



In the Matter of:

ROBERT CHERRY,

ARB CASE NO. 10-023

COMPLAINANT,

ALJ CASE NO. 2009-STA-042

v.

DATE: December 11, 2009

WERNER ENTERPRISES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**FINAL ORDER APPROVING SETTLEMENT
AND DISMISSING COMPLAINT**

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 (Thomson/West 1997 & Supp.2008), and implementing regulations at 29 C.F.R. Part 1978 (2009). On August 26, 2008, Complainant Robert Cherry filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Werner Enterprises, violated the STAA. Thereafter, OSHA denied Cherry's STAA complaint on May 7, 2009, and Cherry timely requested a hearing pursuant to 29 C.F.R. § 1978.105. Prior to the scheduled hearing, the parties negotiated and executed a Settlement Agreement and Release of Claims, which both Cherry and counsel for Werner, whose name is not clearly discernable, signed. The Settlement Agreement was filed with the Administrative Law Judge (ALJ) on November 2, 2009, along with Complainant's Unopposed Motion to Approve Settlement and Dismiss Proceeding.

On November 6, 2009, the ALJ issued a Recommended Order Approving Settlement Agreement. The ALJ reviewed the parties' settlement agreement and

determined that it constitutes a fair, adequate, and reasonable settlement of Cherry's STAA complaint and is in the public interest.

The Administrative Review Board "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 (ARB Sept. 26, 2001). On November 18, 2009, 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. Cherry's counsel responded, stating that Cherry would not be filing a brief. Werner did not file a response with the Board.

The ARB agrees with the ALJ's determination that the parties' Settlement Agreement constitutes a fair, adequate, and reasonable settlement of Cherry's STAA complaint and none of the parties allege otherwise. We note, however, the agreement releases Werner "from all claims of any kind whatsoever" under a variety of statutes, in addition to the STAA. Settlement Agreement at 1-2, Paragraph B, Release of Claims by Cherry. Because the Board's authority over settlement agreements is limited to such statutes as are within the Board's jurisdiction and is defined by the applicable statute, we approve only the terms of the agreement pertaining to Cherry's STAA claim. *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 2000-STA-056, slip op. at 2 (ARB Apr. 30, 2003).

Furthermore, the agreement includes a confidentiality agreement, which notes that the settlement agreement shall be kept confidential except "as required by process of law" or "pursuant to law and lawful process." Settlement Agreement at 4, Paragraph H, Confidentiality. In this regard, we note that if the confidentiality agreement were interpreted to preclude Cherry 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. *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 6 (ARB Nov. 10, 1997); *Conn. 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).

Additionally, we construe Paragraph O of the settlement agreement, the Applicable Law provision, Settlement Agreement at 5, 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. *Phillips v. Citizens' Ass'n for Sound Energy*, 1991-ERA-025, slip op. at 2 (Sec'y Nov. 4, 1991).

The parties have certified that the agreement constitutes the entire settlement with respect to Cherry's STAA claim. The ARB has reviewed the settlement agreement and finds it fair, adequate, and reasonable. Accordingly, with the reservations noted above

limiting our approval to the settlement of Cherry's STAA claim, we **APPROVE** the ALJ's order and **DISMISS** the complaint with prejudice.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge