

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 14 September 2012**

CASE NO.: 2011-FRS-10

In the Matter of:

ADAM ENBERG,  
Claimant

v.

PROGRESSIVE RAIL INCORPORATED,  
Employer

Appearances:

Justin N. Brunner, Esq. and Louise E. Jungbauer, Esq.,  
For the Complainant

Jennifer K. Eggers, Esq.  
For the Respondent

Before: RICHARD A. MORGAN  
Administrative Law Judge

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

The above-styled proceeding arose 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”].

September 4, 2012, the parties signed a Settlement Agreement (“Agreement”). The Agreement resolves the controversy arising from the complaint of Adam Enberg against Progressive Railroad, Incorporated under the statute. The Settlement Agreement is signed by the complainant and the respondent. Additionally, the complainant moved to withdraw his objections to the Assistant Secretary’s Findings.

The Settlement Agreement provides that Complainant releases Respondent from claims arising under the FRSA 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 FRSA. As 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 review this Agreement to determine whether the terms thereof are a fair, adequate and reasonable settlement of Mr. Enberg's allegation that Respondent had violated the 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 21<sup>st</sup> Century [hereinafter "AIR21"], 49 U.S.C. § 42121. 29 C.F.R. §1979.111(d)(2) states 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 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.

The respondent agrees that it will provide Complainant with a neutral employment reference. It will also not disclose or disseminate information relating to the complainant's employment to third parties.

The parties agree that this order shall have the same force and effect as an order made after full hearing, that the entire record on which this order may be based shall consist solely of the settlement agreement and the order, that the parties waive further procedural steps, and that the parties waive any right to challenge or contest the validity of this order.

The parties have agreed to end the litigation, upon terms they have decided are favorable to each of them, without any admission of liability. The courts are designed to resolve "disputes." With approval of this Agreement, there is no longer any dispute requiring a resolution. The parties, who are intimately familiar with the pros and cons of the alternative, i.e., litigation, have resolved any dispute. Such resolutions are to be encouraged. This limitation is not unreasonable.

The Agreement provides a general release, in paragraph 4. 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.

It has been held in a number of cases with respect to confidentiality 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 may 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. The Agreement itself is not appended and will be separately maintained and marked "PREDISCLURE NOTIFICATION MATERIALS." A protective order restricting access to the Agreement will be placed on the outside of the sealed envelope.

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 Adam Enberg is hereby dismissed with prejudice. As the complaint is dismissed, the Secretary's Findings are hereby vacated.

RICHARD A. MORGAN  
Administrative Law Judge