In the Matter of:

GEORGANNE BRADBURY, **ARB CASE NO. 08-120**

COMPLAINANT, **ALJ CASE NO. 2008-STA-007**

v. **DATE: January 29, 2009**

SCHWAN'S FOOD COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINT WITH PREJUDICE

Georganne Bradbury complained that Schwan's Food Company (Schwan's) violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA),[1] and its implementing regulations,[2] when it discharged her for complaining about the unsafe conditions of the commercial motor vehicles assigned to the Brookshire, Texas terminal where she worked as a general manager.

After an investigation, the Occupational Safety and Health Administration (OSHA) found that Schwan's fired Bradbury for substandard performance of her

[1] 49 U.S.C.A. § 31105 (West 2008), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Section 405 of the STAA 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 amended provisions are not at issue in this case and thus do not affect our decision.

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

administrative duties as a general manager, and not for activity protected by the STAA.[3] Accordingly, OSHA dismissed the complaint.[4]

Bradbury objected to OSHA's findings and requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ).[5] The ALJ scheduled the case for hearing, but on July 21, 2008, the ALJ received a letter advising him that Bradbury "was able to negotiate a settlement agreement with the Respondent and pursuant to that agreement must have the judge's dismissal order before the terms favorable to her in that agreement can be applied." The letter enclosed Bradbury's Request for Order of Dismissal with Prejudice. Bradbury's counsel did not provide a copy of the negotiated settlement agreement to the ALJ, and the ALJ did not order that one be provided. On July 23, 2008, the ALJ issued a Recommended Order Approving Withdrawal of Objections and Dismissing Claim. The Order noted that pursuant to 29 C.F.R. § 1978.111(c), a party may withdraw his or her objections to OSHA's findings or order by filing a written withdrawal with the administrative law judge.[6] Accordingly, the ALJ canceled the hearing and dismissed Bradbury's appeal with prejudice. The ALJ's Recommended Order neither acknowledged that the parties had entered into a settlement nor approved the settlement as required by the STAA's implementing regulations.

The applicable regulations specifically provide that "at any time after the filing of objections to the Assistant Secretary's findings and/or order . . . if the participating parties agree to a settlement **and such settlement is approved by the Administrative Review Board . . . or the ALJ.** A copy of the settlement shall be filed with the ALJ or the Administrative Review Board . . . as the case may be."[7] "In keeping with the statute, a settlement under the STAA cannot become effective until its terms have been reviewed and determined to be fair, adequate, and reasonable, and in the public interest. . . ."[8] Because the ALJ in this case failed to review and approve the settlement or to obtain a copy of the settlement for the record, the Board issued an Order to Show Cause on

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3 OSHA's Findings and Order, March 28, 2007.

4 *Id.*

5 *See* 29 C.F.R. § 1978.105.

6 Order at 1-2. 29 C.F.R. § 1978.111(c) provides in relevant part:

> 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.

7 29 C.F.R. § 1978.111(d)(2) (emphasis added).

8 *Tankersley v. Triple Crown Servs., Inc.*, No. 1992-STA-008 (Sec'y Feb. 18, 1993).

January 7, 2009, ordering the parties to either provide the Board with a copy of the settlement for its review or to show cause no later than January 21, 2009, why the Board should not remand the case to the ALJ to issue an order on the merits of this case. On January 20, 2009, counsel for Schwan's, with the approval of Bradbury's counsel, provided the Board with a copy of the settlement.

Because the parties have now submitted the settlement as required and have not indicated any opposition to its terms, we deem the terms of the settlement agreement unopposed and will review it in accordance with the applicable regulations.[9]

Review of the agreement reveals that it may encompass the settlement of matters under laws other than the STAA.[10] The Board's authority over settlement agreements is limited to the statutes that are within the Board's jurisdiction as defined by the applicable statute. Furthermore, it is limited to cases over which we have jurisdiction. Therefore, we approve only the terms of the agreement pertaining to Bradbury's current STAA case.[11]

In addition, if the provisions in paragraph 1 (d) of the Settlement Agreement were to preclude Bradbury from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore constitute unacceptable "gag" provisions.[12] Furthermore, the Agreement provides that the parties shall keep the terms of the settlement confidential.[13] The Board notes that the parties' submissions, including the Settlement Agreement, become part of the record of the case and are subject to the Freedom of Information Act (FOIA).[14] FOIA requires Federal agencies to disclose requested records unless they are exempt from disclosure under the Act.[15] Department of Labor regulations provide specific procedures for

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9 *See* 29 C.F.R. § 1978.111(d)(2).

10 Confidential Settlement Agreement and General Release, para. 1 (a).

11 *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 2000-STA-056, slip op. at 2 (ARB Apr. 30, 2003).

12 *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 6 (ARB Nov. 10, 1997); *Connecticut Light & Power Co. v. Sec'y, U.S. Dep't of Labor*, 85 F.3d 89, 95-96 (2d Cir. 1996) (employer engaged in unlawful discrimination by restricting complainant's ability to provide regulatory agencies with information; improper "gag" provision constituted adverse employment action).

13 Settlement Agreement, para. 1 j.

14 5 U.S.C.A. § 552 (West 2007).

15 *Coffman v. Alyeska Pipeline Serv. Co. & Arctic Slope Inspection Serv.*, ARB No. 96-141, ALJ Nos. 1996-TSC-005, 006, slip op. at 2 (ARB June 24, 1996).

responding to FOIA requests and for appeals by requestors from denials of such requests.[16]

Finally, we construe paragraph 8 stating that the agreement "shall be governed by, and reviewed in accordance with, the laws of the State of Texas" as not limiting the authority of the Secretary of Labor and any Federal court, which is governed in all respects by the laws and regulations of the United States.[17]

The parties have certified that the Agreement constitutes the entire settlement with respect to Bradbury's STAA claim.[18] The Board finds that the settlement is fair, adequate, and reasonable, and in the public interest. Accordingly, with the reservations noted above limiting our approval to the settlement of Bradbury's STAA claim, we **APPROVE** the agreement and **DISMISS** the complaint with prejudice.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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[16] 29 C.F.R. § 70 *et seq*. (2007).

[17] *Phillips v. Citizens' Ass'n for Sound Energy*, 1991-ERA-025, slip op. at 2 (Sec'y Nov. 4, 1991).

[18] Settlement Agreement, para. 2 (d).