



Issue Date: 12 July 2013

CASE NO.: 2012-FRS-00087

In the Matter of:

STEPHEN KAWA
Complainant,

v.

NORFOLK SOUTHERN RAILROAD,
Respondent.

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

A hearing in this case, which arises under the employee protection provisions of the Federal Rail Safety Act (FRSA), as amended, 49 U.S.C. §20109, is scheduled to be held in Detroit or Dearborn, Michigan, from October 21 to 25, 2013. However, the hearing is being canceled because the parties have reached a settlement.

Under cover letter of June 26, filed on July 5, 2013, counsel for Respondent, on behalf of both parties, submitted a Settlement Agreement and Final Release (hereafter "Settlement Agreement") for approval, in accordance with 29 C.F.R. §1982.111(d)(2), as added, Interim Final Rule, 75 Fed. Reg. 53527, 53533 (Aug. 31, 2010). That section relates to adjudicatory settlements and requires the submission of a settlement agreement to the presiding administrative law judge for approval. *Compare Hoffman v. Fuel Economy Contracting*, 1987-ERA-33 (Sec'y Aug. 4, 1989) (Order) (requiring that settlements in whistleblower cases brought under the Energy Reorganization Act be reviewed to determine whether they are fair, adequate and reasonable) *with Indiana Dept. of Workforce Development v. U.S. Dept. of Labor*, 1997-JTP-15 (Admin. Review Bd. Dec. 8, 1998) (holding ALJ has no authority to require submission of settlement agreement in Job Training Partnership case when parties have stipulated to dismissal under Rule 41(a)(1)(A)(ii), FRCP, and contrasting ERA cases.) Although the Settlement Agreement includes Complainant's agreement to withdraw the instant claim, that is unnecessary as approval of the Settlement Agreement would still be required before the claim could be dismissed.

Other Causes of Action. The Settlement Agreement is a global settlement that resolves other pending litigation and causes of action. To the extent that the Settlement Agreement relates to matters under laws other than the Federal Rail Safety Act, I have limited my review to determining whether the terms thereof are a fair, adequate and reasonable settlement of Complainant's allegations that the Respondents violated the FRSA. *See, e.g., Fish v. H and R*

Transfer, ARB No. 01-071, ALJ No. 2000-STA-56 (ARB Apr. 30, 2003); *Poulos v. Ambassador Fuel Oil Co., Inc.*, 1986-CAA-1 (Sec'y Nov. 2, 1987).

Confidentiality Clause and Predisclosure Notification. The Settlement Agreement contains a confidentiality provision and the parties have requested that the monetary terms of the Settlement Agreement be confidential and have requested predisclosure notification under 20 C.F.R. §70.26(f). In that regard, they have designated portions as containing confidential and privileged commercial and financial information subject to exemption 4 of the Freedom of Information Act. The parties are advised that records in whistleblower cases are agency records which the agency must make available for public inspection and copying under the Freedom of Information Act (FOIA), 5 U.S.C. §552, and the Department of Labor must respond to any request to inspect and copy the record of this case as provided in the FOIA. *See generally Seater v. Southern California Edison Co.*, 1995-ERA-13 (ARB Mar. 27, 1997). Pursuant to the request of the parties, however, the Settlement Agreement will be maintained in a separate folder and before any information is disclosed pursuant to a FOIA request, the parties will be notified and given the opportunity to file objections in accordance with 29 C.F.R. §70.26.

Future Claims. The Settlement Agreement references future claims. I have interpreted the reference as relating solely to the right to sue in the future on claims or causes of action arising out of facts occurring before the date of the Settlement Agreement. *See generally McCoy v. Utah Power*, 1994-CAA-0001 (Sec'y, Aug. 1, 1994).

Medicare Secondary Payer Act. Under the Medicare Secondary Payer Act ("MSP"), 42 U.S.C. §1395y(b), the Center for Medicare and Medicaid Services ("CMS") may hold employers and carriers responsible for future Medicare payments if medical expenses are compromised without approval of the settlement by CMS. *See* 42 C.F.R. § 411.46. The parties indicate that they have considered the Medicare issue, as set forth in the Settlement Agreement. In approving this Settlement Agreement, I have not determined whether Medicare's interest (if any) in this matter has been adequately protected under the provisions of the MSP.

Having reviewed the terms of the Settlement Agreement, which are incorporated by reference herein, I find that the settlement is fair, reasonable, and adequate, and that it should be approved. Accordingly, I issue the following Order, in accordance with 29 C.F.R. §18.9 and 29 C.F.R. §1982.111. This Decision and Order Approving Settlement Agreement and Dismissing Complaint shall be the final agency action, in accordance with 29 C.F.R. §1982.111(e).

ORDER

IT IS HEREBY ORDERED that the hearing in this matter scheduled to be held from October 21 to 25, 2013 in Detroit or Dearborn, Michigan, be, and hereby is **CANCELED**;

IT IS FURTHER ORDERED that the Settlement Agreement be, and hereby is, **APPROVED**, and the parties shall comply with its terms to the extent that they have not already done so; and

IT IS FURTHER ORDERED that this action be, and hereby is **DISMISSED WITH PREJUDICE**.

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.