

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



IN THE MATTER OF:

MICHAEL BRAUN,

ARB CASE NO. 2024-0001

COMPLAINANT,

ALJ CASE NO. 2021-AIR-00014

ALJ WILLIAM P. FARLEY

v.

DATE: April 16, 2024

UNITED AIRLINES, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Michael C. Lueder, Esq.; *Hansen Reynolds LLC*; Milwaukee, Wisconsin

For the Respondent:

Ada W. Dolph, Esq.; *Seyfarth Shaw LLP*; Chicago, Illinois

Before HARTHILL, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge

DECISION AND ORDER APPROVING SETTLEMENT, DENYING MOTION TO HOLD SETTLEMENT EXEMPT FROM FOIA DISCLOSURE, AND DISMISSING CASE WITH PREJUDICE

PER CURIAM:

This case arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).¹ Michael Braun (Complainant) filed a complaint alleging that United Airlines, Inc. (Respondent) retaliated against him and violated

¹ 49 U.S.C. § 42121, as implemented by the regulations at 29 C.F.R. Part 1979 (2023).

AIR21.² A Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Granting Respondent’s Motion for Summary Decision After Remand (D. & O.), in which he dismissed Complainant’s claim.³ On October 4, 2023, Complainant appealed to the Board.

On April 5, 2024, the parties filed a Joint Motion for an Order Approving Settlement, Dismissing Action with Prejudice, and Holding the Settlement Agreement Exempted from FOIA Disclosure (Joint Motion), stating they had settled the AIR21 claim and agreed to dismiss the appeal with prejudice pursuant to the terms of a Settlement and Release of AIR21 Claim Agreement (Settlement Agreement).⁴ The parties requested the Board approve the Settlement Agreement and dismiss the action with prejudice.⁵

The AIR21’s implementing regulations provide that at any time after a party has filed objections to the Assistant Secretary’s findings or order, the case may be settled if the participating parties agree to a settlement and, if the Board has accepted the case for review, the Board approves the settlement agreement.⁶

The Settlement Agreement encompasses the settlement of matters under laws other than the AIR21.⁷ The Board’s authority over settlement agreements is limited to statutes that are within the Board’s jurisdiction as defined by the applicable delegation of authority.⁸ Under Board precedent, we review the

² Decision and Order Granting Respondent’s Motion for Summary Decision After Remand at 4.

³ This case was before the ALJ on remand from the Board, following an earlier Petition for Review of the ALJ’s Decision and Order Granting Respondent’s Motion for Summary Decision. The Board remanded this case to the ALJ because it was unable to determine whether there were “sufficiently compelling reasons” to justify maintaining a seal over materials filed with the ALJ below, or to justify accepting materials under seal on appeal. *Braun v. United Airlines, Inc.*, ARB No. 2023-0014, ALJ No. 2021-AIR-00014, slip op. at 4 (ARB May 3, 2023) (Order of Remand). The Board directed the ALJ to issue an order with “specific factual findings addressing whether there [were] sufficiently compelling reasons to maintain a seal over materials in the record . . . [and] focus [] on the evidence and other material that Complainant [] redacted from his briefs and appendix filed with the Board.” *Id.* at 5.

⁴ Joint Motion at 1.

⁵ *Id.* at 4.

⁶ 29 C.F.R. § 1979.111(d)(2).

⁷ Settlement Agreement ¶ 3.

⁸ Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); see *Gray v. DAL Global*, ARB No. 2010-0112,

Settlement Agreement to ascertain whether its terms fairly, adequately, and reasonably settle this AIR21 case over which we have jurisdiction.⁹

The Settlement Agreement contains a confidentiality clause, pursuant to which the parties request the Board exempt it from disclosure under the Freedom of Information Act (FOIA or Act) because it “contains highly confidential information regarding compensation and benefits to be provided to Complainant in exchange for his dismissal of this action and separation of employment from Respondent.”¹⁰

The Board denies the parties’ request to withhold the Settlement Agreement from disclosure under the FOIA. The parties’ submissions, including the e-mailed Settlement Agreement, are part of the record and subject to FOIA.¹¹ “The FOIA requires federal agencies to disclose requested records unless they are exempt from disclosure under the Act.”¹² The Board lacks the authority to exempt documents from FOIA as a part of the settlement approval process under AIR21, and any request for an exemption under FOIA is premature. In the absence of a FOIA request, it would be inappropriate for the Board to determine whether any exemption is applicable.¹³ If a FOIA request is received for this particular

ALJ No. 2009-AIR-00028, slip op. at 2 (ARB Aug. 31, 2010) (citing *Fish v. H & R Transfer*, ARB No. 2001-0071, ALJ No. 2000-STA-00056, slip op. at 2 (ARB Apr. 30, 2003)).

⁹ *Bell v. Bald Mountain Air Serv.*, ARB No. 2019-0002, ALJ No. 2016-AIR-00016, slip op. at 2 (ARB Dec. 23, 2019) (citing *Coogler v. Schneider Nat’l Carriers, Inc.*, ARB No. 2009-0133, ALJ No. 2019-STA-00023, slip op at 3 (July 20, 2010)).

¹⁰ Joint Motion at 3; see Settlement Agreement ¶ 7.

¹¹ 5 U.S.C. § 552. The Board recognizes the parties e-mailed the Settlement Agreement instead of filing it through the Board’s Electronic Filing and Service System (EFS System) in an attempt to limit its disclosure under the FOIA. See Joint Motion at 1. However, e-mails sent or received related to public business are an agency record which are subject to the FOIA. See *id.* To properly maintain the current record, the Board will upload the Settlement Agreement to its Electronic Filing and Service (EFS) system and Department of Labor Appeals (DOLA) system. The EFS system allows parties to initiate appeals, file briefs and motions, receive electronic service of Board issuances and documents file by other parties, and check the status of appeals via an internet-accessible interface. The EFS system is only accessible by the parties and DOL staff. The DOLA system is an intra-office application that stores the parties’ filings and the Board’s issuances and is only accessible to ARB staff. Thus, in practice, the Settlement Agreement is protected from public disclosure.

¹² *Rew v. CSX Transp., Inc.*, ARB Nos. 2021-0042, -0058, ALJ No. 2019-FRS-00073, slip op. at 3 (ARB Nov. 2, 2021) (citing *Ware v. BNSF Ry. Co.*, ARB No. 2014-0044, ALJ No. 2013-FRS-00028, slip op. at 3 (ARB June 24, 2014)).

¹³ *Hendrix v. CSX Transp., Inc.*, ARB No. 2023-0033, ALJ No. 2020-FRS-00076, slip op. at 3 (ARB July 13, 2023) (citing *Bettner v. Crete Carrier Corp.*, ARB No. 2007-0093, ALJ No.

Settlement Agreement, the Department of Labor will follow the proper procedures for responding to FOIA requests.¹⁴

Furthermore, if the confidentiality clause was interpreted to preclude Complainant from communicating with federal or state enforcement agencies concerning alleged violations of law, it would violate public policy, as it would contain an unacceptable “gag provision.”¹⁵ We construe such language as allowing Complainant, either voluntarily or pursuant to an order or subpoena, to communicate with or provide information to state and federal authorities about suspected violations of law involving Respondent. This is further evidenced in the Settlement Agreement’s “Non-Disparagement” provision, which specifies:

Nothing in this Agreement is intended to or will be used in any way to limit [Complainant’s] right to engage in any protected activity. . . . Nothing in this section is intended to prohibit [Respondent] or [Complainant] from responding truthfully and accurately to inquiries about [Respondent] or [Complainant] from the FAA or other governmental entities.^[16]

The Settlement Agreement also provides that it shall be governed by the laws of the state of Illinois.¹⁷ We construe this “Applicable Law” provision as not limiting the authority of the Secretary of Labor, the Board, and any federal court with regard to any issue arising under the AIR21, which authority shall be governed in all respects by the laws and regulations of the United States.¹⁸

2006-STA-00033, slip op. at 3 n.11 (ARB Sept. 27, 2007) (discussing premature FOIA exemption requests and determinations concerning settlement agreements)).

¹⁴ 29 C.F.R. Part 70 (2023). Pursuant to 29 C.F.R. § 70.26(b), submitters may, in good-faith, designate portions of their submissions as containing confidential commercial information, which they consider to be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). Because the parties have designated the Settlement Agreement as containing confidential commercial information, the Board will treat the Settlement Agreement as subject to the pre-disclosure procedures in 29 C.F.R. § 70.26.

¹⁵ *Hendrix*, ARB No. 2023-0033, slip op. at 3 (citations omitted) (applying same public policy consideration to other whistleblower statute settlements).

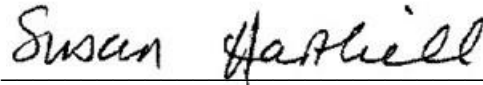
¹⁶ Settlement Agreement ¶ 14.

¹⁷ *Id.* ¶ 9.

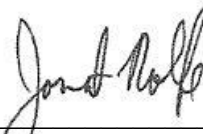
¹⁸ *Bell*, ARB No. 2019-0002, slip op. at 2 (citing *Trucker v. St. Cloud Meat & Provisions, Inc.*, ARB No. 2008-0080, ALJ No. 2008-STA-00023, slip op. at 3 (ARB May 30, 2008)).

The Board concludes that the Settlement Agreement is fair, adequate, and reasonable, and does not contravene the public interest. Accordingly, we **APPROVE** the Settlement Agreement, **DENY** the parties' Motion to hold the Settlement Agreement exempt from FOIA disclosure, and **DISMISS** the complaint with prejudice.

SO ORDERED.



SUSAN HARTHILL
Chief Administrative Appeals Judge



JONATHAN ROLFE
Administrative Appeals Judge