



**In the Matter of:**

**EVERETT L. HENDERSON,**  
**COMPLAINANT,**

**ARB CASE NO. 07-045**

**ALJ CASE NO. 2007-STA-001**

**v.**

**DATE: May 29, 2008**

**FEDEX EXPRESS,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**FINAL DECISION AND DISMISSAL ORDER**

Everett L. Henderson complained that FedEx Express violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified,<sup>1</sup> and its implementing regulations,<sup>2</sup> when it discharged and discriminated against him. After an investigation, the Occupational Safety and Health Administration (OSHA) found that Henderson's complaint was meritless.<sup>3</sup> Henderson

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<sup>1</sup> 49 U.S.C.A. § 31105 (West 2008). Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. Congress has amended the STAA since Henderson filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide here whether the amendments would apply to this case, because even if the amendments applied, the amended provisions are not at issue in this case and thus the amendments would not affect our decision.

<sup>2</sup> 29 C.F.R. Part 1978 (2007).

<sup>3</sup> *See* 29 C.F.R. § 1978.102.

objected to OSHA's findings and requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ).<sup>4</sup>

The ALJ scheduled the case for hearing, but on December 13, 2006, Henderson's counsel filed a Request for Voluntary Dismissal of Complaint. On December 18, 2006, FedEx indicated to the ALJ in a letter that it had no objections to Henderson's motion for withdrawal.

On January 4, 2007, the ALJ issued a Recommended Order of Dismissal (R. O.). The ALJ noted that pursuant to 29 C.F.R. § 1978.111(c), a "party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge." R. O. at 1. Accordingly, the ALJ canceled the hearing and dismissed Henderson's appeal with prejudice. R. O. at 2.

The ALJ forwarded his recommended decision and the administrative record to the Administrative Review Board (ARB) and the case is now before us pursuant to the STAA's automatic review provisions.<sup>5</sup> The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.<sup>6</sup> When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence in the record considered as a whole.<sup>7</sup> In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." <sup>8</sup> Therefore, the Board reviews the ALJ's legal conclusions de novo.<sup>9</sup>

The Board issued a Notice of Review and Briefing Schedule reminding the parties of their right to file briefs with the Board in support of or in opposition to the ALJ's recommended order within thirty days of the date on which the ALJ issued it.<sup>10</sup> Both parties responded to the Board's notice indicating their approval of the ALJ's R. O.

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<sup>4</sup> See 29 C.F.R. § 1978.105.

<sup>5</sup> See 49 U.S.C.A. § 31105(b)(2)(C); 29 C.F.R. § 1978.109(c)(1).

<sup>6</sup> Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

<sup>7</sup> 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995).

<sup>8</sup> 5 U.S.C.A. § 557(b) (West 1996).

<sup>9</sup> See *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

<sup>10</sup> See 29 C.F.R. § 1978.109(a).

The STAA and its regulations do not specifically provide for withdrawal of a complaint once the case has been referred to an administrative law judge for hearing, but, the STAA's implementing regulations do provide:

At 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. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.<sup>[11]</sup>

The ALJ correctly relied on 29 C.F.R. § 1978.111(c). However, instead of only dismissing the complaint, the ALJ should have, consistent with 29 C.F.R. § 1978.111(c), recommended that Henderson's claim be dismissed based on his withdrawal of his objections to OSHA's denial of his STAA complaint, and reinstated those findings denying his complaint.

Accordingly, we **GRANT** the request to withdraw the objections to the Secretary's preliminary findings and **AFFIRM** those findings denying Henderson's complaint as provided in 29 C.F.R. § 1978.111(c).

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**DAVID G. DYE**  
**Administrative Appeals Judge**

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<sup>11</sup> 29 C.F.R. § 1978.111(c).