



In the Matter of:

MICHELLE GIST,

ARB CASE NO. 09-143

COMPLAINANT,

ALJ CASE NO. 2009-STA-059

v.

DATE: October 30, 2009

**CALEX EXPRESS, INC., and
BLUE HEN LINES,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND DISMISSAL ORDER

Michelle Gist complained that Calnex Express and Blue Hen Lines (Calnex) 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 making a safety complaint.

After an investigation, the Occupational Safety and Health Administration (OSHA) found that Gist's claim of constructive discharge was not actionable under the STAA because she voluntarily resigned in protest of Calnex's alleged violations of Department of Transportation Hours of Service rules. Accordingly, OSHA dismissed the complaint.³ Gist objected to OSHA's

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 (2009).

³ Secretary's Findings and Order at 3.

findings and requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ).⁴

The ALJ scheduled the case for hearing, but on September 9, 2009, Gist's counsel filed a motion withdrawing objections and moving for voluntary dismissal of complaint with prejudice. Thereafter, on September 21, 2009, the ALJ issued a Recommended Order of Dismissal (R. O.). The ALJ noted that pursuant to 29 C.F.R. § 1978.111(c), a party may withdraw his objections to the findings or order of OSHA by filing a written withdrawal with the administrative law judge.⁵ Accordingly, the ALJ canceled the hearing and dismissed Gist's appeal with prejudice.⁶

The ALJ forwarded her recommended decision and the administrative record to the Administrative Review Board (ARB or Board) and the case is now before us pursuant to the STAA's automatic review provisions.⁷ The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.⁸ When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence in the record considered as a whole.⁹ 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"¹⁰ Therefore, the Board reviews the ALJ's legal conclusions de novo.¹¹

⁴ See 29 C.F.R. § 1978.105.

⁵ R. O. at 1. 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. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.

⁶ R. O. at 2.

⁷ See 29 C.F.R. § 1978.109(c)(1).

⁸ Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

⁹ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995).

¹⁰ 5 U.S.C.A. § 557(b) (West 1996).

¹¹ See *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

On September 28, 2009, the Board issued a Notice of Review and Briefing Schedule reminding the parties of their right to file briefs with the Board in support of or in opposition to the ALJ's recommended order within thirty days of the ALJ's decision, or by October 21, 2009.¹² Both parties responded to the Board's request indicating that they would not file briefs.

The ALJ's R. O. approving withdrawal of Gist's objections to the Secretary's findings, reinstating those findings, and dismissing Gist's claim is in accordance with 29 C.F.R. § 1978.111(c). Accordingly, we **AFFIRM** the ALJ's R. O. approving withdrawal of objections and dismissing Gist's claim.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹² See 29 C.F.R. § 1978.109(c)(2).