



In the Matter of:

JOSEPH A. CAIMANO,

ARB CASE NO. 97-041

COMPLAINANT,

ALJ CASE No. 95-STA-4

v.

DATE: January 22, 1997

BRINK'S, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

ORDER TO SHOW CAUSE

On January 10, 1997, Brink's, Incorporated filed Respondent's Motion to Withdraw Orders in this case, which is currently pending on appeal before the United States Court of Appeals for the Second Circuit. The Secretary issued a decision in this case, which arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105 (1994), on January 26, 1996. In that Decision and Order of Remand, the Secretary held that Brink's had violated the STAA when it terminated the complainant, Joseph A. Caimano, on April 21, 1994. Following remand to the Administrative Law Judge for a determination concerning Caimano's complete remedy, the parties submitted a joint stipulation concerning the amount of damages, attorney's fees and costs due Caimano. On August 14, 1996, the Board issued a Final Decision and Order that ordered Brink's to pay Caimano damages, interest, attorney's fees and costs in the amounts stipulated by the parties.^{2/} See generally *Brock v. Roadway Express, Inc.*, 481 U.S.

^{1/} On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia*, the Surface Transportation Assistance Act and the implementing regulations, 29 C.F.R. Part 1978, to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 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 ARB now issues final agency decisions. 61 Fed. Reg. 19982.

^{2/} The joint stipulation signed by the parties that is referred to in the Board's Final Decision and Order provides:

- 1) Complainant shall waive reinstatement; 2) The amount of Complainant's back pay
(continued...)

252, 258-59 (1987)(discussing Section 405 purpose of protecting whistleblowers from devastating financial consequences of termination by employer). Subsequently, Brink's appealed the decisions in this case to the United States Court of Appeals for the Second Circuit. Brink's motion seeks withdrawal with prejudice of the Secretary's Decision and Order of Remand and the Board's Final Decision and Order in this case. Specifically, Brink's requests that the Board issue a decision voiding the Secretary's January 26, 1996 Decision and Order of Remand, withdrawing its August 14, 1996 Final Decision and Order and dismissing Caimano's complaint in its entirety. Brink's urges that granting the relief sought is necessary to "effectuate the prompt resolution of the instant matter without further resort to litigation." Motion at 1.

As further support for its motion, Brink's suggests that the parties have agreed to a settlement of this case, contingent upon the vacating of the aforesaid decisions of the Secretary and this Board. Brink's states that, during a pre-argument conference held by Staff Counsel for the Second Circuit Court of Appeals with the respective counsel for Brink's, Caimano and the Department of Labor, Staff Counsel advised the parties that "appellate litigation would be wasteful of resources and extremely costly, particularly to Complainant, for it would likely consume his entire remedy even if he ultimately were successful."^{2/} Motion at 8. In the Motion, Brink's also states that the respective counsel for Caimano and the Department of Labor concur in Brink's agreement that its Petition for Review now pending before the Second Circuit court be placed on the court's suspended calendar to provide an opportunity for Brink's to file and "the ARB to consider and rule upon, the within motion." *Id.*

When parties agree to the settlement of a case that is pending on appeal, the parties may seek the vacating of the judgment of the lower tribunal through the filing of a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S.Ct. 386, 393, 1994 U.S. LEXIS 7982,*21 (1994); *Agee v. Paramount Communications, Inc.*, 932 F.Supp. 85 (S.D.N.Y. 1996); *Aetna Casualty and Surety Co. v. Home*

^{2/}(...continued)

shall be \$21,930.32; 3)The amount of Complainant's pre-judgment interest shall be \$2,246.35; 4)The amount of Complainant's compensatory damages shall be \$4,231.50; 5)The amount of attorneys' fees for services rendered by Complainant's counsel before the Department of Labor shall be \$9,150.00; 6)The amount of costs for matters adjudicated before the Department of Labor shall be \$181.00; 7)A hearing on damages, attorneys' fees and costs is not necessary, based on the foregoing stipulations; 8)If the Secretary of Labor's decision is reversed on appeal and all appellate remedies have been exhausted, the foregoing stipulations will have no force or effect; 9)The parties make no stipulations or representations beyond the foregoing stipulations.

^{3/} There is currently no controlling precedent in the Second Circuit regarding the question of whether the Secretary of Labor may award attorney's fees to a prevailing whistleblower complainant for services rendered before a United States Court of Appeals. Relevant pronouncements by the United States Courts of Appeals for the Fourth and Sixth Circuits, in *Blackburn v. Reich*, 79 F.3d 1375, 1379 (4th Cir. 1996) and *DeFord v. Secretary of Labor*, 715 F.2d 231, 232-33 (6th Cir. 1983), are in conflict. See *Delcore v. W.J. Barney Corp.*, Case No. 96-161, ARB Order, Oct. 31, 1996.

Insurance Co., 882 F.Supp. 1355 (S.D.N.Y. 1995); *see also* 29 C.F.R. §§ 18.1, 1978.106(a)(1996).^{4/} This Board may not effectively entertain such motion, however, while jurisdiction of the case rests with an appellate tribunal. *See U.S. Bancorp Mortgage Co.*, 115 S.Ct. at 393, 1994 U.S. LEXIS 7982, *21; *Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280, 281 (2d Cir. 1985); *Agee*, 932 F.Supp. at 87 and cases cited therein. Furthermore, consideration of such motion requires submission of a settlement agreement that meets the criteria for approval by this Board, as required by Section 29 C.F.R. § 1978.111(d)(2), and which is binding on the parties should we grant the motion to vacate the decisions issued in this case by the Secretary and this Board. *See generally Davis v. Kimstock, Inc.*, Case No. 90-STA-08, Sec. Order, Nov. 30, 1990, slip op. at 1-2 (approving terms of settlement agreement as fair, adequate and reasonable and dismissing complaint).

Accordingly, and inasmuch as it appears that the parties have not sought and the United States Court of Appeals for the Second Circuit has not granted a remand of this case to the Administrative Review Board for the purpose of entertaining such motion, and inasmuch as the Motion before us provides no substantiation that Caimano, as the party who prevailed in this matter

^{4/} The regulations at 29 C.F.R. Part 1978 govern the adjudication of Section 405 complaints within the Department of Labor. 29 C.F.R. § 1978.100(b)(1996). Those regulations, as well as the regulations governing hearings before Department of Labor Administrative Law Judges, 29 C.F.R. Part 18, which are referenced in Section 1978.106(a), are silent in regard to the procedure applicable to a motion such as that filed by Brink's. *But see* 29 C.F.R. § 1978.115 Special circumstances; waiver of rules. When the pertinent statute and implementing regulations are silent in regard to a procedural issue, we look to the Federal Rules of Civil Procedure for guidance in reaching a result that will be fair to the parties and serve the purpose of the statute. *See, e.g., Timmons v. Mattingly Testing Servs.*, Case No. 95-ERA-40, ARB Dec., June 21, 1996, slip op. at 2-3 (citing *Nolder v. Kaiser Engineers, Inc.*, Case No. 84-ERA-5, Sec. Dec., June 28, 1985, slip op. at 5-6); *Spearman v. Roadway Express, Inc.*, Case No. 92-STA-1, Sec. Order, Oct. 27, 1992, slip op. at 1-2. This approach is consistent with Section 18.1(a), which provides for resort to the Federal Rules as persuasive authority. 29 C.F.R. § 18.1(a).

before the Secretary of Labor and the Administrative Review Board, has agreed to the settlement resolution suggested by the Motion,^{5/} we hereby order the parties to show cause within thirty (30) days why Respondent's Motion to Withdraw Orders should not be denied.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

^{5/} Section 405 of the STAA creates a private right of action for complainants. *Martin v. Yellow Freight System, Inc.*, 793 F.Supp. 461, 465-67 (S.D.N.Y. 1992)(citing, *inter alia*, *Brock v. Roadway Express, Inc.*, 481 U.S. at 258-59). The statutory scheme under the STAA thus contrasts with, *e.g.*, the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, which is also administered by the Department of Labor. *Compare Reich v. Contractors Welding of Western N.Y., Inc.*, 996 F.2d 1409 (2d Cir. 1993)(ordering OSHA Commission to vacate decision following withdrawal of citation by Secretary and approval by appellate court of settlement between Secretary and employer respondent) *with Martin*, 793 F.Supp. at 465-68.