

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 January 2018

CASE NO.: 2017-FRS-00040

In the Matter of:

STEVEN J. MOSES,
Complainant

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent

Appearances:

Steven J. Moses, pro se
For the Complainant

Ami N. Wynne, Esq.,
For the Respondent

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

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

This proceeding arises under the Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”), Pub. L. No. 110-53. (Aug. 3, 2007) [hereinafter “FRSA”]. Section 20109(d)(2)(A) of the FRSA states that the procedures for actions arising under the FRSA shall be governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century [hereinafter “AIR21”], 49 U.S.C. § 42121. The implementing regulations at 29 C.F.R. §1979.111(d)(2) state that a case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge. This order will constitute the final order of the Secretary. 29 C.F.R. §1979.111(e).

The parties have submitted a Confidential Settlement and Final Release Agreement (“Agreement”) and requested approval of the same. The Agreement resolves the controversy arising from the complaint of Steven J. Moses (“Complainant”) against Norfolk Southern Railway (“Norfolk”) under the statute. The Settlement Agreement is signed by the Complainant.

Respondent's Counsel, Ami N. Wynne, Esq. has submitted the Settlement Agreement by her signed cover letter, on behalf of the Respondent and has represented that the Respondent is in Agreement with the terms of the Agreement. It is therefore determined that the Respondent has agreed to, and intends to be bound by the terms of the Agreement.

The Settlement Agreement provides that Complainant releases respondent from claims arising under the FRSA as well as under various other laws. This Order Approving Settlement is limited to whether the terms of the settlement are a fair, adequate, and reasonable settlement of Complainant's allegations that respondent violated the FRSA. *Kidd v. Sharron Motor Lines, Inc.*, 87-STA-2 (Sec'y July 30, 1987); *Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Sec. Ord., Nov. 2, 1987, slip op. at 2. As was stated in *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, (Nov. 2, 1987):

The Secretary's authority over the settlement agreement is limited to such statutes as are within [the Secretary's] jurisdiction and is defined by the applicable statute. *See Aurich v. Consol. Edison Co. of N.Y., Inc.*, Case No. 86-CAA-2, Secretary's Order Approving Settlement, issued July 29, 1987; *Chase v. Buncombe Co., N.C.*, Case No. 85-SWD-4, Secretary's Order on Remand, issued November 3, 1986.

I have, therefore, limited my review of this Agreement to determining whether the terms thereof are a fair, adequate, and reasonable settlement of Complainant's allegation that respondent has violated the FRSA.

The Agreement provides that the Respondent shall make a payment to Complainant of a mutually agreed upon amount. The parties agree that this payment will satisfy all claims against the Respondent by the Complainant. This provision must be interpreted as limited to the right to sue in the future on claims or causes of action arising out of facts or any set of facts occurring before the date of the agreement. *Bittner v. Fuel Economy Contracting Co.*, 88-ERA-22, (Sec'y Order June 28, 1990). No admissions of liability are made.

The Respondent has requested that the monetary terms of the settlement be considered confidential and privileged commercial and financial information within the meaning of Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b)(4).

29 C.F.R. §18.85 of the revised rules of practice before the Office of Administrative Law Judges which took effect on June 18, 2015, pertains to privileged, sensitive, or classified material. Under Section 18.85 the administrative law judge, upon the motion of an interested person or on the judge's own, may seal a portion of the record to protect against undue disclosure of privileged, sensitive or classified material. Section 18.85(b)(2) provides that notwithstanding the judge's order, all parts of the record remain subject to statutes and regulations pertaining to public access to agency records.

It has been held in a number of cases, with respect to confidentiality of settlement agreements, that the Freedom of Information Act, 5 U.S.C. section 552, *et seq.* (1988) ("FOIA"), requires federal agencies to disclose requested documents unless they are exempt from disclosure. *Faust v. Chemical Leaman Tank Lines, Inc.*, 92-SWD-2 and 93-STA-15 (ARB

1998). The records in this case are agency records which may be made available for public inspection and copying under the FOIA. I construe the Respondent's request for confidentiality as a request for pre-disclosure notification rights in accordance with 29 C.F.R. §70.26.¹ The Agreement itself is not appended to this Order approving the settlement, and will be kept in a separate envelope and marked "PREDISCLOSURE NOTIFICATION MATERIALS" in compliance with 29 C.F.R. §70.26. It will also be noted on the envelope that the predisclosure notification will apply to all requests for disclosure of this document. Therefore, should disclosure be requested, the parties will have the opportunity to state their positions in regard to whether disclosure is proper or warranted by law.

I find that the provisions of the settlement agreement are fair, adequate, reasonable and not contrary to the public interest. Accordingly, I approve the parties' settlement and grant the parties' motion for dismissal of the complaint with prejudice. The parties shall implement the terms of the approved settlement as specifically stated in their agreement. This Order shall have the same force and effect as one made after a full hearing on the merits.

ORDER

Wherefore, it is ordered that:

1. The Settlement Agreement is **APPROVED**;
2. The complaint is **DISMISSED WITH PREJUDICE**; and,
3. The Settlement Agreement is designated as confidential business information, under 29 C.F.R. § 70.26, and shall be afforded the protections thereunder, for purposes of a FOIA request. Predisclosure notification will also be provided to the parties in relation to other requests for disclosure as well.

RICHARD A. MORGAN
Administrative Law Judge

¹The parties are afforded the right to request that information be treated as confidential business information. See 29 C.F.R. §70.26 (2016). The DOL is then required to take steps to preserve the confidentiality of that information, and must provide the parties with predisclosure notification if a FOIA request is received seeking release of that information. Accordingly, an unredacted copy of the Settlement Agreement in this matter will be placed in an envelope marked "PREDISCLOSURE NOTIFICATION MATERIALS." Consequently, before any information in this unredacted file is disclosed pursuant to a FOIA request, the DOL is required to notify the parties to permit them to file any objections to disclosure. See 29 C.F.R. § 70.26 (2016).