

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

Issue Date: 09 January 2019

ALJ NO.: 2018-FRS-00019

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*In the Matter of:*

**KEVIN BUDKE,**  
*Complainant,*

v.

**UNION PACIFIC RAILWAY COMPANY,**  
**and SEAN COTTON, INDIVIDUALLY,**  
*Respondents.*

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**DECISION AND ORDER APPROVING SETTLEMENT  
AGREEMENT & DISMISSING COMPLAINT WITH PREJUDICE**

This proceeding arises from a discrimination complaint filed under the Federal Rail Safety Act (“the FRSA”), 49 U.S.C. § 20109 (2008). On November 30, 2017, the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting as agent for the Secretary of Labor (“Secretary”), issued a letter dismissing the complaint. By letter dated December 28, 2017, the Complainant objected to the Secretary’s findings and requested a de novo hearing before an administrative law judge pursuant to 29 C.F.R. § 1982.106 (2015). Trial was set to commence on December 13, 2018 in Omaha, Nebraska, and after a final pre-trial conference on December 13, 2018, I issued an order cancelling the trial and setting a deadline for settlement documentation. During the conference, we discussed the confidential nature of the settlement and I granted the parties’ request to keep the terms of the settlement confidential.

On January 8, 2019, the parties filed their settlement documentation and seek approval of an adjudicatory settlement in this matter. The document is entitled “Settlement Agreement and Release of Claims” (hereinafter “Stipulation”). The Stipulation is filed under seal and its contents will remain confidential subject to my rulings below.

In reviewing the Stipulation, I must determine whether the terms of the agreement fairly, adequately, and reasonably settle the Complainant's allegations that the Respondent violated the FRSA whistleblower provisions. *See* 29 C.F.R. § 1982.111(d)(2). I find that the Stipulation complies with the standard required and it is APPROVED pursuant to 29 C.F.R. § 1982.111(d)(2), subject to my comments below.

Considering the request to seal and keep confidential, during our final pretrial conference, the Respondent asserted its pre-disclosure notification rights in accordance with 29 C.F.R. § 70.26, and the copy of the Stipulation therefore is being maintained in a separate envelope and identified as being confidential commercial information pursuant to the parties' request. *See Duffy v. United Commercial Bank*, 2007-SOX-00063 (Oct. 23, 2007). In this regard, I find that the Stipulation contains financial information and business information that is privileged or confidential within the meaning of 29 C.F.R. §70.2(j), as well as personal information relating to the Complainant.

With regard to confidentiality of the Stipulation, the parties are advised that notwithstanding the confidential nature of the Stipulation, all of their filings, including the Stipulation, are part of the record in this case and may be subject to disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C.A. § 552 *et seq.* The Administrative Review Board has noted that:

If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine *at the time a request is made* whether to exercise its discretion to claim the exemption and withhold the document. If no exemption is applicable, the document would have to be disclosed.

*Seater v. S. Cal. Edison Co.*, USDOL/OALJ Reporter (PDF), ARB No. 97-072, ALJ No. 1995-ERA-00013 at 2 (ARB March 27, 1997) (emphasis added). Should disclosure be requested, the parties are entitled to pre-disclosure notification rights under 29 C.F.R. § 70.26.

The parties have also requested that access to the Stipulation be restricted by the undersigned under 29 C.F.R. § 18.85 (Restricted Access). I find good cause for such restricted access and the Stipulation will be so maintained under that authority in the sealed envelope. *See*

29 C.F.R. §§ 18.85 & 70.26. *See Sharp v. The Home Depot, Inc.*, ALJ No. 2006-SOX-00129, 2008 DOLSOX LEXIS 4, at \*3 (ALJ Jan. 16, 2008).

One additional point requires brief attention. My authority over settlement agreements is limited to the statutes and regulations that are within my jurisdiction as defined by the FRS. Therefore, I approve only the terms of the Settlement Agreement pertaining to Budke's current FRS case, 2018-FRS-00019. *See Anderson v. Schering Corp.*, ARB No. 10-070, ALJ No. 2010-SOX-7 (ARB Jan. 31, 2011).

Upon consideration of the Stipulation and the record in this proceeding, I find that the terms and conditions are fair, adequate, and reasonable under the FRSA. The terms adequately protect the Complainant, and it is in the public interest to approve the Stipulation as a basis for administrative disposition of this case. Accordingly, it is **ORDERED** that:

- (1) The request to seal and keep the Stipulation confidential is **GRANTED**;
- (2) The motion to approve the Stipulation is **GRANTED**;
- (3) The Stipulation is **APPROVED**;
- (4) The Stipulation shall be designated as confidential subject to the procedures requiring disclosure under FOIA; and
- (5) The Complaint of Kevin Budke is **DISMISSED WITH PREJUDICE**.

**SO ORDERED.**

**JONATHAN C. CALIANOS**  
Administrative Law Judge

Boston, Massachusetts