



In the Matter of:

GARY KANOST,

ARB CASE NO. 08-121

COMPLAINANT,

ALJ CASE NO. 2008-STA-042

v.

DATE: November 26, 2008

FEDEX FREIGHT EAST, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**FINAL DECISION AND ORDER APPROVING SETTLEMENT
AND DISMISSING COMPLAINT WITH PREJUDICE**

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA)¹ and its implementing regulations.² Gary Kanost complained that FedEx Freight East, Inc. (FedEx) violated the employee protection provisions of the STAA when it suspended him for three days in retaliation for his refusal to operate one of its trucks because he considered the weather conditions to be unsafe.

After an investigation, the Occupational Safety and Health Administration (OSHA) found that Kanost's refusal to drive was protected by the STAA because Kanost reasonably believed that the driving conditions were unsafe and that FedEx discharged Kanost because of his protected activity.³ Accordingly, OSHA ordered FedEx to pay

¹ 49 U.S.C.A. § 31105 (West 2008).

² 29 C.F.R. Part 1978 (2007).

³ OSHA's Findings and Order, March 5, 2008.

Kanost back wages with interest, to expunge any adverse references from Kanost's personnel records, not to make negative references to the suspension in any future performance reviews or requests for employment references, and to post a notice to all employees acknowledging its obligations under the STAA.⁴

FedEx objected to OSHA's findings and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).⁵ The ALJ scheduled the case for hearing, but prior to the scheduled hearing, the parties negotiated and executed a Settlement Agreement and Release (Agreement), which both Kanost and FedEx signed. The parties filed the Agreement with the ALJ.

Under the regulations implementing the STAA, the parties may settle a case at any time after filing objections to OSHA's preliminary findings, and before those findings become final, "if the participating parties agree to a settlement and such settlement is approved by the Administrative Review Board [ARB] . . . or the ALJ." 29 C.F.R. § 1978.111(d)(2).

When the parties reached a settlement, the case was pending before the ALJ. Therefore, the ALJ appropriately reviewed the settlement agreement. On July 29, 2008, the ALJ issued a Recommended Order Approving Withdrawal of Objections and Dismissing Claim. The ALJ noted that pursuant to 29 C.F.R. § 1978.111(d)(2), the parties submitted a copy of the settlement agreement signed by Kanost and FedEx.⁶ Accordingly, the ALJ canceled the hearing and dismissed FedEx's appeal with prejudice. Order at 1.

The case is now before the Board pursuant to the STAA's automatic review provisions.⁷ The Board "shall issue the final decision and order based on the record and

⁴ *Id.*

⁵ *See* 29 C.F.R. § 1978.105.

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

At any time after the filing of objections to the Assistant Secretary's findings and/or order, the 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. A copy of the settlement shall be filed with the ALJ or the Administrative Review Board, United States Department of Labor as the case may be.

⁷ *See* 49 U.S.C.A. § 31105(b)(2)(C); 29 C.F.R. § 1978.109(c)(1).

the decision and order of the administrative law judge.”⁸ The Board issued a Notice of Review and Briefing Schedule permitting either party to submit briefs in support of or in opposition to the ALJ’s order. Neither party submitted a brief pursuant to the Board’s notice. We therefore deem the settlement unopposed under its terms.

The ARB concurs with the ALJ’s determination and finds that the parties’ settlement agreement is fair, adequate, and reasonable. But we note that the Agreement may encompass the settlement of matters under laws other than the STAA.⁹ 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. Our approval is limited to this case, and we understand the settlement terms relating to release of STAA claims as pertaining only to the facts and circumstances giving rise to this case. Therefore, we approve only the terms of the Agreement pertaining to Kanost’s STAA claim, ARB No. 08-121, 2008-STA-042.¹⁰

Furthermore, if the provisions in paragraph 10 of the Agreement were to preclude Kanost from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore, constitute unacceptable “gag” provisions.¹¹

Paragraph 14 of the Agreement provides that the Agreement shall be construed and governed by the laws of the Commonwealth of Pennsylvania. We interpret this “choice of law” provision as not limiting the authority of the Secretary of Labor and any Federal court, which shall be governed in all respects by the laws and regulations of the United States.¹²

⁸ 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001).

⁹ See Agreement, para. 6.

¹⁰ See *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 2000-STA-056, slip op. at 2 (ARB Apr. 30, 2003).

¹¹ *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); *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 6 (ARB Nov. 10, 1997).

¹² See *Phillips v. Citizens’ Ass’n for Sound Energy*, 1991-ERA-025, slip op. at 2 (Sec’y Nov. 4, 1991).

Finally, the Agreement provides that the parties shall keep the terms of the settlement confidential.¹³ The Board notes that the parties' submissions, including the Agreement, become part of the record of the case and are subject to the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (West 2007). FOIA requires Federal agencies to disclose requested records unless they are exempt from disclosure under the Act.¹⁴ Department of Labor regulations provide specific procedures for responding to FOIA requests and for appeals by requestors from denials of such requests.¹⁵

The parties have certified that the Agreement constitutes the entire settlement with respect to Kanost's STAA claim.¹⁶ Accordingly, we **APPROVE** the ALJ's order and **DISMISS** the complaint with prejudice.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹³ Agreement, para. 10.

¹⁴ *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).

¹⁵ 29 C.F.R. § 70 *et seq.* (2007).

¹⁶ Agreement, para. 15.