



In the Matter of:

ERIC REW,

COMPLAINANT,

v.

CSX TRANSPORTATION, INC.,

RESPONDENT.

ARB CASE NOS. 2021-0042  
2021-0058

ALJ CASE NO. 2019-FRS-00073

DATE: November 2, 2021

Appearances:

*For the Complainant:*

Robert B. Thompson, Esq.; *The Law Office of Robert B. Thompson, LLC*; Chicago, Illinois

*For the Respondent:*

Jacqueline M. Holmes, Esq.; *Jones Day*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge* and  
Thomas H. Burrell, *Administrative Appeals Judge*

**DECISION AND ORDER APPROVING SETTLEMENT  
AND DISMISSING CASE WITH PREJUDICE**

PER CURIAM. This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act (FRSA).<sup>1</sup> Eric Rew (Complainant) filed a complaint alleging that CSX Transportation, Inc. (Respondent) retaliated against him for reporting a work injury and following the treatment plan of his physician in

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<sup>1</sup> 49 U.S.C. § 20109, as implemented by 29 C.F.R. Part 1982 (2020).

violation of FRSA. On June 1, 2021, an Administrative Law Judge (ALJ) issued a Decision and Order finding that Respondent had violated FRSA and awarding Complainant damages. On June 15, 2021, Respondent appealed to the Administrative Review Board (Board).

On July 23, 2021, the ALJ issued a Supplemental Decision and Order Awarding Attorney Fees. On August 9, 2021, CSX filed a “Petition for Review of Supplemental Decision and Order,” which the Board interpreted as a separate appeal.<sup>2</sup>

On October 27, 2021, the parties filed a Joint Motion to Approve Settlement and Dismiss Action with Prejudice for each appeal, stating that the parties had settled the FRSA claim and agreed to dismiss the appeals with prejudice pursuant to the terms of a Confidential Settlement Agreement and General Release. The parties requested the Board to approve the settlement agreement and dismiss the action with prejudice. The parties attached a signed copy of the agreement to the motions.

The FRSA’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.<sup>3</sup>

Review of the Agreement reveals that it encompasses the settlement of matters under laws other than the FRSA. The Board’s authority over settlement agreements is limited to the statutes that are within the Board’s jurisdiction as defined by the applicable delegation of authority.<sup>4</sup> Therefore, we have restricted our

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<sup>2</sup> In response, the Board issued an Order to Show Cause explaining why it should not dismiss the petition as untimely. Respondent explained that the filing was not intended to be a separate appeal and was meant to notify the Board that Respondent had already challenged the ALJ’s award of attorney’s fees and litigation costs as part of its challenge to the June 1 order.

<sup>3</sup> 29 C.F.R. § 1982.111(d)(2).

<sup>4</sup> *Helgeson v. Soo Line R.R. Co.*, ARB No. 2019-0054, ALJ No. 2016-FRS-00084, slip op. at 2 (ARB Jan. 13, 2021).

review of the Settlement Agreement to ascertaining whether its terms fairly, adequately, and reasonably settle this FRSA case over which we have jurisdiction.<sup>5</sup>

The Agreement contains a confidentiality clause. The Board notes that the parties' submissions, including the Agreement, become part of the record and are subject to the Freedom of Information Act (FOIA).<sup>6</sup> The FOIA requires federal agencies to disclose requested records unless they are exempt from disclosure under the Act.<sup>7</sup> Department of Labor regulations set out the procedures for responding to FOIA requests and for appeals by requestors from denials of such requests.<sup>8</sup>

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 and therefore constitute an unacceptable "gag" provision.<sup>9</sup> The clause includes language that Complainant shall not disclose the agreement's existence or terms to a third party except "to the extent disclosure is compelled by law or compulsory legal process." 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.<sup>10</sup>

The Agreement also provides that it shall be governed by the laws of the State of Florida. We construe this "Governing 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 FRSA, which authority shall be governed in all respects by the laws and regulations of the United States.<sup>11</sup>

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<sup>5</sup> *Thompson v. Norfolk S. Ry. Co.*, ARB No. 2013-0032, ALJ No. 2011-FRS-00015, slip op. at 2 (ARB Feb. 28, 2013).

<sup>6</sup> 5 U.S.C. § 552 (2016).

<sup>7</sup> *Ware v. BNSF Ry. Co.*, ARB No. 2014-0044, ALJ No. 2013-FRS-00028, slip op. at 3 (ARB June 24, 2014).

<sup>8</sup> 29 C.F.R. Part 70 (2017).

<sup>9</sup> *Helgeson*, ARB No. 2019-0054, slip op. at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Thompson*, ARB No. 2013-0032, slip op. at 2.

The Board concludes that the settlement between Complainant and Respondent is fair, adequate, and reasonable, and does not contravene the public interest. Accordingly, we **APPROVE** the settlement agreement and **DISMISS** the complaint with prejudice.

**SO ORDERED.**