U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

JOHN NICHOLS,

COMPLAINANT,

v.

ROMA OF DALLAS,

RESPONDENT.

ARB CASE NO. 06-113

ALJ CASE NO. 2006-STA-006

DATE: October 21, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:
Jonathan C. Wilson, Esq., *Haynes and Boone, LLP*, Dallas, Texas

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 (STAA) of 1982.[1] On June 6, 2006, the parties submitted a Joint Motion to Dismiss with Prejudice to a Department of Labor Administrative Law Judge (ALJ). Attorneys for both the Complainant, John Nichols, and the Respondent, Roma of Dallas (A.K.A. Vistar Corporation), signed the motion. On June 8, 2006, the ALJ issued a Recommended Order Approving Withdrawal of Objections and Dismissing Claim (R. O.). The ALJ forwarded his recommended order

[1] 49 U.S.C.A. § 31105 (West 2007). Congress has amended the STAA since Nichols filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

and the administrative record to the Administrative Review Board to issue a final administrative decision.[2]

On April 19, 2007, in an effort to determine on what basis the parties had attempted to terminate the litigation, the Board informed the parties that the regulations provide only two options for ending litigation short of a merits decision after a party has filed objections to the Occupational Safety and Health Administration's (OSHA) findings or preliminary order. First, "[a]t 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."[3] If a party wishes to withdraw objections to the findings or order, the judge or the Board "shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn."[4] Although the parties requested that the case be dismissed with prejudice, the ALJ instead treated the motion as it if were a request to withdraw objections. Thus, the case was not in fact, dismissed with prejudice; instead the ALJ recommended that the OSHA findings become the final findings of the Secretary of Labor in this case.

Second, parties may terminate litigation by entering into an adjudicatory settlement "at any time after the filing of objections to the Assistant Secretary's findings and/or order, . . . if the participating parties agree to a settlement **and such settlement is approved by the Administrative Review Board.** A copy of the settlement **shall be filed with** the ALJ or the **Administrative Review Board** . . . as the case may be."[5] Although the Complainant filed a Notice to Withdraw Objections with the Board, the parties, in their joint motion to dismiss, noted that they had resolved their differences, suggesting the possibility that the parties had entered into a settlement. Pursuant to well-established precedent, the Board will not dismiss a complaint, in which there is a settlement between the private parties, unless the settlement is provided to the Board for its review and approval.[6]

Accordingly, on April 19, 2007, the Board notified the parties that no later than May 18, 2007, the parties must inform the Board which method they intended to pursue and that if they had agreed to a settlement to provide the Board with a copy of the settlement. Neither party responded to the Board's request. Because a page of the April

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2 R. O. at 2, *see* 29 C.F.R. § 1978.109(a), (c) (2007).

3 29 C.F.R. § 1978.111(c).

4 *Id.*

5 29 C.F.R. § 1978.111(d)(2) (emphasis added).

6 *See e.g., Macktal v. Sec'y of Labor,* 923 F.2d 1150, 1154 (5th Cir. 1991); *Kingsbury v. West Wis. Transp., Inc.,* ARB No. 07-029, ALJ No. 2006-STA-025 (ARB Jan. 31, 2007).

19th Order was omitted from the copies served on the parties, the Board issued a Corrected Order to Show Cause on September 19, 2007, ordering the parties to show why the Board should not remand the case to the ALJ to be adjudicated on the merits either affirming or denying Nichols's STAA complaint.

On September 27, 2007, Roma submitted to the Board a Compromise Settlement Agreement and Release, signed June 3, 2006. Based on the letter accompanying the Settlement Agreement, it appears that the parties believed that they could circumvent the regulation's requirement that parties submit any settlement to the Board for approval by simply withdrawing objection to the Secretary's findings.[7] However, "[i]n keeping with the statute, a settlement under the STAA cannot become effective until its terms have been reviewed and determined to be fair, adequate, and reasonable, and in the public interest. . . . Consistent with that required review, the applicable regulations specifically provide that '[a] copy of the settlement shall be filed with the ALJ or the Secretary as the case may be.' 29 C.F.R. § 1978.111(d)(2)."[8] Thus had the parties attempted to consummate a settlement without the Department of Labor's approval, the settlement would not have been effective.

Because the parties have submitted the settlement to the Board, although somewhat belatedly, we will review it. Roma wrote the Board on September 27, 2007, acknowledging its support for the settlement. Nichols did not reply to the Board's June 23, 2006 Notice of Review in which the parties were informed of their right to file a brief in support of or in opposition to the ALJ's R. O., nor to our Order to Show Cause. We therefore deem the terms of the settlement agreement unopposed.

Review of the agreement reveals that it may encompass the settlement of matters under laws other than the STAA and references cases other than ARB No. 06-113, 2006-STA-009, the case currently before the Board.[9] The Board's authority over settlement agreements is limited to the statutes that are within the Board's jurisdiction as defined by the applicable statute. Furthermore, it is limited to cases over which we have jurisdiction. Therefore, we approve only the terms of the agreement pertaining to Nichols's current STAA case.[10]

Under the agreement, Nichols releases Roma from, essentially, any claims or causes of action arising out of or connected with his employment at Roma.[11] Thus, we

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[7] September 26, 2007 Letter from Jonathan Wilson to Janet Dunlop.

[8] *Tankersley v. Triple Crown Servs., Inc.*, No. 1992-STA-008 (Sec'y Feb. 18, 1993).

[9] Compromise Settlement Agreement and Release, paras. 4, 5.

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

[11] Compromise Settlement Agreement and Release, paras. 4, 5.

interpret this portion of the agreement as limiting Nichols's right to sue on claims or causes of action arising only out of facts, or any set of facts, occurring before the date of the settlement agreement. Nichols does not waive claims or causes of action that may accrue after the signing of the agreement.[12]

Furthermore, if the provisions in paragraph 9 of the Settlement Agreement were to preclude Nichols from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore, constitute unacceptable "gag" provisions.[13]

Finally, we construe paragraph 16, "Forum and Construction," 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.[14]

The Board finds that the settlement is fair, adequate, and reasonable, and in the public interest. Accordingly, with the reservations noted above limiting our approval to the settlement of Nichols's STAA claim, we **APPROVE** the agreement and **DISMISS** the complaint with prejudice.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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[12] *See Bittner v. Fuel Economy Contracting Co.,* No. 1988-ERA-022, slip op. at 2 (Sec'y June 28, 1990); *Johnson v. Transco Prods., Inc.*, 1985-ERA-007 (Sec'y Aug. 8, 1985).

[13] *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 6 (ARB Nov. 10, 1997); *Connecticut 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).

[14] *Phillips v. Citizens' Ass'n for Sound Energy*, 1991-ERA-025, slip op. at 2 (Sec'y Nov. 4, 1991).