

U.S.DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of)	
)	
Amerijet International, Inc.)	13-TSA-0052
)	
Respondent.)	

ORDER

Amerijet International, Inc. (Respondent) appeals an order issued by the Administrative Law Judge (ALJ) on October 18, 2013 denying Respondent's motion for decision. As explained below, Respondent's appeal is denied.

TSA's rules of practice do not permit a party to file an interlocutory appeal to the TSA Decision Maker until the Initial Decision is entered on the record. 49 C.F.R. §1503.631(a). However, an interlocutory appeal as of right is permitted without the consent of the ALJ before the Initial Decision is entered in the following circumstances: (1) a ruling or order by the ALJ barring a person from the proceedings; (2) failure of the ALJ to dismiss the proceedings in accordance with §1503.623; (3) a ruling or order by the ALJ in violation of §1503.607(b); or (4) a ruling or order by the ALJ regarding public access to a particular docket or documents.

In this case, Respondent contends the interlocutory appeal is permitted because the order is in violation of 49 C.F.R. §1503.607(b)(iv). That provision provides that the ALJ must not "adopt or follow a standard of proof or procedure contrary to that set forth in this subpart." Respondent argues that the ALJ order fails to properly follow the TSA rules of practice as to when a motion for decision must be granted. TSA's rules of practice state:

A party may move for decision, regarding all or any part of the proceedings, at any time before the ALJ has issued an initial decision in the proceedings. A party may include with a motion for decision affidavits as well as any other evidence in support of the motion. The ALJ must grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, affidavits, matters

that the ALJ has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party moving for decision has the burden of showing that there is no genuine issue of material fact.

49 C.F.R. §1503.629(f)(5).

In the order, the ALJ denied Respondent's motion because Respondent had not met its burden of showing that there were no genuine issues of material fact to be determined. The order explains that there is a material fact in dispute regarding whether the method Respondent used to meet TSA's cargo security requirements was appropriate. The order notes that Respondent has denied the factual allegations in the Complaint and there is no stipulation as to any of those facts.

Respondent asserts that there are no genuine issues of material fact in dispute. Even though Respondent denied the factual allegations listed in the complaint, Respondent claims that such allegations are not pertinent to its contention, supported by documentation appended to its appeal that it is in compliance with TSA cargo security requirements. Respondent claims TSA failed to present sufficient evidence to defeat Respondent's motion. Respondent alleges that the order fails to consider Respondent's alternate procedural grounds in support of its motion regarding TSA's failure to provide fair notice of new interpretations of its security requirements which Respondent claims TSA is trying to apply retroactively contrary to 49 C.F.R.

§1503.629(e). Finally, Respondent states that the ALJ's failure to rule on Respondent's motion for leave to file a response before ruling on the motion to dismiss violates 49 C.F.R.

§1503.629(d).

TSA opposes Respondent's appeal. TSA asserts that facts material to Respondent's culpability are in dispute, specifically Respondent's claim that it is in compliance with TSA's cargo security requirements. TSA provides arguments with supporting documentation to dispute Respondent's claim. TSA states that the ALJ did not violate 49 C.F.R. §1503.629(e) as

decisions on motions were made no later than seven days before the hearing and Respondent's fair notice and retroactive application claims are not ripe for appeal. Finally, TSA asserts that the ALJ did not violate 49 C.F.R. §1503.629(d) because that provision does not guarantee that a party may respond to a reply.

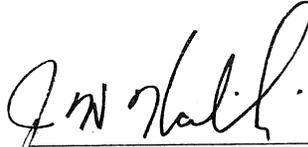
It should be noted that TSA civil penalty proceedings are governed by the rules of practice in TSA civil penalty actions, 49 C.F.R., part 1503, subpart G. The Federal Rules of Civil Procedure are not binding in TSA civil penalty proceedings, but may provide guidance. TSA's rules of practice limit a party's ability to file an interlocutory appeal as of right. In this instance, I find that an interlocutory appeal as of right is not permitted because the ALJ's denial of Respondent's motion is consistent with the standards and procedures set forth in the rules of practice.

As noted in the order, every fact alleged by TSA is disputed by Respondent and TSA disputes Respondent's claim that it is in compliance with cargo security requirements. I agree with the ALJ's finding that a critical fact disputed by the parties is whether the method Respondent uses to comply with TSA's cargo security requirements is proper. This fact is material to the case and likely will determine the outcome of this matter. Therefore, the ALJ's order is in accord with TSA's rules of practice. In addition, the ALJ has not acted in contravention of either 49 C.F.R. §1503.629(e) or 49 C.F.R. §1503.629(d). The former rule requires that prehearing motions be resolved not later than seven days before the hearing. The ALJ complied with that requirement. The latter rule states that replies to motions are permitted not later than thirty days after service of a written motion and that the moving party may file a response at the discretion of the ALJ. The ALJ has the authority to determine whether a response is permitted.

Based on the foregoing, the interlocutory appeal as of right is denied.

Dated: _____

12/19/13



J.W. Halinski
Deputy Administrator