

**U.S. Department of Labor**

Office of Administrative Law Judges  
William S. Moorhead Federal Office Building  
1000 Liberty Avenue, Suite 1800  
Pittsburgh, PA 15222



(412) 644-5754  
(412) 644-5005 (FAX)

**Issue Date: 22 December 2011**

CASE NO.: 2011-STA-31

In the Matter of:

TIM L. HIMMELRICK, JR.,  
Complainant

v.

UPS GROUND FREIGHT, INC.,  
Respondent

Appearances:

Paul Taylor, Esq.,  
For the Complainant

Sepideh Esmaili, Esq.,  
For the Respondent

Before: RICHARD A. MORGAN  
Administrative Law Judge

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

This proceeding arises under the “whistleblower” employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter “the Act” or “STAA”], 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305), and the applicable regulations at 29 C.F.R. Part 1978.<sup>1</sup> On December 1, 2011 and December 16, 2011, the parties signed the Confidential Settlement Agreement and Release (“Agreement”) in accordance with 29 C.F.R. section 1978.111(d)(2). The Agreement resolves the controversy arising from the complaint of TIM L. HIMMELRICK, JR., Complainant, against UPS GROUND FREIGHT, INC., Respondent under the statute. The Settlement Agreement is signed by the complainant and the respondent.

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<sup>1</sup> On August 3, 2007, various amendments to the STAA were signed into law, which were included in the Implementing Regulations of the 9/11 Commission Act of 2007. See Pub. L. No. 110-53, § 1536, 121 Stat. 266, 464-467. The STAA amendments generally strengthen protections for employees who complain of potential dangers and “problems, deficiencies, or vulnerabilities” regarding motor carrier equipment. The new subsection 49 U.S.C. §31105(b)(3)(C), provides for punitive damages up to \$250,000 where previously only compensatory damages were allowed. I previously ruled that punitive damages were not available in this proceeding.

The Settlement Agreement provides that complainant releases respondent from claims arising under the Surface Transportation Act as well as under various other laws. This order is limited to whether the terms of the settlement are a fair, adequate and reasonable settlement of complainant's allegations that respondent violated the STAA. *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. Consolidated Edison Company of New York, Inc.*, Case No. 86-CAA-2, Secretary's Order Approving Settlement, issued July 29, 1987; *Chase v. Buncombe County, 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 Mr. Himmelrick's allegation that respondent had violated the STAA.

Under the STAA and implementing regulations, a proceeding may be terminated on the basis of a settlement provided either the Secretary or the Administrative Law Judge approves the agreement. 49 U.S.C. app. section 2305(c)(2)(A); 29 C.F.R. section 1978.111(d)(2). The parties must submit for review an entire agreement to which each party has consented. *Tankersley v. Triple Crown Services, Inc.* 92- STA-8 (Sec'y Feb. 18, 1993). The agreement must be reviewed to determine whether the terms are a fair, adequate and reasonable settlement of the complaint. *Macktal v. Secretary of Labor*, 923 F.2d 1150 (5th Cir. 1991); *Thompson v. U.S. Department of Labor*, 885 F.2d 551 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec'y Ord. Mar. 23, 1989, slip op. at 1-2. This Order approving the settlement is final since all parties have joined in the Agreement. *Swischer v. Gerber Childrenswear, Inc.*, 93-STA-1 (Sec-y Jan. 4, 1993).

The Agreement provides that the Respondent shall make a payment to Complainant of an amount mutually agreed to. The parties agree that these payments will satisfy all claims against the respondent, NFI Interactive Logistics, Inc. by the complainant. The parties agree that these payments will satisfy all claims against the respondent, UPS GROUND FREIGHT, INC., by the complainant.

The Agreement provides releases, in paragraphs 3 and 10. These provisions 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.

I find the overall settlement terms to be reasonable but some clarification is necessary. Paragraph 6 of the Agreement contains a confidentiality provision limiting all disclosures except under certain stated circumstances. As the Agreement recognizes, it has been held in a number

of cases with respect to confidentiality provisions in 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.*, Case Nos. 92-SWD-2 and 93-STA-15, ARB Final Order Approving Settlement and Dismissing Complaint, March 31, 1998. The records in this case are agency records which must be made available for public inspection and copying under the Freedom of Information Act. However, the employer will be provided a pre-disclosure notification giving the employer the opportunity to challenge any such potential disclosure. In the event the Agreement is disclosed, pursuant to 5 U.S.C. section 552, *et seq.*, the parties have provided such disclosure is not a violation of the agreement and will not result in a violation of the agreement. (See paragraph J). The Agreement itself is not appended and will be separately maintained and marked "PREDISCLURE NOTIFICATION MATERIALS."

I find the terms of the "confidentiality" provision do not violate public policy in that they do not prohibit the Complainant from communicating with appropriate government agencies. *See, e.g., Bragg v. Houston Lighting & Power Co.*, 94-ERA-38 (Sec'y June 19, 1995); *Brown v. Holmes & Narver*, 90-ERA-26 (Sec'y May 11, 1994); *The Connecticut Light & power Cop. v. Secretary Of United States Department of Labor*, No. 95-4094, 1996 U.S. App. LEXIS 12583 (2d Cir. May 31, 1996); and, *Anderson v. Waste Management of New Mexico*, Case No. 88-TSC-2, Sec. Final Order Approving Settlement, December 18, 1990, slip opin. at 2, where the Secretary honored the parties' confidentiality agreement except where disclosure may be required by law.

The Agreement also notes at Paragraph 12 that it is governed and interpreted in accordance with the laws of the State of Illinois, but that nothing shall restrict the authority of the Secretary or any U.S. Court. That provision is interpreted as not limiting the authority of the Secretary or any U.S. court to seek or grant appropriate relief under any applicable federal whistleblower statute or regulation. *Phillips v. Citizens Assoc. for Sound Energy*, Case No. 91-ERA-25, Sec. Final Order of Dismissal (Nov. 4, 1991).

As so construed, noting that the parties are represented by counsel, I find the terms of the Agreement to be fair, adequate and reasonable, and therefore approve it. Accordingly, the complaint filed by Tim Lee Himmelrick, Jr., is hereby dismissed with prejudice.

### **ORDER**

Wherefore, it is ordered that:

1. The parties' Stipulations are ACCEPTED;
2. The Settlement Agreement is APPROVED;

3. The complaint is DISMISSED WITH PREJUDICE; and,
4. The Settlement Agreement is designated as “CONFIDENTIAL COMMERCIAL INFORMATION,” under 20 C.F.R. § 70.26, and shall be afforded the protections thereunder.

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RICHARD A. MORGAN  
Administrative Law Judge