



In the Matter of:

CHRISTOPHER J. CAIN,

ARB CASE NO. 13-006

COMPLAINANT,

ALJ CASE NO. 2012-FRS-019

v.

DATE: SEP 15 2016

BNSF RAILWAY COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert J. Friedman, Esq.; *Law Offices of C. Marshall Friedman, St. Louis, Missouri*

For the Respondent:

Andrea Hyatt, Esq.; *BNSF Railway Company, Fort Worth, Texas* and Bryan Neal, Esq. and Micah R. Prude, Esq.; *Thompson & Knight LLP, Dallas, Texas*

Before: Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

ORDER VACATING ORDER OF REMAND AND APPROVING SETTLEMENT

This case arose when the Complainant, Christopher Cain, filed a complaint under the whistleblower protection provisions of the Federal Railroad Safety Act (FRSA),¹ and its implementing regulations.² The Administrative Law Judge (ALJ) determined that the employer's actions violated the Act, and he granted relief. On review, the Administrative Review Board affirmed the ALJ's findings except for the amount of punitive damages. The

¹ 49 U.S.C.A. §20109 (Thomson Reuters 2007 & Supp. 2015).

² 29 C.F.R. Part 1982 (2015) and 29 C.F.R. Part 18, Subpart A (2015).

Board found that part of the ALJ's basis for the amount of the award was not part of Cain's claim, and, therefore, the Board reduced the punitive damage award by one-half.³

On appeal to the United States Court of Appeals for the Tenth Circuit, the court affirmed the ALJ's and the Board's holding that Cain proved the BNSF violated the FRSA whistleblower statute, and that BNSF failed to prove its affirmative defense. The Tenth Circuit also affirmed the finding that Cain is entitled to punitive damages. However, the court vacated the Board's reduced-damages award and remanded the matter to the Board for reconsideration of "whether the punitive damages award satisfies due process by using both [Section] 20109 and the guideposts [from *Campbell*]."⁴ *BNSF Railway Co. v. ARB*, 816 F.3d 628 (10th Cir. 2016). Subsequently, BNSF filed a petition for rehearing with the court that the court denied on April 28, 2016. The court issued a mandate order on May 6, 2016. In the meantime, the Board held that applying the guideposts may require further ALJ fact-findings, and accordingly, it issued a Decision and Order of Remand on April 6, 2016.⁵

On May 12, 2016, the parties submitted a Joint Motion to Re-Enter Decision and Order of Remand Dated April 6, 2016, requesting the Board to re-issue the April 6 Decision and Order of Remand, contending that it had been issued prematurely. However, before consideration of that motion, the parties submitted a Joint Motion to Approve Settlement Agreement and Dismiss Complaint with Prejudice on August 9, 2016.

As the parties correctly contend, the Board's decision remanding the case to the Office of Administrative Law Judges was issued prior to the Tenth Circuit's mandate order and thus prior to a final judgment. However, since the Tenth Circuit judgment is now final, jurisdiction in this case currently resides with the ARB. Therefore, we vacate the Board's decision in this case dated April 6, 2016, and review the parties' Joint Motion to Approve Settlement Agreement and Dismiss Complaint with Prejudice received August 9, 2016.

The applicable FRSA implementing regulations specifically provide that "[a]t any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the . . . ARB if the ARB has accepted the case for review."⁶ "A copy of the settlement" must be filed with the ARB.⁷ We review the terms of a proposed settlement agreement under the FRSA to

³ *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019 (ARB Sept. 18, 2014).

⁴ *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

⁵ *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019 (ARB Apr. 6, 2016).

⁶ 29 C.F.R. § 1982.111(d)(2). See also *Moore v. National R.R. Passenger Corp.*, ARB No. 15-041, ALJ No. 2014-FRS-073, slip op. at 2 (ARB Aug. 6, 2015); *Schow v. Union Pacific R.R. Co.*, ARB No. 15-048, ALJ No. 2013-FRS-043, slip op. at 2 (ARB May 29, 2015); *Peterson v. BNSF Ry. Co.*, ARB Nos. 14-026, 15-019; ALJ No. 2010-FRS-029, slip op. at 2 (ARB Mar. 19, 2015).

⁷ *Id.*

determine whether it is fair, adequate, and reasonable.⁸ Because the parties have jointly submitted the settlement as required and no party has indicated any opposition to its terms, we deem the terms of the settlement agreement unopposed and will review it in accordance with the applicable regulations.


Review of the agreement reveals that it includes the settlement of matters in addition to Cain's FRSA complaint.⁹ But the Board's authority over settlement agreements is limited to claims brought under the statutes within the Board's jurisdiction and pending before the Board. Thus, our approval is limited to this case, and we approve the agreement only insofar as it pertains to Cain's FRSA claim.¹⁰

Paragraph 5 of the Settlement Agreement includes a release provision. Waiver provisions such as this are 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; such waivers do not apply to actions taken by the employer subsequent to the agreement date.¹¹ We construe paragraph 5 consistently with this precedent.

Thus, as so construed, we find that the settlement is fair, adequate, and reasonable. Accordingly, we **VACATE** the ARB's decision in this case dated April 6, 2016, **APPROVE** the Release and Settlement Agreement and, as provided in the agreement, and **DISMISS** Cain's complaint with prejudice.

SO ORDERED.


LUIS A. CORCHADO
Administrative Appeals Judge


JOANNE ROYCE
Administrative Appeals Judge

⁸ *Schow*, ARB No. 15-048, slip op. at 2.

⁹ Release and Settlement Agreement (Settlement Agreement), ¶¶ 1C, 1E, 2, 3.

¹⁰ *Grigsby v. The Kansas City S. Ry. Co.*, ARB No. 14-093, ALJ No. 2014-FRS-082 (ARB Jan. 6, 2016).

¹¹ *Smith v. Union Pac. R.R. Co.*, ARB No. 13-058, ALJ No. 2012-FRS-039, slip op. at 2-3 (ARB July 23, 2013). See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974); *Rogers v. General Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986).