to forward his order for review, now that he has done so we ought to review it. Indeed, the Secretary did this in *Underwood*, explaining that although there had been "no need" for the ALJ to forward his decision for review, the Secretary nonetheless would proceed to review the withdrawal as if it had occurred while the case was on review before the Secretary.[56]

But this portion of *Underwood*, while not explicitly repudiated, was not followed by later decisions. Rather, after the first few cases[57] the Secretary (and later the ARB) then in 1993 took the position that because such ALJ orders and affirmances constituted the Department's final order, the Secretary should not review such ALJ orders and affirmances.[58]

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[54] It is difficult to argue that "or" was not the intended term. The disjunctive nature of section 111 is emphasized by the inclusion of the phrase "as the case may be" at the end of the sentence.

[55] *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citing decisions from 2000, 1999, 1989, and 1917) (discussing how, if at all, possible absence of comma in text affected plain meaning of provision); *see also Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 462-63 (1987) ("Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' . . . Respondents' position depends upon the addition of words to a statutory provision which is complete as it stands. Adoption of their view would require amendment rather than construction of the statute, and it must be rejected here.") (internal citations omitted).

[56] *Underwood*, Show Cause Order at 2.

[57] *See Chapman v. Witt Corrugating, Inc.*, 1987-STA-14. slip op. at 2 (Sec'y May 24, 1988) (citing *Underwood*); *Creech v. Salem Carriers, Inc.*, 1988-STA-29, slip op. at 2 (Sec'y Sept. 27, 1988) (same); *Mysinger v. Rent-a-Driver*, 1990-STA-23, slip op. at 2 (Sec'y Sept. 21, 1990) (citing *Creech*); *Jarrett v. MGM Transport Corp.*, 1990-STA-38, slip op. at 1 (citing "judicial economy"); *Snow v. TNT Red Star Express, Inc.*, 1991-STA-44, slip op. at 2 (Sec'y Mar. 13, 1992) (citing both "administrative efficiency" and *Creech*).

[58] *See Hall v. Yellow Freight Systems*, 1993-STA-24, at 1 (Sec'y July 1, 1993).

Once this revised position had been taken, then until late 2004 in every subsequent instance when an ALJ mistakenly forwarded for review an order issued pursuant to 29 C.F.R. § 111(c), the response from the Secretary (and later the ARB) was a simple "Notice . . . to advise the parties that the case is closed pursuant to the ALJ's final order."[59]

When faced with a discovery that precedent is inconsistent, the Board has an obligation either to reconcile the conflicting decisions or to select one line of precedent to follow.[60] Because *Underwood* not only remains good law, but also represents the best reading of the regulation, in my view we ought to follow the far more robust line of precedent represented by the Notices and decline review of this and other withdrawal and settlement cases.

Therefore, the line of decisions begun by *Cook* (for settlements) and *Boyd* (for withdrawals) should not be understood to convey any requirement that ALJs forward such orders for review.[61]

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[59] *Id*. at 1; *see Ford v. Robinson Cartage Co.*, 1994-STA-31, at 1 (Sec'y Aug. 22, 1994) (same); *Adams v. Con-Way Southwest Express*, 1995-STA-10, at 1 (OAA Mar. 30, 1995) (same); *Trumble v. Goodway Transport Co.*, 1995-STA-16, at 1 (OAA June 22, 1995); *see also Lepley v. Farmers Union Elevator at New Salem*, ARB No 00-046, ALJ No. 1999-STA-48, slip op. at 1 (ARB Apr. 25, 2000) (noting that "the ALJ's decision will be considered the final administrative order," but suggesting that the Board's decision to consider it final was influenced by the fact that neither party had provided briefs in response to the Board's invitation that they do so). Because the STAA's implementing regulations require the ARB to review all ALJ decisions issued under 29 C.F.R. § 1978.109(a), even when no briefs have been filed, it is odd that *Lepley*'s conclusion that the ALJ's decision was final appears to have been premised upon the absence of briefs; but no further explanation was provided.

[60] Fundamental principles of appellate jurisprudence not only require that an appellate body follow its precedent, they also require, in the event that a line of decisions is found to be inconsistent with an earlier line of decisions, that the appellate body state which line should be followed and explain why. See footnote 23.

[61] There appears to be continuing disagreement among the ALJs with the ARB's conclusion in *Boyd* that ALJs were required to forward such decisions for review. Prior to *Boyd*'s issuance, ALJs did not routinely forward withdrawal-based affirmance orders to the ARB for review. *See, e.g., Palmer v. G&W Lumber & Millwork*, Inc., 2004-STA-45 (ALJ July 7, 2004) (Chief ALJ) (citing *Creech* in issuing "Final Decision and Order Approving Withdrawal of Objections and Dismissing Claim"). Subsequent to *Boyd*, while most ALJs forward such orders without comment, some continue to protest that their own orders are the final ones. *Compare, e.g., Nicols v. Roma of Dallas*, 2006-STA-9 (ALJ June 8, 2006) (citing *Boyd* in forwarding for review an order dismissing a claim on the basis of a withdrawal made under 1978.111(c)) *with Drake v. Yellow Transportation*, 2005-STA-3 (ALJ Mar. 2, 2005) (stating that "This Order is the final administrative action and no Secretarial review is required," yet also forwarding order to ARB for review) *and Fraley v. Transservice Logistics, Inc.*, 2005-STA-11, slip op. at 2 (stating that "Despite the plain language of [section 111], the ARB in . . . *Boyd* . . . [a] case[] devoid of any authority or reasoning . . .

Conclusion

Because my colleagues do not have the power to overturn *Underwood*, do not provide any persuasive reason for doing so, and do not either overturn *Thompson* or distinguish it, Secretarial precedent and the text of the regulations require that the Board should ordinarily treat as final those orders issued by an ALJ under the authority of 29 C.F.R. § 1978.111, and ALJs should not forward such orders for review.

The Board may be able to issue an order correcting such an ALJ order in unusual circumstances, but no such circumstances are present here. There has been no suggestion that the ALJ in any way misunderstood the Complainant's intent to withdraw, nor has any other special circumstance been alleged. Indeed, neither party filed a brief or in any other way sought to bring to our attention any irregularity.[62]

In sum, the ALJ has dismissed Hutchins' complaint on the basis of Hutchins' written withdrawal, and in my view *Underwood* and its successors require that in dismissing this case we decline to review ALJ's order because that order is already final.[63]

A. LOUISE OLIVER
Administrative Appeals Judge

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found that the [ALJ's] orders were subject to the automatic review provisions of 49 U.S.C.A. s. 31105(b)(2)(C) . . . . [This] holding that there is automatic review . . . of a voluntary withdrawal before an Administrative Law Judge in STAA cases appears to overrule, *sub silentio* the Secretary of Labor's holding[] in [*Underwood*, as followed in] *Shown* . . . and *Creech* . . . .") (full citations omitted).

[62] Nor has any party made an "application" asking the ARB to proceed under the provisions of section 115.

[63] Therefore, in my view my colleagues' opinion includes surplusage insofar as it purports to review the ALJ's decision and the settlement agreement, and to dismiss (again) Hutchins' claim.