In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

PROSECUTING PARTY,

and

SHERRIE HERBERT,

COMPLAINANT,

v.

NAVAJO EXPRESS,

RESPONDENT.

ARB CASE NO. 09-137

ALJ CASE NO. 2009-STA-025

DATE: September 23, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael Ross, Esq., *Slater Ross*, Portland, Oregon

For the Respondent:
Nancy Cornish Rodgers, Esq., *Kissinger & Fellman, P.C.*, Denver, Colorado

FINAL DECISION AND ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINT WITH PREJUDICE

Sherrie Herbert alleged that Navajo Express violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA),[1] and its implementing regulations,[2] when it terminated her employment because she refused to drive an unsafe vehicle.

Following an investigation of the complaint, the Occupational Safety and Health Administration (OSHA) found that there "was reasonable cause to believe that the Complainant was discriminated against in violation of the STAA."[3] Accordingly, the Secretary issued a Preliminary Order providing relief that ordered the Respondent to reinstate the Complainant, pay the Complainant back wages and interest, pay the Complainant compensatory and punitive damages, expunge any adverse references to the Complainant from her personnel records relating to the discharge, make no reference to the discharge in any future requests for employment references, place the poster entitled "Attention Drivers" in a prominent location where the Respondent's employees could readily see it, and post a "Notice to Employees" acknowledging its obligations under the STAA for at least 60 consecutive days in conspicuous locations.[4]

Navajo 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 24, 2009, the parties informed the ALJ that they had reached a Settlement Agreement in the matter and that the hearing could be cancelled. The parties forwarded the Settlement Agreement to the ALJ on September 2, 2009, for her review and approval.

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."[6] When the parties reached a settlement, the case was pending before the ALJ. Therefore, the ALJ appropriately reviewed the settlement agreement. On August 31, 2009, the ALJ issued a Recommended Decision and Order (R. D. &

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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.

2 29 C.F.R. Part 1978 (2006).

3 Secretary's Findings at 2 (Jan. 13, 2009).

4 *Id.* at 14-15.

5 *See* 29 C.F.R. § 1978.105.

6 29 C.F.R. § 1978.111(d)(2).

O.) dismissing the complaint, and finding that the agreement "constitutes a fair, adequate and reasonable settlement of the complaint and is in the public interest."[7]

The case is now before the ARB pursuant to the STAA's automatic review provisions.[8] The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."[9]

On September 11, 2009, the ARB issued a Notice of Review and Briefing Schedule permitting each party to submit a brief in support of or in opposition to the ALJ's order. The parties have indicated that they will not be submitting briefs in this matter.

The ALJ found that the parties' settlement agreement constitutes a fair, adequate, and reasonable settlement of Herbert's STAA complaint.[10] The parties have agreed that the Settlement Agreement addresses and resolves all the issues presently in controversy between the parties and that there are no other agreements involving the allegations raised in this matter with respect to Herbert's STAA claim.[11] After reviewing the record, the decision and order of the ALJ, and the Settlement Agreement, we agree with the ALJ that the agreement is a fair, adequate, and reasonable settlement of Herbert's STAA complaint. Accordingly, we accept the ALJ's recommendation to **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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7 R. D. & O. at 2.

8 49 U.S.C.A. § 31105(b)(2)(C); *see* 29 C.F.R. § 1978.109(c)(1).

9 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).

10 29 C.F.R. § 1978.111(d)(2); *see also Poulos v. Ambassador Fuel Oil Co.,* 1986-CAA-001, (Sec'y Nov. 2, 1987) in which the Secretary limited review of a settlement agreement to whether the terms of the settlement are a fair, adequate, and reasonable settlement of the complainant's allegations that the respondent violated the STAA.

11 Settlement Agreement para. 14.