U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 February 2014

CASE NO.: 2013-FRS-00017

In the Matter of:

SEAN M. GALLAGHER,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

DECISION AND ORDER APPROVING SETTLEMENT AGREEMENT AND DISMISSING COMPLAINT

Although 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, was scheduled to be held in Minneapolis in October 2013, the hearing was canceled in view of impact of the partial government shutdown. It was not rescheduled as the parties advised they had reached a settlement.

Under cover letter of January 27, 2014, filed by facsimile and mail, counsel for Complainant, on behalf of both parties, submitted a Confidential Agreement and 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.)

I had my law clerk contact the parties to obtain additional information, because the agreement did not specify the amount of attorney fees. By letter of February 17, 2014, counsel provided the requested information, and the settlement agreement is now complete. In that regard, in order to approve a settlement agreement in a whistleblower case, where the parties

submit an agreement providing for the complainant to pay his own attorney fees, the administrative law judge must determine the net amount to be received by the complainant in order to determine whether the settlement is fair, adequate and reasonable. *See Tinsley v. 179 South Street Venture*, 1989-CAA-3 (Sec'y Aug. 3, 1989) (order of remand). In *Guity v. Tennessee Valley Authority*, 1990-ERA-10 (ALJ Aug. 15, 1996), I recommended approval of a settlement of an ERA whistleblower complaint, where the settlement specified the total amount payable to the complainant and required the complainant to pay his own attorney fees, but did not indicate the amount payable to the attorney. On appeal, the Administrative Review Board found that to be deficient and ordered that the parties file a joint response indicating the actual amount payable to the complainant, or that the complainant's counsel submit the necessary information. *Guity v. Tennessee Valley Authority*, 1990-ERA-10 (ARB Aug. 28, 1996). Although this case arises under the Federal Rail Safety Act, the same principle is applicable. Inasmuch as the Settlement Agreement is now complete, no further discussion is necessary.

Other Causes of Action/Future Claims. I have limited my review to determining whether the terms of the Settlement Agreement are a fair, adequate and reasonable settlement of Complainant's allegations that the Respondent 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). Likewise, to the extent that the Settlement Agreement may relate to future claims, I have interpreted it 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)

Confidentiality Clause and Predisclosure Notification. The Settlement Agreement contains a confidentiality provision and the parties have requested predisclosure notification under 29 C.F.R. §70.26(f). *See also* 29 C.F.R. §18.85(b) (2014) ("Sealing the record.") In that regard, they have designated the Settlement Agreement 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 remain confidential to the extent permitted. It 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.

Having reviewed the terms of the Settlement Agreement, 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. §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 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**.

Digitally signed by Pamela Lakes
DN: CN=Pamela Lakes,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.