



In the Matter of:

BARRY ROBERTS,

ARB CASE NO. 09-036

COMPLAINANT,

ALJ CASE NO. 2008-STA-057

v.

DATE: May 29, 2009

BUCKLEY POWDER COMPANY,

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), 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) and implementing regulations at 29 C.F.R. Part 1978 (2008). 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.

On February 12, 2008, the Complainant, Barry Roberts, filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA). Roberts alleged that Respondent, Buckley Powder Company, violated the STAA when it terminated his employment in retaliation for raising motor vehicle safety concerns with his supervisors. OSHA denied Roberts's complaint on May 22, 2008, for failure to establish that he had engaged in STAA-protected activity. Roberts objected to OSHA's findings and timely requested a hearing pursuant to 29 C.F.R. § 1978.105.

Prior to the scheduled hearing, the parties negotiated and executed a Confidential Settlement Agreement and Release of Claims (Settlement Agreement), which Roberts and Harold Wichter, Buckley Powder Company's Chief Financial Officer, signed on October 28, 2008, and October 31, 2008, respectively. Roberts's counsel, Kim L. Ritter, filed the settlement agreement with the Administrative Law Judge (ALJ). The parties subsequently filed with the ALJ a Joint Motion for Dismissal with Prejudice.

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 . . . 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 December 12, 2008, the ALJ issued a Recommended Order Approving Settlement. The ALJ determined that the settlement agreement constituted a fair, adequate, and reasonable settlement of Roberts's STAA complaint. Order at 2. Therefore, the ALJ recommended that the Administrative Review Board (ARB or Board) approve the settlement agreement and dismiss the case with prejudice. *Id.*

The case is now before the ARB pursuant to the STAA's automatic review provisions. 49 U.S.C.A. § 31105(b)(2)(C); *see* 29 C.F.R. § 1978.109(c)(1). The ARB "shall issue the 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); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050, slip op. at 2 (ARB Sept. 26, 2001).

On January 2, 2009, the ARB 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. Roberts did not file a response. Buckley Powder Company responded that it would not be filing a brief. We therefore deem the settlement unopposed.

The ARB agrees with the ALJ's determination that the parties' settlement agreement constitutes a fair, adequate, and reasonable settlement of Roberts's STAA complaint and none of the parties alleges otherwise. However, review of the agreement reveals that it may encompass the settlement of matters under laws other than the STAA. Settlement Agreement at 2-3, paragraph A.

The ARB's authority over settlement agreements is limited to the statutes that are within the Board's jurisdiction as defined by the applicable statute. Furthermore, that authority is limited to cases over which the ARB has jurisdiction. Therefore, we approve only the terms of the settlement agreement pertaining to Roberts's current STAA case.¹

¹ The Settlement Agreement incorrectly lists the Office of Administrative Law Judge's case number. Settlement Agreement at 2, paragraph A.1. That number is 2008-STA-057.

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

Additionally, the agreement contains a confidentiality clause providing that the parties shall keep the terms of the settlement confidential, except as required by process of law. Settlement Agreement at 3, paragraph G. The ARB notes that the parties' submissions, including the agreements, 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. *Norton v. Uni Group, Inc.*, ARB No. 08-079, ALJ No. 2007-STA-036, slip op. at 3 (ARB May 30, 2008). Department of Labor regulations provide specific procedures for responding to FOIA requests and for appeals by requestors from denials of such requests. *Id.* If the confidentiality agreement were interpreted to preclude Roberts from communicating with federal or state enforcement agencies concerning alleged violations of law, it would violate public policy and therefore constitute an unacceptable "gag" provision. *Kingsbury v. Gordon Express, Inc.*, ARB No. 07-047, ALJ No. 2006-STA-024, slip op. at 2-3 (ARB Aug. 31, 2007).

Finally, the settlement agreement provides its enforcement shall be governed and interpreted by and under the laws of the state of Colorado. Settlement Agreement at 4, paragraph N. We construe 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. *Trucker v. St. Cloud Meat & Provisions, Inc.*, ARB No. 08-080, ALJ No. 2008-STA-023, slip op. at 3 (ARB May 30, 2008).

The parties have indicated that the Settlement Agreement constitutes the entire settlement with respect to Roberts's STAA claim. Accordingly, with the reservations noted above, we **AFFIRM** the ALJ's recommended order approving the parties' settlement and **DISMISS** Roberts's complaint with prejudice.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge