



In the Matter of:

OLEN WARE,

ARB CASE NO. 14-044

COMPLAINANT,

ALJ CASE NO. 2013-FRS-028

v.

DATE: June 24, 2014

BNSF RAILWAY COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Clint E. McGuire, Esq.; *The Law Firm of Alton C. Todd*, Friendswood, Texas

For the Respondent:

**Andrea Hyatt, Esq. and Jennifer L. Willingham, Esq.; *BNSF Railway Co.*,
Fort Worth, Texas**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge* and Luis A. Corchado,
*Administrative Appeals Judge***

**FINAL DECISION AND ORDER APPROVING SETTLEMENT
AND DISMISSING COMPLAINT WITH PREJUDICE**

The Complainant, Owen Ware, filed a complaint under the Federal Railroad Safety Act of 1982 (FRSA)¹ alleging that his employer, Respondent BNSF Railway Company violated the FRSA's whistleblower protection provisions by terminating his employment because he reported a workplace injury. On January 23, 2014, a Department

¹ 49 U.S.C.A. § 20109 (Thomson/West 2013) as implemented by federal regulations at 29 C.F.R. Part 1982 (2013).

of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) agreeing that BNSF's termination of Ware's employment violated the FRSA's employee protection provisions and awarding damages.²

BNSF timely petitioned the Administrative Review Board for review of the ALJ's D. & O.³ But before the Board had issued its decision, the parties filed a Confidential Agreement and Release for the Board's review and approval.

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.⁴

Review of the Settlement Agreement reveals that it may encompass the settlement of matters under laws other than the FRSA.⁵ 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. Therefore, we have restricted our review of the Confidential Agreement and Release to ascertaining whether its terms fairly, adequately, and reasonably settle this FRSA case over which we have jurisdiction.⁶

Further the settlement paragraph 9 includes a waiver provision. Waiver provisions 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.⁷ We construe paragraph 9 consistently with this precedent.

² *Ware v. BSNF Ry. Co.*, ALJ No. 2013-FRS-028, slip op. at 26 (Mar. 12, 2014).

³ *See* Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

⁴ 29 C.F.R. § 1982.111(d)(2).

⁵ Confidential Agreement and Release at paras. 3, 4.

⁶ *Accord Thompson v. Norfolk Southern Railway, Co.*, ARB No. 13-032, ALJ No. 2011-FRS-015, slip op. at 2 (ARB Feb. 28, 2013); *Bhat v. District of Columbia Water & Sewer Auth.*, ARB No. 06-014, ALJ No. 2003-CAA-017, slip op. at 2 (ARB May 30, 2006).

⁷ *Smith v. Union Pacific 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).

Paragraph 17 of the Confidential Agreement and Release provides that the Agreement shall be construed and interpreted in accordance with the laws of the State of Texas. We interpret this “choice of law” provision as not limiting the authority of the Secretary of Labor and any Federal courts, which shall be governed in all respects by the laws and regulations of the United States.⁸

We note that the parties further request that the terms of the Confidential Agreement and Release remain confidential. The parties’ submissions, including the Confidential Agreement and Release, become part of the record of the case and the record is subject to the Freedom of Information Act (FOIA).⁹ The FOIA requires federal agencies to disclose requested records unless they are exempt from disclosure under the Act. Department of Labor regulations set out the procedures for responding to FOIA requests and for appeals by requestors from denials of such requests.

Accordingly, as so construed, we find that the settlement is fair, adequate, and reasonable, and we **APPROVE** the agreement and, as provided in the Agreement, **DISMISS** Ware’s complaint with prejudice.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

⁸ See *Hildebrand v. H. H. Williams Trucking, LLC*, ARB No. 11-030, ALJ No. 2010-STA-056, slip op. at 3 (ARB Sept. 26, 2011).

⁹ 5 U.S.C.A § 552 (West 1996 & Supp. 2014).