



In the Matter of:

DANNY BYERS,

ARB CASE NO. 09-020

COMPLAINANT,

ALJ CASE NO. 2008-STA-038

v.

DATE: December 31, 2008

NATIONWIDE TRANSPORTATION, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center*, Burnsville, Minnesota

For the Respondent:

Robert F. Rossiter, Jr., Esq., *Fraser Stryker PC LLO*, Omaha, Nebraska

**FINAL ORDER APPROVING SETTLEMENT
AND DISMISSING COMPLAINT**

This case arises under Section 405 of the Surface Transportation Assistance Act of 1982 (STAA), as amended, and its implementing regulations.¹ Danny Byers filed a complaint with the

¹ 49 U.S.C.A. § 31105 (West 2008). The STAA was amended shortly before Byers filed his complaint on August 17, 2007. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). *See also* STAA's implementing regulations, 29 C.F.R. Part 1978 (2007).

Continued . . .

Occupational Safety and Health Administration (OSHA) on August 17, 2007, alleging that Nationwide Transportation, Inc. (Nationwide) retaliated against him for his complaints concerning violations of the Department of Transportation's hours of service and safety regulations.² After an investigation, OSHA found that Byers voluntarily resigned for personal reasons and that Nationwide did not retaliate against him for engaging in protected activity.³

Byers 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, but prior to the scheduled hearing, the parties negotiated and executed a Settlement Agreement and Release (Agreement), which both Byers and Nationwide signed. The parties filed the Agreement with the ALJ.

When the parties reached a settlement, the case was pending before the ALJ. Therefore, the ALJ appropriately reviewed the Settlement Agreement. On November 4, 2008, the ALJ issued a Recommended Order Approving Settlement and Dismissing Claim. The ALJ noted that pursuant to 29 C.F.R. § 1978.111(d)(2), the parties submitted a copy of the Agreement signed by Byers and Nationwide.⁵ Accordingly, the ALJ canceled the hearing and dismissed Byers's appeal with prejudice.

The case is now before the Administrative Review Board pursuant to the STAA's automatic review provisions.⁶ 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

² Complaint at 2; 49 C.F.R. § 395.3.

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

⁴ See 29 C.F.R. § 1978.105.

⁵ Recommended Order at 2. 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.

⁶ See 49 U.S.C.A. § 31105(b)(2)(C); 29 C.F.R. § 1978.109(a),(c)(1).

party submitted a brief pursuant to the Board's notice. We therefore deem the settlement unopposed under its terms.

The Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge."⁷ In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision"⁸ Therefore, the Board reviews the ALJ's legal conclusions de novo.⁹

The ARB concurs with the ALJ's determination that the parties' Agreement is fair, adequate and reasonable. But we note that the Agreement 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. 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 Byers's STAA claim, ARB No. 09-020, 2008-STA-038.¹¹

Furthermore, if the provisions in paragraph G of the Agreement were to preclude Byers 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

Paragraph M of the Agreement provides that the Agreement shall be construed and governed by the laws of the State of Nebraska. We interpret this "choice of law" provision as

⁷ 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).

⁸ 5 U.S.C.A. § 557(b) (West 2008).

⁹ *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

¹⁰ *See Agreement*, paras. A, B, and C.

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

¹² *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).

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.¹³

Finally, the Agreement provides that the parties shall keep the terms of the settlement confidential.¹⁴ 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.¹⁵ Department of Labor regulations provide specific procedures for responding to FOIA requests and for appeals by requestors from denials of such requests.¹⁶

The parties have agreed to settle Byers's STAA claim. Accordingly, we **APPROVE** the ALJ's order and **DISMISS** the complaint with prejudice.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

¹³ See *Phillips v. Citizens' Ass'n for Sound Energy*, 1991-ERA-025, slip op. at 2 (Sec'y Nov. 4, 1991).

¹⁴ Agreement, para. G.

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).

¹⁶ 29 C.F.R. § 70 *et seq.* (2007).