



**Issue Date: 22 May 2013**

**CASE NO.: 2012-FRS-00010**

**In the Matter of:**

**ROBERT L. BOLSER, JR.,  
Complainant,**

**v.**

**CSX TRANSPORTATION, INC.,  
Respondent.**

**DECISION AND ORDER APPROVING SETTLEMENT  
AGREEMENT AND DISMISSING COMPLAINT**

This case arises under the employee protection provisions of the Federal Rail Safety Act (FRSA), as amended, 49 U.S.C. §20109. On April 16, 2013, I canceled a scheduled hearing in this matter upon receipt of advice that the parties were in the process of settling the case. The parties were allowed thirty days to submit a settlement agreement for approval, in accordance with 29 C.F.R. §1982.111(d)(2), as added, Interim Final Rule, 75 Fed. Reg. 53527, 53533 (Aug. 31, 2010). That section relates to adjudicatory settlements and requires the submission of a settlement agreement to the presiding administrative law judge for approval. *Compare Hoffman v. Fuel Economy Contracting*, 1987-ERA-33 (Sec’y Aug. 4, 1989) (Order) (requiring that settlements in whistleblower cases brought under the Energy Reorganization Act be reviewed to determine whether they are fair, adequate and reasonable) *with Indiana Dept. of Workforce Development v. U.S. Dept. of Labor*, 1997-JTP-15 (Admin. Review Bd. Dec. 8, 1998) (holding ALJ has no authority to require submission of settlement agreement in Job Training Partnership case when parties have stipulated to dismissal under Rule 41(a)(1)(A)(ii), FRCP, and contrasting ERA cases.)

Under cover letter of May 2, 2013, filed on May 3, 2013, counsel for Respondent, on behalf of both parties, submitted for approval an executed Settlement Agreement and General Release between CSX Transportation, Inc. and Complainant (hereafter “Settlement Agreement”) resolving the above-captioned matter. The parties have stipulated that the above-captioned proceeding shall be dismissed with prejudice.

On May 14, 2013, I issued a Notice of Possible Deficiency, which indicated the following:

Although the Settlement Agreement is otherwise in order, there is a deficiency that precludes my acting upon it at this time. Specifically, the

Settlement Agreement provides for the issuance of two checks, one of which is payable to Complainant while the other is payable to Complainant and his attorney. The Settlement Agreement provides that each party shall pay his or its own attorney fees and costs, and it does not indicate the amount of the settlement that is allocable for such fees. There is also insufficient information of record from which a determination can be made as to how the proceeds from the checks are to be distributed. Thus, it is not possible to determine the net amount that Complainant will receive.

As a general rule, in order to approve a settlement agreement in a whistleblower case, where the parties submit an agreement providing for the complainant to pay his own attorney fees, the administrative law judge must determine the net amount to be received by the complainant in order to determine whether the settlement is fair, adequate and reasonable. *See Tinsley v. 179 South Street Venture*, 1989-CAA-3 (Sec'y Aug. 3, 1989) (order of remand). In *Guity v. Tennessee Valley Authority*, 1990-ERA-10 (ALJ Aug. 15, 1996), I recommended approval of a settlement of an ERA whistleblower complaint, where the settlement specified the total amount payable to the complainant and required the complainant to pay his own attorney fees, but did not indicate the amount payable to the attorney. On appeal, the Administrative Review Board found that to be deficient and ordered that the parties file a joint response indicating the actual amount payable to the complainant, or that the complainant's counsel submit the necessary information. *Guity v. Tennessee Valley Authority*, 1990-ERA-10 (ARB Aug. 28, 1996). Although this case arises under the Federal Rail Safety Act, the same principle is applicable, as I cannot evaluate the adequacy of the amount payable to the Complainant without finding out the amount payable to his counsel from the settlement proceeds.

*Notice of Possible Deficiency of May 14, 2013 at 1-2.*

In response, by facsimile of May 20, 2013, Complainant filed Complainant's Notice of Distribution of Settlement to Correct Deficiency. Complainant's Notice provides the missing information and indicates the net amount that Complainant will receive (after deduction of expenses and attorneys' fees), which I find to be fair and adequate.

The Settlement Agreement contains a confidentiality clause. However, the parties are advised that records in whistleblower cases are agency records which the agency must make available for public inspection and copying under the Freedom of Information Act (FOIA), 5 U.S.C. §552, and the Department of Labor must respond to any request to inspect and copy the record of this case as provided in the FOIA. *See generally Seater v. Southern California Edison Co.*, 1995-ERA-13 (ARB Mar. 27, 1997).

To the extent that the Settlement Agreement relates to matters under laws other than the Federal Rail Safety Act, I have limited my review to determining whether the terms thereof are a fair, adequate and reasonable settlement of Complainant's allegations that the Respondents violated the FRSA. *See Poulos v. Ambassador Fuel Oil Co., Inc.*, 1986-CAA-1 (Sec'y Nov. 2,

1987). In reviewing the Settlement Agreement, I have not determined, or taken into consideration, the tax consequences of any payments made in accordance with the Settlement Agreement.

Having reviewed the terms of the Settlement Agreement, which are incorporated by reference herein, I find that the settlement is fair, reasonable, and adequate, and that it should be approved. Accordingly, I make the following Findings and issue the following Order, in accordance with 29 C.F.R. §18.9 and 29 C.F.R. §1982.111.

#### FINDINGS

1. This Decision and Order shall have the same force and effect as an Order made after a full hearing.
2. The parties have waived any further procedural steps before the undersigned administrative law judge.
3. The parties have waived any rights to challenge or contest the validity of this Decision and Order entered into in accordance with the Settlement Agreement.
4. Each party shall bear all its own costs, expenses, and legal and accounting fees incurred in connection with this action.
5. This Decision and Order Approving Settlement Agreement and Dismissing Complaint shall be the final agency action, in accordance with 29 C.F.R. §1982.111(e).

#### ORDER

**IT IS HEREBY ORDERED** that the Settlement Agreement be, and hereby is, **APPROVED**, and the parties shall comply with its terms to the extent that they have not already done so; and

**IT IS FURTHER ORDERED** that this action be, and hereby is **DISMISSED WITH PREJUDICE**.

PAMELA J. LAKES  
Administrative Law Judge

Washington, D.C.