In the Matter of:

GERALD E. D'HOOGE,

COMPLAINANT,

v.

BNSF RAILWAYS,

RESPONDENT.

ARB CASE NOS. 15-042
15-066

ALJ CASE NO. 2014-FRS-002

DATE: September 14, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
John A. Kutzman, Esq.; *Paoli Kutzman, P.C.*; Missoula, Montana

***For the Respondent*:**
Michelle T. Friend, Esq.; *Hedger Friend, P.L.L.C.*; Billings, Montana; and Jennifer L. Willingham, Esq.; Noah K. Garcia, Esq.; *BNSF Railways, Co.*; Fort Worth, Texas

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge;* Joanne Royce, *Administrative Appeals Judge;* and Leonard Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER APPROVING SETTLEMENT AND DISMISSING APPEAL

Complainant Gerald D'Hooge filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, BNSF Railways, violated the Federal Rail Safety Act,[1] by retaliating against him because he reported a safety hazard. D'Hooge later amended his complaint to add additional protected activities of reporting a second safety hazard

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[1] 49 U.S.C.A. § 20109 (Thomson Reuters 2014) (FRSA), 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, and as implemented by the federal regulations at 29 C.F.R. Part 1982 (2016).

and a workplace injury.

Following an investigation, OSHA found that there was no reasonable cause to believe that BNSF violated the FRSA. D'Hooge objected to OSHA's findings and timely requested a hearing before a Department of Labor Administrative Law Judge (ALJ). The ALJ held a formal hearing and concluded that D'Hooge had established the elements of an FRSA whistleblower complaint and awarded remedies. BNSF filed a timely Petition for Review of the ALJ's Decision and Order with the Administrative Review Board (ARB or Board).[2] The ARB affirmed the ALJ's decision.[3]

BNSF filed an appeal of the ARB's decision in the Federal Court of Appeals for the Ninth Circuit. Before the Ninth Circuit, the parties reached a settlement. The court ordered, "Pursuant to the terms of the parties' stipulation . . . , the appeal is dismissed without prejudice to reinstatement in the event the Administrative Review Board fails to approve the parties' settlement agreement." The parties jointly moved the ARB to approve the settlement agreement.

Under the regulations implementing the FRSA, the parties may settle a case at any time after filing objections to OSHA's preliminary findings, and before those findings become final, "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. A copy of the settlement will be filed with the ALJ or the ARB, as the case may be."[4]

The Board has received and reviewed the settlement agreement. Initially, we note that while the settlement agreement encompasses the settlement of matters under statutes 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 Secretary of Labor's Delegation of Authority. Therefore, we only approve the terms of the Agreement pertaining to D'Hooge's current FRSA case.[6]

Furthermore, the agreement includes a confidentiality agreement, which notes that the settlement agreement shall be kept confidential except "as required by law." Settlement Agreement at 4, Para. 8, "Confidentiality." In this regard, we note that if the confidentiality agreement were interpreted to preclude D'Hooge from communicating with federal or state

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[2] The ALJ's award of attorney's fees was also appealed.

[3] The Secretary of Labor has delegated her authority to issue final decisions under the FRSA to the Board. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

[4] 29 C.F.R. § 1982.111(d)(2) (2016).

[5] Confidential Agreement and Release at 2, para. 1(a).

[6] *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 2000-STA-056, slip op. at 2 (ARB Apr. 30, 2003).

enforcement agencies concerning alleged violations of law, it would violate public policy and therefore constitute an unacceptable "gag" provision.[7]

Additionally, we construe Paragraph 15 of the settlement agreement, the Choice of Law provision, as not limiting the authority of the Secretary of Labor and any Federal court, which shall be governed in all respects by the laws and regulations of the United States.[8]

As construed, we find the settlement to be fair, adequate, and reasonable, and as such we **APPROVE** the settlement and **DISMISS** D'Hooge's appeal.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LEONARD HOWIE III
Administrative Appeals Judge

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[7] *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 6 (ARB Nov. 10, 1997); *Conn. Light & Power Co. v. Sec'y, U.S. Dep't of Labor,* 85 F.3d 89, 95-96 (2d Cir. 1996) (employer engaged in unlawful discrimination by restricting complainant's ability to provide regulatory agencies with information; improper "gag" provision constituted adverse employment action).

[8] *Phillips v. Citizens' Ass'n for Sound Energy*, 1991-ERA-025, slip op. at 2 (Sec'y Nov. 4, 1991).