



In the Matter of:

BENN C. KINGSBURY,

ARB CASE NO. 07-047

COMPLAINANT,

ALJ CASE NO. 06-STA-024

v.

DATE: August 31, 2007

GORDON EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINT

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1997), and implementing regulations at 29 C.F.R. Part 1978 (2006). On December 15, 2005, the Complainant, Benn C. Kingsbury, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Gordon Express, Inc., violated the STAA. OSHA denied Kingsbury's STAA complaint on March 15, 2006, and he timely requested a hearing pursuant to 29 C.F.R. § 1978.105. Prior to the scheduled hearing, the parties negotiated and executed a Settlement Agreement and Dismissal of Claims, which both Kingsbury and Lyle Gordon, president of Gordon Express, Inc., signed. The Settlement Agreement was filed with the Administrative Law Judge (ALJ) along with Kingsbury's Unopposed Motion to Approve Settlement and Dismiss Proceeding with Prejudice.

Under the regulations implementing the STAA, the parties may settle a case at any time after filing objections to the Assistant Secretary's preliminary findings, and before those findings become final, "if the participating parties agree to a settlement and such settlement is approved by the Administrative Review Board [Board] . . . or the

ALJ.”¹ The regulations direct the parties to file a copy of the settlement with the ALJ, the Board, or United States Department of Labor.²

On January 31, 2007, the ALJ issued a Recommended Decision and Order Approving Settlement and Dismissing Complaint. Although the Settlement Agreement purported to release Gordon Express from claims under the STAA, as well as under various other laws, the ALJ noted that the Secretary’s authority over settlement agreements is limited to such statutes as are within the Secretary’s jurisdiction and is defined by the applicable statute. The ALJ determined that the Settlement Agreement constituted a fair, equitable, adequate and reasonable settlement of Kingsbury’s STAA complaint. Further, the ALJ found that the confidentiality provision and constraints provided in the Settlement Agreement are consistent with public policy.

The case is now before the ARB pursuant to the STAA’s automatic review provisions.³ The Board “shall issue the final decision and order based on the record and the decision and order of the administrative law judge.” 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 00-STA-050 (ARB Sept. 26, 2001). The Board issued a Notice of Review and Briefing Schedule permitting either party to submit briefs in support of or in opposition to the ALJ’s order. Kingsbury’s counsel responded, stating that Kingsbury would not file a brief. Gordon Express did not file a response with the Board.

The ARB agrees with the ALJ’s determination that the parties’ Settlement Agreement constitutes a fair, equitable, adequate and reasonable settlement of Kingsbury’s STAA complaint and none of the parties allege otherwise. As the ALJ noted, however, the agreement releases Gordon Express “from all claims of any kind whatsoever.” See Settlement Agreement at 2, paragraph B. Because the Board’s authority over settlement agreements is limited to such statutes as are within the Board’s jurisdiction and is defined by the applicable statute, we approve only the terms of the agreement pertaining to Kingsbury’s STAA claim. *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 00-STA-056, slip op. at 2 (ARB Apr. 30, 2003).

Furthermore, as the ALJ noted, the agreement includes a confidentiality agreement, except, in part, “(1) as required by process of law, (2) in response to discovery served pursuant to the Rules of Procedure of any Court or agency,” and it does not prohibit Kingsbury “from voluntarily communicating with a federal or state agency concerning his employment with [the Respondent].” See Settlement Agreement at 4, paragraph G. If the confidentiality agreement were interpreted to preclude Kingsbury from communicating with federal or state enforcement agencies concerning alleged

¹ 29 C.F.R. § 1978.111(d)(2).

² *Id.*

³ See 49 U.S.C.A. § 31105(b)(2)(C), 29 C.F.R. § 1978.109(c)(1).

violations of law, it would violate public policy and therefore constitute an unacceptable “gag” provision. *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 complainant’s ability to provide regulatory agencies with information; improper “gag” provision constituted adverse employment action). Additionally, the parties are on notice that the settlement agreement becomes part of the record of the case and is subject to the Freedom of Information Act (FOIA). 5 U.S.C.A. § 552 (West 2006). Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of such requests, and for protecting the interests of submitters of confidential commercial information. 29 C.F.R. § 70 *et seq.* (2006).

Also, we construe paragraph N, the choice of law provision, 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. *Phillips v. Citizens’ Ass’n for Sound Energy*, 1991-ERA-025, slip op. at 2 (Sec’y Nov. 4, 1991).

The parties have certified that the agreement constitutes the entire settlement with respect to Kingsbury’s STAA claim. Accordingly, with the reservations noted above limiting our approval to the settlement of Kingsbury’s STAA claim, we **APPROVE** the ALJ’s order and **DISMISS** the complaint with prejudice.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

Administrative Appeals Judge