



In the Matter of:

JOHN SIMON,

ARB CASE NO. 08-122

COMPLAINANT,

ALJ CASE NO. 2008-STA-016

v.

DATE: September 30, 2008

**ELVA L. JESS, L.L.C.,
ELVA L. JESS, INDIVIDUALLY,**

RESPONDENTS.

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 of 1982 (STAA)¹ and its implementing regulations.² John Simon filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Elva L. Jess and Elva L. Jess, L.L.C., violated the STAA. OSHA denied Simon's complaint, 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 General Release (Agreement), which both Simon and Jess signed. The parties filed the Agreement with the Administrative Law Judge (ALJ).

¹ 49 U.S.C.A. § 31105 (West 2008).

² 29 C.F.R. Part 1978 (2007).

Under the regulations implementing the STAA, the parties may settle a case at any time after filing objections to OSHA'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 [ARB] . . . or the ALJ." 29 C.F.R. § 1978.111(d)(2).

When the parties reached a settlement, the case was pending before the ALJ. Therefore, the ALJ appropriately reviewed the settlement agreement. On August 5, 2008, the ALJ issued a Recommended Order Approving Settlement Agreement and Dismissing Complaint (R. D. & O). The ALJ determined that the Agreement constituted a fair, adequate, and reasonable settlement of Simon's STAA complaint.³

The case is now before the ARB pursuant to the STAA's automatic review provisions.⁴ The ARB "shall issue the final decision and order based on the record and the decision and order of the administrative law judge."⁵ The ARB 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. Neither party responded to the ARB's notice. We therefore deem the settlement unopposed under its terms.

The ARB concurs with the ALJ's determination that the parties' settlement agreement is fair, adequate, and reasonable. But we note that the Agreement may encompass the settlement of matters under laws other than the STAA.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. Our approval is limited to this case, and we understand the settlement terms relating to release of STAA claims as pertaining only to the facts and circumstances giving rise to this case. Therefore, we approve only the terms of the Agreement pertaining to Simon's STAA claim, ARB No. 08-122, 2008-STA-016.⁷

Furthermore, if the provisions in paragraphs 9 and 10 of the Agreement were to preclude Simon from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore, constitute unacceptable "gag" provisions.⁸

³ R. D. & O. at 1.

⁴ See 49 U.S.C.A. § 31105(b)(2)(C); 29 C.F.R. § 1978.109(c)(1).

⁵ 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001).

⁶ See Agreement, para. 5.

⁷ See *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 2000-STA-056, slip op. at 2 (ARB Apr. 30, 2003).

Finally, the Agreement provides that the parties shall keep the terms of the settlement confidential.⁹ The Board notes that the parties' submissions, including the Agreement, become part of the record of the case and are subject to the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (West 2007). FOIA requires Federal agencies to disclose requested records unless they are exempt from disclosure under the Act.¹⁰ Department of Labor regulations provide specific procedures for responding to FOIA requests and for appeals by requestors from denials of such requests.¹¹

The parties have certified that the Agreement constitutes the entire settlement with respect to Simon's STAA claim.¹² Accordingly, we **APPROVE** the ALJ's order and **DISMISS** the complaint with prejudice.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

⁸ *Connecticut 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); *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 6 (ARB Nov. 10, 1997).

⁹ Agreement, para. 9.

¹⁰ *Coffman v. Alyeska Pipeline Serv. Co. & Arctic Slope Inspection Serv.*, ARB No. 96-141, ALJ Nos. 1996-TSC-005, -006, slip op. at 2 (ARB June 24, 1996).

¹¹ 29 C.F.R. § 70 *et seq.* (2007).

¹² Agreement, para. 11.