



In the Matter of:

PETER P. CEFALU,

**ARB CASE NO. 04-103
04-161**

COMPLAINANT,

ALJ CASE NO. 2003-STA-55

v.

DATE: January 31, 2006

ROADWAY EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., Truckers Justice Center, Burnsville, Minnesota

For the Respondent:

Lisa A. McGarrity, Esq., Franczek Sullivan, P.C., Chicago, Illinois

FINAL DECISION AND ORDER

Peter P. Cefalu complained that Roadway Express, Inc. violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2005), when it terminated his employment on February 21, 2002. We approve the Administrative Law Judge's Recommended Decision and Order (R. D. & O.) issued on May 20, 2004, that Roadway violated the STAA. We also accept the ALJ's Recommended Attorney's Fee Order dated August 9, 2004.

BACKGROUND

A. *Facts*

Cefalu was a commercial truck driver for Roadway, an interstate trucking company, from November 22, 1999, to February 21, 2002. Joint Stipulation. He was a member of Local 200 of the International Brotherhood of Teamsters, as was Jonathan Gomaz, another Roadway driver. *Id.* Roadway discharged Gomaz on January 3, 2002, for allegedly falsifying his driving log about when he left a rest area. Hearing transcript (T.) at 12-13, 21. Gomaz grieved his discharge. T. at 12. Cefalu provided a notarized statement for Gomaz's use at his discharge hearing on February 21, 2002. T. at 14-15, 21; Joint Exhibit (JX) 1. The statement documented an incident in which a Roadway supervisor allegedly directed Cefalu to falsify his hours. According to Cefalu, he was out of hours for the day, meaning he had already worked as many hours as federal regulations permit. His supervisor told him to take a mandatory drug test that day, but to record his time as if he had taken the test on a subsequent day. When he refused, the supervisor gave him a disciplinary letter. T. at 20-22; JX-1.

The grievance panel reinstated Gomaz. T. at 38. The hearing was over by noon. T. at 12-13. Thomas Forrest, Roadway's labor relations manager, attended the hearing. Forrest called Robert Schauer, an assistant manager of Roadway's Milwaukee terminal, to tell him that the panel reinstated Gomaz. T. at 38. But Forrest denied informing Schauer that Cefalu had submitted a statement on Gomaz's behalf. T. at 39. That same afternoon, Schauer participated in a conference call with Phillip Stanoch, Roadway's vice-president for labor relations and Mike Jones, Roadway's relay manager. Following the call, Jones called Cefalu and told him he was being discharged for falsifying his 1999 employment application. T. at 24, 26, 60-61.

B. *Procedural history*

Cefalu filed a complaint with the Occupational Safety and Health Administration (OSHA) on August 19, 2002, alleging that Roadway retaliated against him in violation of the STAA because he provided a written statement at Gomaz's grievance hearing. After an investigation, OSHA issued a report and informed Cefalu on September 9, 2003, that it dismissed his complaint for lack of merit. On September 24, 2003, Cefalu appealed and requested an evidentiary hearing.

On October 17, 2003, Cefalu served interrogatories on Roadway. Interrogatory No. 6 asked Roadway to:

Identify all individuals who provided information that Respondent [Roadway] considered in determining whether or not to discharge Complainant [Cefalu]. For each individual identified, please state specifically the information provided to Respondent.

Roadway objected and refused to identify the “confidential source” of the information “on the grounds of relevance and confidentiality.” Cefalu then filed a motion with the ALJ to compel Roadway to identify the confidential source. Roadway filed a motion for a protective order, asserting that it had promised to keep the informant’s identity secret.

On December 16, 2003, the ALJ issued an order granting Cefalu’s motion to compel discovery and denying Roadway’s motion for protective order. Order Granting Motion to Compel Discovery and Striking Objections and Order Denying Motion for Protective Order. However, by letter dated December 23, 2003, Roadway’s counsel informed the ALJ that her client would not comply with his order directing it to reveal the “confidential source.” Then on December 30, 2003, Cefalu’s counsel deposed three Roadway witnesses. They knew the identity of the informant, but refused to disclose it.

Cefalu filed a motion on January 6, 2004, seeking sanctions against Roadway for failing to obey the ALJ’s December 16, 2003 order on discovery. Although the ALJ denied Cefalu’s request for a default judgment, he imposed the following sanction on Roadway:

I find that Respondent shall not be permitted to present any evidence that arose from the unidentified confidential source, including, but not limited to, the testimony of the individual(s) who confirmed that Complainant was terminated from his prior employment, the testimony of the individual(s) who made the decision to terminate Complainant, and any related documentary evidence.

Order Granting Complainant’s Motion for Sanctions.

The ALJ held a hearing on the merits on January 27, 2004, in Chicago, and on May 20, 2004, issued a Recommended Decision and Order in which he concluded that Roadway discharged Cefalu because he engaged in protected activity, and therefore discriminated against him in violation of the STAA. R. D. & O. at 8. The ALJ awarded reinstatement, back pay and other relief. *Id.* In an order dated August 9, 2004, the ALJ awarded attorney’s fees to Cefalu’s counsel. Recommended Attorney’s Fee Order. The case is now before us. Both parties are represented by counsel and have filed briefs addressing the sanction the ALJ imposed and the merits of Cefalu’s complaint.

ISSUES

Our review addresses the following issues:

1. Whether the ALJ abused his discretion in excluding certain evidence as a sanction for Roadway’s refusal to comply with his order on discovery.

2. Whether Cefalu established, by a preponderance of the evidence, that Roadway fired him for engaging in activity protected under the STAA.
3. Whether Cefalu is entitled to the remedies the ALJ awarded, including reinstatement, back pay, and attorney's fees.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) to the Administrative Review Board (ARB or Board). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c) (2005).

When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's legal conclusions de novo. *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

We review an ALJ's imposition of discovery sanctions on an abuse of discretion standard. *Canterbury v. Administrator, Wage & Hour Div., USDOL*, ARB No. 03-135, ALJ No. 2002-SCA-11, slip op. at 3 (ARB Sept. 2003); *Dickson v. Butler Motor Transit/Coach USA*, ARB No. 02-098, ALJ No. 2001-STA-39, slip op. at 4 (ARB July 25, 2003); *Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-47, slip op. at 4-5 (ARB Sept. 30, 2002).

DISCUSSION

I. Discovery Sanction

As a sanction for refusing to disclose its confidential source, the ALJ precluded Roadway from introducing evidence that "arose" from that source, including the testimony of the individual who confirmed that Cefalu was terminated from his prior employment or the individual who made the decision to terminate him from his employment with Roadway. The Office of Administrative Law Judges' Rules of

Practice, 29 C.F.R. § 18.6(d)(2) (2005), authorize an ALJ to impose one or more of the following sanctions upon a party who fails to obey an order compelling discovery:

- (i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;
- (ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;
- (iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;
- (iv) Rule that the non complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown;
- (v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

29 C.F.R. § 18.6(d)(2)(i)-(v).

We consider whether the ALJ abused his discretion in levying sanctions, *see Canterbury; Dickson; Supervan*, and conclude that he did not in excluding evidence that “arose” from Roadway’s informant. Roadway’s defense was to be that it discharged Cefalu for a legitimate, non-discriminatory reason, namely that he lied on his 1999 job application. To show that this reason for terminating him was a pretext, Cefalu was entitled to know when Roadway found out about the job application and from whom. He was also entitled to know who participated in the decision to discharge him. Thus, the sanction imposed against Roadway was appropriate and tailored to the discovery it refused to produce.

II. Merits of the Complaint

A. The legal standard

The STAA provides that an employer may not “discharge,” “discipline” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain

protected activities. § 31105(a). To prevail on a claim of unlawful discrimination under the STAA's whistleblower protection provisions, the complainant must allege and later prove by a preponderance of the evidence that he is an employee and the respondent is an employer; that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him; and that the protected activity was the reason for the adverse action. *Forrest v. Dallas and Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-53, slip op. at 3-4 (ARB July 29, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004).

B. Protected activity

The parties stipulated that Cefalu was an employee and that Roadway was an employer subject to the STAA. Joint Stipulation; R. D. & O. at 2. The ALJ correctly ruled that Cefalu engaged in protected activity when he testified by way of a statement in the Gomaz grievance hearing. STAA whistleblower protection extends to an "employee" who "has testified or will testify" "in . . . a proceeding" "related to a violation of a commercial motor vehicle safety regulation, standard, or order." § 31105(a)(1)(A). A grievance hearing is a "proceeding" under this section, and an employee's testimony as a witness is protected, provided the hearing is "related to" a violation of a commercial motor vehicle safety regulation. *Cf. Yellow Freight System, Inc. v. Reich*, No. 95-4135, 1996 WL 724369 (6th Cir. Dec. 16, 1996) (ruling that witness's testimony not protected because it related to grievant's medical condition rather than safety rule violation).

Cefalu was a witness in Gomaz's grievance hearing because he submitted an affidavit that was used at the hearing. Gomaz's grievance hearing was related to his alleged violation of a Department of Transportation (DOT) motor vehicle safety regulation, 49 C.F.R. § 395.8(f)(7) (2005), which provides:

(7) Signature/certification. The driver shall certify to the correctness of all entries by signing the form containing the driver's duty status record with his/her legal name or name of record. The driver's signature certified that all entries required by this section made by the driver are true and correct.

49 C.F.R. § 395.8(f)(7). *See generally* 49 C.F.R. Part 395, Hours of Service of Drivers.

Cefalu's notarized statement constituted a complaint to management and related to a violation of 49 C.F.R. § 395.8, when a supervisor asked him to falsify his daily log, which would violate the hours of service regulations. Therefore, the ALJ correctly ruled that Cefalu provided testimony related to motor vehicle safety, and this testimony was therefore protected activity under the STAA.

C. *Roadway's knowledge*

Roadway knew about Cefalu's protected activity. Forrest, Roadway's representative, attended the grievance hearing. Forrest called Schauer, the assistant terminal manager, after the hearing, and later that afternoon Schauer spoke with Stanoch, the vice president for labor relations, and Jones, the relay manager. After that call, Jones called Cefalu and fired him. The ALJ did not believe Forrest's testimony that he did not tell Schauer about Cefalu's notarized statement. He found that Stanoch knew about Cefalu's protected activity when he discharged him. R. D. & O. at 6. We defer to the ALJ's credibility determinations. *Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 2003-STA-54, slip op. at 6, n.3 (ARB Sept. 30, 2005); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35, slip op. at 8-9 (ARB Aug. 6, 2004).

D. *Causal nexus*

Cefalu established a causal nexus between his participation in the Gomaz grievance hearing and his termination. Temporal proximity between protected activity and adverse employment action supports an inference of discrimination. *Densieski*, slip op. at 7; *Roberts*, slip op. at 16. Cefalu was discharged within a few hours of Roadway's receipt of his affidavit. Although Roadway proffered evidence that Cefalu was fired that afternoon for lying on his job application in 1999, the ALJ's ruling imposing sanctions excluded that evidence. *See* T. at 76-82. Consequently, the person who made the decision to terminate Cefalu's employment did not testify and, other than his protected activity, the record contains no reason for his termination. As the ALJ pointed out, Roadway could have known for months about Cefalu's alleged misstatements on his employment application, and then used that as a pretext for his termination after he provided his affidavit at the grievance hearing. R. D. & O. at 7. The ALJ concluded: "In light of the close temporal proximity of Complainant's protected activity and his discharge, and in the absence of any evidence of a legitimate business reason for discharging Complainant, I find that Complainant has proven by a preponderance of the evidence that he was discharged because of his protected activity." *Id.* We agree, because substantial evidence of a causal nexus supports the ALJ's finding.

III. Remedies

A. *Reinstatement, back pay, and other relief*

Roadway does not address the ALJ's award of damages and other remedies on appeal. *See* Brief of Respondent Roadway Express, Inc. With brief discussion, we adopt the ALJ's recommendations. *See* R. D. & O. at 7-8.

Under 49 U.S.C.A. § 31105(b)(3)(A),

If the Secretary [of Labor] decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to—

- (i) take affirmative action to abate the violation;
- (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
- (iii) pay compensatory damages, including back pay.

Reinstatement is an automatic remedy for a successful STAA complainant. 49 U.S.C.A § 31105(b)(3)(A)(ii). *See Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26, slip op. at 7 (ARB Aug. 31, 2004). We affirm the ALJ's order that Roadway reinstate Cefalu to his former position. R. D. & O. at 7-8.

Cefalu is also entitled to back pay. 49 U.S.C.A § 31105(b)(3)(A)(iii). *See Jackson*, slip op. at 7, and cases cited therein. The ALJ calculated Cefalu's entitlement to back wages based upon the average weekly earnings of ten other Roadway drivers, less Cefalu's interim earnings. The ALJ awarded back pay of \$46,260.07, plus \$433.51 per week from April 2, 2004, until Cefalu's reinstatement. R. D. & O. at 7-8. The method and amounts are reasonable and unopposed and we accept them. Moreover, Cefalu is entitled to pre-judgment interest on the award of damages, calculated in accordance with the IRS penalty rate at 26 U.S.C.A. § 6621 (West 2002). R. D. & O. at 7-8.

Reinstatement of "terms and privileges of employment" include retirement plans. *See Jackson*, slip op. at 8, and cases cited therein. The ALJ correctly ordered Roadway to pay to the Teamster pension fund all the contributions it would have paid on Cefalu's behalf if he had not been discharged. R. D. & O. at 8. We also accept the recommendation that Roadway delete references to the adverse action in Cefalu's employment records and post a copy of the ALJ's R. D. & O. *Id.*

B. Attorney's fees

Lastly, we consider the ALJ's award of attorney's fees to Cefalu. Recommended Attorney's Fee Order. Before the ALJ, Cefalu's counsel filed fee petitions, and Roadway's counsel filed an opposition. Neither filed briefs before us on the question of the fee award.

A prevailing STAA complainant is entitled to be reimbursed for litigation costs, including attorney's fees. "[T]he Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint." 49 U.S.C.A. § 31105(b)(3)(B). We adhere to Supreme Court precedent in calculating reasonable attorney's fees. The starting point is the "lodestar" method of multiplying a reasonable number of hours by a reasonable hourly rate. *See Jackson*, slip op. at 10-11; *see also Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 98-STA-8, slip op. at 5 (ARB May 29, 2003);

Gutierrez v. Regents of the Univ. of Cal., ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 12 (ARB Nov. 13, 2002). Courts should exclude time that is duplicative, e.g., where two or more attorneys unnecessarily attend hearings and depositions, and perform the same tasks. *Jackson*, slip op. at 11. The burden to prove the reasonableness of the fee request is on the petitioner. *Id.* at 10.

The ALJ carefully reviewed the parties' filings and made various downward adjustments. He reduced the number of hours spent by Attorney Amanda Cefalu (a new member of the bar and evidently Peter Cefalu's daughter). He eliminated 2.25 hours she spent on Cefalu's employment grievance hearing before he filed his OSHA complaint and 16.3 hours that he found involved telephone conferences and reading filings prepared by the other attorneys, and thus did not represent her own substantive legal work. Recommended Attorney's Fee Order, at 2. The ALJ granted her petition as to the remaining time entries, which he found did not duplicate the work of Cefalu's primary attorney, Paul Taylor. *Id.* The ALJ reduced Amanda Cefalu's requested hourly rate from \$175 to \$125 per hour. *Id.* at 3-4.

The ALJ found that Attorney Paul Taylor's billing rate of \$250 per hour was reasonable. *Id.* at 3. He reduced his time for travel between Minneapolis and Chicago, granted Roadway's attorney's objection with respect to time entries for several telephone calls, excluded part of Taylor's time preparing his fee petition as duplicative, eliminated time spent on non-legal, clerical tasks, and denied some overhead expenses. *Id.* at 4-5.

Substantial evidence supports the ALJ's adjustments. The number of compensable hours and the rates he accepted are reasonable. We approve the recommended award of \$28,662.50 in fees and \$1,096.76 in expenses to Attorney Taylor; \$2,031.25 in fees to Attorney Cefalu; and \$1,271.49 in expenses to Mr. Cefalu. *Id.* at 5-6.

CONCLUSION AND ORDER

Substantial evidence in the record supports the ALJ's findings of fact. He applied the correct law to those findings. We therefore adopt his recommendations and **ORDER** that Respondent Roadway:

1. Reinstatement Complainant Cefalu to his former position.
2. Reimburse Complainant Cefalu back pay of \$46,260.07, plus \$433.51 per week from April 2, 2004, until his reinstatement.
3. Pay interest to Complainant Cefalu on the back pay award.
4. Pay the Teamster pension fund all the contributions it would have paid on Complainant Cefalu's account if he had not been discharged on February 21, 2002.

5. Delete references in Complainant Cefalu's employment file to any adverse action taken against him because of his protected activity.
6. Post a copy of the ALJ's decision and order at all its terminals for a period of sixty days.
7. Pay the sum of \$29,759.26 to Attorney Paul O. Taylor for costs incurred and services rendered to Complainant Cefalu in this claim.
8. Pay the sum of \$2,031.25 to Attorney Amanda Cefalu for services rendered to Complainant Cefalu in this claim.
9. Pay the sum of \$1,271.49 to Peter P. Cefalu for costs incurred by Complainant Cefalu in this claim.

Complainant Cefalu's counsel shall have fifteen days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition for costs and services before this Board, with simultaneous service on opposing counsel. Thereafter, Roadway shall have ten days from receipt of the fee petition to file a response.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge