



In the Matter of:

WILLIAM J. BETTNER,

ARB CASE NO. 07-093

COMPLAINANT,

ALJ CASE NO. 2007-STA-033

v.

DATE: September 27, 2007

CRETE CARRIER CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**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 May 21, 2007, the parties submitted a request for approval of their settlement and dismissal of the complaint to a Department of Labor Administrative Law Judge (ALJ). The settlement was signed by the Complainant, William J. Bettner, and the Respondent, Crete Carrier Corporation. Under the regulations implementing the STAA, the parties may settle a case at any time after the filing of objections to the Assistant Secretary's preliminary findings "if the participating parties agree to a settlement and such settlement is approved by the Administrative Review Board . . . or the ALJ."² The regulations direct the parties to file a copy of the settlement "with the ALJ or the Administrative Review Board, United States Department of Labor, as the case may be."³

When the parties reached a settlement the case was pending before the ALJ. Therefore, the ALJ appropriately reviewed the settlement agreement. On July 2, 2007, the ALJ issued a Recommended Order Approving Settlement and Dismissing Complaint.

¹ 49 U.S.C.A. § 31105 (West 2007). The STAA has been amended since Bettner 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.

² 29 C.F.R. § 1978.111(d)(2) (2007).

³ *Id.*

According to the STAA's implementing regulations, the Administrative Review Board (ARB or Board) issues the final decision and order in this case.⁴

The Board issued a Notice of Review and Briefing Schedule apprising the parties of their right to submit briefs supporting or opposing the ALJ's recommended decision on July 19, 2007.⁵ Neither party responded to the Board's notice. We therefore deem the settlement unopposed under the terms of the Recommended Order Approving Settlement and Dismissing Complaint.

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. 07-093, 2007-STA-033, the case currently before the Board.⁶ 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 the Complainant's STAA claim ARB No. 07-093, 2007-STA-033.⁷

Under the agreement, Bettner releases Crete Carrier from, essentially, any claims or causes of action arising out of or connected with his employment at Crete Carrier.⁸ Thus, we interpret this portion of the agreement as limiting Bettner'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. Bettner does not waive claims or causes of action that may accrue after the signing of the agreement.⁹

Furthermore, if the provisions in paragraph 3(i) of the Settlement Agreement were to preclude Bettner from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore, constitute unacceptable "gag" provisions.¹⁰

⁴ 29 C.F.R. § 1978.109(c)(2); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 00-STA-050 (ARB Sept. 26, 2001); *Cook v. Shaffer Trucking Inc.*, ARB No. 01-051, ALJ No. 00-STA-017 (ARB May 30, 2001).

⁵ 29 C.F.R. § 1978.109(c)(2).

⁶ Settlement Agreement, paras.1, 3(a), 3(c), 6.

⁷ *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 00-STA-056, slip op. at 2 (ARB Apr. 30, 2003).

⁸ Settlement Agreement, paras. 3(a), 3(c), 4.

⁹ See *Bittner v. Fuel Econ. Contracting Co.*, No. 88-ERA-022, slip op. at 2 (Sec'y June 28, 1990); *Johnson v. Transco Prods., Inc.*, 85-ERA-007 (Sec'y Aug. 8, 1985).

¹⁰ *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

The Board finds that the settlement is fair, adequate and reasonable. Accordingly, with the reservations noted above limiting our approval to the settlement of Bettner's STAA claim, we **APPROVE** the agreement and **DISMISS** the complaint with prejudice.¹¹

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

complainant's ability to provide regulatory agencies with information; improper "gag" provision constituted adverse employment action).

¹¹ The ALJ states in the R. D. & O. that the settlement was filed "under seal." In *Porter v. Brown & Root, Inc.*, 91-ERA-004 (Sec'y Feb. 25, 1994), the Secretary of Labor refused to approve a settlement in which the parties had agreed that the settlement of the complainant's whistleblower complaint would be maintained under seal and placed in a restricted access portion of the record. In support of his conclusion, the Secretary cited the Administrative Law Judge's determination that, in the absence of regulations in 29 C.F.R. Part 18 permitting the ALJ to place the settlement agreement in a restricted access portion of the record, he could not do so. The Secretary also noted that he had consistently held that "once submitted for review, the parties' submissions including Settlement Agreements and all related documents become a part of the public record in the case and are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 522 (1988), requiring federal agencies to disclose requested records unless they are exempt from disclosure under the Act."

In *Brown v. Holmes & Narver, Inc.*, 90-ERA-026, (Sec'y May 11, 1994), the Secretary noted that the respondent had requested pre-disclosure notification pursuant to 29 C.F.R. § 70.26 should anyone file a FOIA request that included the agreement. The Secretary ordered the Office of Administrative Law Judges (OALJ), the custodian of the record, to place a notice prominently displayed in the case record noting the respondent's request and directing that OALJ to follow the procedures in 29 C.F.R. § 70.26 if it received a FOIA request including the settlement. But the Secretary noted that the ALJ's statement that the settlement agreement was considered to be confidential commercial or financial information was overly broad because no FOIA request had yet been filed and therefore it was premature for the Secretary to decide if the settlement contained commercial or financial information that fell within the FOIA's trade secrets exemption from disclosure.

Thus, while the Board can agree that the settlement in this case will be subject to 29 C.F.R. § 70.26's pre-disclosure notification prior to release under the FOIA, the ALJ's statement that the settlement is filed "under seal" is erroneous as it is not in accordance with law.