



In the Matter of:

MICHAEL DRAKE,

ARB CASE NO. 05-110

COMPLAINANT,

ALJ CASE NO. 2005-STA-26

v.

DATE: July 18, 2006

YELLOW TRANSPORTATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:

E. Scott Smith, Esq., Fisher & Phillips LLP, Atlanta, Georgia

**FINAL DECISION AND ORDER APPROVING STIPULATION
OF DISMISSAL WITHOUT PREJUDICE**

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA).¹ On March 3, 2005, Michael Drake filed a complaint alleging that the Respondent, Yellow Transportation, Inc., violated the STAA when it issued him a written warning after he refused to drive because he had a back condition that made it unsafe for him to drive. On March 7, 2005, the Respondent rescinded the warning.² Following a “limited investigation” of the complaint, the Occupational Safety and Health Administration (OSHA) determined that since the Respondent had rescinded the warning prior to the investigation, Drake had experienced “no tangible loss.”³ OSHA also stated that Drake had requested that OSHA

¹ 49 U.S.C.A. § 31105 (West 1997).

² Recommended Decision and Order Approving Stipulation of Dismissal Without Prejudice (R. D. & O.) at 1.

³ OSHA Findings (Mar. 23, 2005) at 2.

issue its findings immediately, without further investigation, so that he could request a hearing before a Department of Labor Administrative Law Judge (ALJ). Therefore OSHA “dismissed” the case.⁴

On March 24, 2005, Drake objected to OSHA’s findings and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).⁵ On June 6, 2005, the parties filed a joint Stipulation of Dismissal Without Prejudice. Upon review of the case record, the ALJ found that “dismissal without prejudice is appropriate.”⁶ Accordingly, the ALJ approved the joint stipulation and ordered that the complaint be dismissed without prejudice.⁷

The ALJ’s decision and the record were forwarded to the Administrative Review Board for automatic review and to issue a final decision.⁸ The Board issued a Notice of Review and Briefing Schedule, notifying the parties of their opportunity to file briefs in support of or in opposition to the R. D. & O. within thirty days from the date on which the ALJ issued it.⁹ Drake did not respond to the Board’s Notice. Yellow Transportation filed a letter urging the Board to adopt the ALJ’s R. D. & O.

The Board is required to issue a final decision and order based on the record and the decision and order of the ALJ.¹⁰ Neither the STAA, nor its regulations address joint stipulations of dismissal.¹¹ Therefore, it is appropriate to look to the Federal Rules of Civil Procedure for guidance.¹²

⁴ *Id.*

⁵ *See* 29 C.F.R. § 1978.105 (2005).

⁶ R. D. & O. at 1.

⁷ *Id.*

⁸ 29 C.F.R. § 1978.109(a). *Accord Holmes v. Roadway Express, Inc.*, ARB No. 05-112, ALJ No. 2005-STA-20 (ARB Apr. 28, 2006); *Pardis v. B & I Auto Supply*, ARB No. 05-103, ALJ No. 2005-STA-17 (ARB Mar. 27, 2006); *Palmer v. G.W. Lumber & Mill Work, Inc.*, ARB No. 04-141, ALJ No. 2004-STA-45 (ARB Sept. 27, 2005).

⁹ *See* 29 C.F.R. § 1978.109(c)(2).

¹⁰ 29 C.F.R. § 1978.109(c)(1).

¹¹ The STAA regulations do address withdrawal of a complaint by the employee alone and provide that an employee may withdraw his or her complaint “at any time prior to the filing of objections to the findings or preliminary order.” 29 C.F.R. § 1978.111(a).

¹² *Accord Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 03-STA-47, slip op. at 4 (ARB Apr. 26, 2005)(ALJ properly applied Fed. R. Civ. P. 12(b)(6) because the rules

Federal Rule of Civil Procedure 41(a)(1)(ii) provides in pertinent part:

Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

The Secretary of Labor has substantially applied Rule 41(a)(1)(ii) in analogous cases in which parties have submitted a joint stipulation of dismissal involving the whistleblower provisions of the environmental and nuclear energy statutes over which the Secretary has jurisdiction.¹³ The Secretary departed from Rule 41(a)(1)(ii) in these cases only to the extent that he entered an Order of Dismissal even though the Rule provides that “the action may be dismissed without order of court.”¹⁴ Therefore in accordance with established precedent, we **APPROVE** the R. D. & O. and **DISMISS** this case without prejudice.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted).

¹³ See e.g., *Mayhew v. Formosa Plastic Corp.*, No. 94-CAA-12 (Aug. 22, 1994); *Bradish v. Detroit Edison Co.*, No. 94-ERA-20 (Aug. 8, 1994); *Bauer v. Power Res., Inc.*, No. 94-ERA-10 (June 24, 1994).

¹⁴ The Secretary has also issued an Order of Dismissal in a STAA case in which the parties submitted a joint stipulation of dismissal, but he did not specify the authority under which he did so. *Hester v. Blue Bell Servs.*, No. 86-STA-11 (Sept. 23, 1986).