



In the Matter of:

**ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY & HEALTH,
PROSECUTING PARTY,
and
PETER BIGHAM,
COMPLAINANT,**

ARB CASE NO. 96-108

ALJ CASE NO. 95-STA-37

DATE: December 12, 1996

v.

**GUARANTEED OVERNIGHT DELIVERY,
RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD¹

ORDER DENYING STAY

Respondent, Guaranteed Overnight Delivery, has moved for a stay of the Board's Final Decision and Order (D. and O.), issued September 5, 1996 pursuant to the employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 31105 (1994) in the above-captioned case. The D. and O. orders Respondent to reinstate Complainant Peter Bigham (Bigham) to his former position together with full back pay with interest, fringe benefits and compensatory damages. Respondent avers that, on October 31, 1996, it appealed this D. and O. to the United States Court of Appeals for the First Circuit. Respondent's motion is unaccompanied by affidavits or other supporting documents.

The courts have developed a four-part test to determine the appropriateness of a stay request and the Secretary of Labor has applied the same standards in deciding whether to stay his own decisions. See *Office of Federal Contract Compliance Programs v. The University of North Carolina*, Case No. 84-OFC-20, Sec. Order Denying Stay, April 25, 1989, slip op. at 3-4, citing *Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Rexroat V. City of New Albany*, Case No. 85-WPC-3, Sec. Order Denying Stay, October 8, 1986, slip op. at 2. The factors the court set forth in *Petroleum Jobbers* are:

^{1/} On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization were also promulgated on that date.

- 1) Has the [party seeking a stay] made a strong showing that it is likely to prevail on the merits of its appeal?

* * * *

- 2) Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.

* * * *

- 3) Would the issuance of a stay substantially harm other parties interested in the proceedings?

* * * *

- 4) Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes.

259 F.2d at 925.

Upon consideration of these factors and in light of Respondent's failure to produce any evidence in support of its motion, we find that justice does not require us to grant a stay of the D. and O. and, therefore, Respondent's motion is denied. 5 U.S.C. § 705 (1988). Neither a mere possibility of success on appeal nor certain economic loss in the interim is sufficient to warrant a stay. *See Rexroat, supra*, at 2-3; *see also Spinner v. Yellow Freight System, Inc.*, Case No.

90-STA-17, Sec. Order Denying Application for Stay, Sept. 25, 1991, slip op. at 5, citing *Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983).

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member