



**In the Matter of:**

**NICK THOMPSON,**

**ARB CASE NO. 07-085**

**COMPLAINANT,**

**ALJ CASE NO. 2007-STA-031**

**v.**

**DATE: July 31, 2007**

**INLAND NORTHWEST DAIRIES, LLC,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**FINAL DECISION AND ORDER GRANTING COMPLAINANT'S REQUEST TO  
WITHDRAW HIS OBJECTIONS TO OSHA'S FINDINGS**

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA).<sup>1</sup> The Complainant, Nick

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<sup>1</sup> 49 U.S.C.A. § 31105 (West 1997). Pursuant to the STAA's whistleblower provision, a person may not retaliate against an employee because:

- (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
- (B) the employee refuses to operate a vehicle because –
  - (i) the operation violates a regulation, standard, or order of the United States related to the commercial motor vehicle safety or health; or
  - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C.A. § 31105 (A), (B).

Thompson, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, the Respondent, Inland Northwest Dairies, fired him in retaliation for his refusal to operate a commercial motor vehicle in violation of a Department of Transportation safety regulation. After an investigation, OSHA found that there was "no reasonable cause to believe that the Respondent violated the employee protection provisions of the Act . . . ." Thompson requested a hearing by a Department of Labor administrative law judge.<sup>2</sup>

On May 11, 2007, the Administrative Law Judge (ALJ) to whom the case had been assigned issued a Notice of Trial, Order to Show Cause Why Case Should Not Be Dismissed for Failure to Make Out a *Prima Facie* Case, and Pre-Trial Order. The ALJ ordered Thompson to respond to the Order on or before June 1, 2007.

On May 24, 2007, Thompson faxed a document to the ALJ, which stated, "I Nick Thompson do here by [sic] withdraw my appeal in this matter due to the short time given for my attorney to prepare for this case. Thank you for your time." Inland did not oppose the request to withdraw.<sup>3</sup>

The STAA's implementing regulations 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>4</sup>]

Nevertheless, the ALJ did not grant Thompson's request to withdraw his appeal (i.e., his objections to OSHA's findings) and affirm OSHA's findings as provided in the applicable regulation. Instead, the ALJ issued a Recommended Decision and Order Dismissing Case and Vacating Trial (R. D. & O.) in which he stated:

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<sup>2</sup> See 29 C.F.R. § 1978.105(a)(2006).

<sup>3</sup> A handwritten note in the ALJ's file indicates that counsel for Inland was contacted and faxed a copy of Thompson's withdrawal request. The note further indicates that counsel would submit a statement of non-opposition to the withdrawal by fax, but there is no such fax in the record.

<sup>4</sup> 29 C.F.R. § 1978.111(c).

Since Complainant has requested withdrawal of his appeal of [OSHA's] April 5, 2007 denial of Complainant's claims against Respondent and Complainant has not complied with my May 11 pre-hearing order and has not submitted his pre-hearing statement of position, witness list or exchanged exhibits in advance of the June 11, 2007 trial in this matter, his complaint is be [sic] dismissed for lack of prosecution[.] [<sup>5</sup>]

The case is now before the Administrative Review Board pursuant to the STAA's automatic review provisions<sup>6</sup> The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.<sup>7</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>8</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>9</sup> Therefore, the Board reviews the ALJ's legal conclusions de novo.<sup>10</sup>

On June 18, 2007, 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 R. D. & O. within thirty days of the date on which the ALJ issued it.<sup>11</sup> Neither party submitted a brief.

Although the ALJ's R. D. & O. did not strictly comply with the applicable STAA regulations because he did not respond to Thompson's request to withdraw his appeal as provided in 29 C.F.R. § 1978.111(c), Thompson has not objected to the ALJ's R. D. & O. and in any event, the ALJ's error ultimately is harmless since the Board has de novo review of the ALJ's legal conclusions and issues the final decisions for the Secretary.

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<sup>5</sup> R. D. & O. at 2.

<sup>6</sup> See 49 U.S.C.A. § 31105(b)(2)(C); 29 C.F.R. § 1978.109(c)(1).

<sup>7</sup> Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

<sup>8</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>9</sup> 5 U.S.C.A. § 557(b) (West 1996).

<sup>10</sup> See *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

<sup>11</sup> See 29 C.F.R. § 1978.109(a).

Accordingly, we **GRANT** Thompson's request to withdraw his appeal of OSHA's findings and we **AFFIRM** those findings denying his 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**