



Issue Date: 19 February 2016

CASE NO. 2015-FRS-00042

In the Matter of

JACOBY SIMES,
Complainant,

v.

**SOO LINE RR D/B/A CANADIAN
PACIFIC,**
Respondent.

**ORDER APPROVING SETTLEMENT AGREEMENT
AND DENYING MOTION TO SEAL**

The parties have settled this case under the Federal Rail Safety Act. Consistent with regulatory requirements, *see* 29 C.F.R. § 1982.111(d)(2), the parties submitted proposed settlement papers on September 30, 2015. They stated that they understood the settlement agreement will be sealed and not released in the event of a Freedom of Information Act request. I disapproved the proposed papers without prejudice on October 16, 2015 and informed the parties that, if they wanted their agreement sealed, they would have to file a motion. The parties filed the motion and a revised settlement agreement for review and approval on November 23, 2015. On January 25, 2016, I again disapproved without prejudice the proposed papers. On February 17, 2016, the parties filed another revised settlement agreement for review and approval.

I will approve the settlement agreement but deny the motion to seal.

Approve settlement. Some language in the revised settlement agreement extends to claims beyond the scope of the Act. I limit my review to the Federal Rail Safety Act claim only; anything beyond that exceeds this Office's jurisdiction.

The proposed settlement agreement is fair and reasonable as to the claim under the Federal Rail Safety Act. It adequately protects Complainant, and none of its terms is against public policy. The proposed settlement is therefore APPROVED, and the parties are ORDERED to comply with its terms. *See* 29 C.F.R. § 1982.111(d)(2). This matter is DISMISSED.

On the motion to seal, Respondent argues that the agreement contains commercial and financial information of the parties and that this information would not be customarily released to the

public. It relies principally on Exemption 4 in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). I will deny the motion but grant an alternative request in part.

Motion to seal. At the outset, a motion to seal differs from a determination of whether a government agency responding to a request under the Freedom of Information Act should produce the requested materials or deny the request under an exemption in FOIA. Adjudicative filings may not be sealed absent a showing that the reasons to seal outweigh the presumption of public access. See 29 C.F.R. § 18.85(b).

The common-law right of access to judicial records is well-established. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).¹ “This right of access bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings and to keep a watchful eye on the workings of public agencies.” *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (citations omitted). It also provides a “measure of accountability to the public at large, which pays for the courts.” *Id.*²

The right is not absolute. See *Nixon* at 597-98, *IDT* at 1221.

Where the common-law right of access is implicated, the court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed.

IDT at 1223. This Office’s procedural rules are consistent with the Eighth Circuit’s analysis. See 29 C.F.R. § 18.85(b).

As the Supreme Court held and the Eighth Circuit recognized, “The decision as to access is one best left to the sound discretion of the trial court . . . in light of the relevant facts and circumstances of the particular case.” *Nixon* at 599; *IDT* (quoting *Nixon*) at 1223. For example, trade-secrets or “compelling reasons of personal privacy” may warrant sealing. *Goesel v. Boley International (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (Posner, J.) But to defeat the general right of access to judicial records, the reasons for sealing must rebut the presumption that documents bearing on the “disposition of federal litigation” are “open to public view.” *Goesel*, 738 F.3d at 833.

Settlement agreements that require judicial approval fall squarely within the range of documents that generally must be made available to the public.³ *Id.* So long as the settlement is filed with

¹ Eleven Circuits, including the Eighth (which is controlling here), apply this right to civil cases as well as criminal. *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (citations omitted).

² As Judge Easterbrook has admonished, “People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.” *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (Easterbrook, J.).

³ This is the rule even if the approval does not make the settlement agreement enforceable by contempt. *Jessup v. Luther*, 277 F.3d 926, 927, 929 (7th Cir. 2002).

the court and the judge participates in its approval, the public interest obtains, and the document becomes presumptively public.⁴ *Jessup v. Luther*, 277 F.3d 926, 929-30 (7th Cir. 2002) (Posner, J.).

Here, the parties seek to seal a settlement agreement filed with this Office that, with the ALJ's approval, disposes of the case. The settlement agreement is ineffective without the ALJ's approval. See 29 C.F.R. § 1982.111(d)(2). It is therefore a presumptively public document in which the people retain their common-law right of access.

Though Respondent does not address the analysis that the Eighth Circuit required in *IDT*, apparently it would argue that the settlement should be hidden from the public because the parties agreed to treat it confidentially and because knowledge of the settlement terms might help other employees who would bring whistleblower claims against Respondent under the Federal Rail Safety Act.

These arguments barely weigh in the scale against the public's right to know. There is nothing approaching any intrusion into areas of compelling personal privacy or the competitive disadvantage that might occur with the disclosure of a trade secret. The parties' agreement to treat the settlement confidentially appears merely intended to protect Respondent against the same concern as its second "reason": Keeping other whistleblowing employees (such as Complainant's co-workers and union) from knowing that it agreed to (even minimal) remedies to resolve this case.⁵ If anything, that reason runs counter to Congress' purpose in enacting the Federal Rail Safety Act's whistleblower protection provision. Employees who are considering blowing the whistle on unsafe or insecure conditions on railroads should know that their rights may be vindicated, even if as in this case, the monetary recovery is minimal.

FOIA Exemption 4. Were I to consider Exemption 4 of the Freedom of Information Act, I would reach the same result. FOIA Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [when the information is] privileged or confidential." 5 U.S.C. § 552(b)(4). The exemption encourages the voluntary submission to the government of useful commercial or financial information and makes the reliability and candor of the information submitted more likely. See *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871, 878 (D.C. Cir. 1992). It safeguards those who are required to furnish commercial or financial information to the government from competitive disadvantages that could result from disclosure. See *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974). The exemption covers two categories of information: (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. 5 U.S.C. § 552(b)(4).

⁴ As Judge Posner wrote, "Judicial kibitzing is official behavior. The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to." *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002).

⁵ The parties' agreement to treat their settlement and its terms confidentially does not make their agreement confidential for purposes of sealing the record. See *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (an example of a reason to seal a portion of a court record is to protect trade secrets, but "Calling a settlement confidential does not make it a trade secret."). Were that the rule, litigants could foreclose all public access to court files through their private agreement irrespective of any rationale or court involvement.

I assume for this purpose that the case on which Respondent relies, *Critical Mass*, persuasively states the law.⁶ Applying that case to the current facts, I conclude that Exemption 4 does not apply. One of the majority's concerns in *Critical Mass* was the cooperation of private parties who make information available to government agencies on a voluntary basis. If the government did not keep its assurances that it would treat the information confidentially, the private parties might stop providing the information or might narrow the scope of what they would supply.

But unlike *Critical Mass*, the information in the present case is compelled, not voluntary. As the regulation provides:

Adjudicatory settlements. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ, or by the ARB if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be.

29 C.F.R. § 1982.111(d)(2) (emphasis added). I reject any notion that a substantial number of litigants under the Federal Rail Safety Act, who otherwise would settle, will instead go to the expense, inconvenience, vagaries, and exposure of a trial rather than have the terms of their settlement agreement left unsealed in the public records of this Office.⁷

Nor is there reason to question that the parties will be forthright and candid when they submit the required information. Here, the parties have no option but to submit their entire settlement agreement (including any side-agreements). They have no "wobble room" to decide whether information must be submitted: If it is part of the agreement, it must be submitted; otherwise, it need not be submitted.

Second, *Critical Mass* was concerned about putting parties at a competitive disadvantage if they supplied information to government agencies, and the agencies disclosed the information to the public. Even if submission of the information was compulsory, the court was concerned if compliance would create a "substantial" competitive disadvantage.

Here, I reject Respondent's contention that disclosure of the settlement or its terms would place Respondent at a competitive disadvantage. Respondent offers no argument that the information would advantage any of the rail carriers with which it competes. Rather, it argues that the information will place it at a disadvantage – not with competitors – but with its employees who might sue it under the Act.

⁶ The present case arises in the Eighth Circuit. As *Critical Mass* is a District of Columbia Circuit decision, it is not controlling.

⁷ As then-judge Ruth Bader Ginsburg wrote in dissent in *Critical Mass*, the majority holding relaxes the showing required to come within Exemption 4 in cases of voluntary submissions of information. 975 F.2d at 882 (Ginsburg, J., joined by Mikva, C.J., and Wald and Harry Edwards, JJ). As to compelled submission, the rule remains unchanged from that stated in *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Nothing in the particular settlement terms here would put Respondent at any disadvantage with employees who might sue it under the Federal Rail Safety Act. But more important is that nothing in *Critical Mass* construes a competitive disadvantage to extend to a disadvantage in litigation with potential plaintiffs in future, unrelated claims; *Critical Mass*' focus is on business competitors, not employees in an adversarial litigation posture.

Nonetheless, as Respondent requests, I will note the unsealed settlement agreement with (1) their request that the agreement not be produced in response to a FOIA request because they believe FOIA Exemption 4 to apply, and (2) that the Department of Labor must provide the required notice and opportunity to object to any FOIA production, citing 29 C.F.R. § 70.26.

Order

Respondent's motion to seal the settlement agreement is DENIED. The settlement agreement will be noted as follows:

NOTICE TO THE DOL FOIA OFFICE:

In the event that this settlement agreement is the subject of a FOIA request, Respondent asserts that the settlement agreement is exempt from production under FOIA Exemption 4. Respondent requests notice and an opportunity to object to any FOIA production of the settlement agreement. *See* 29 C.F.R. § 70.26.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge