U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

JAMES V. SAMSEL,	**ARB CASE NO. 03-085**
COMPLAINANT,	**ALJ CASE NO. 2002-STA-46**
v.	**DATE: June 30, 2004**
ROADWAY EXPRESS, INC.,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Christopher J. Oldham, Esq., *Baker, Gulley & Oldham, P.A., Knoxville, Tennessee*

For the Respondent:
Darin E. Playle, Esq., Michael D. Oesterle, Esq., *King & Ballow, Nashville, Tennessee*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997). Complainant James W. Samsel and Respondent Roadway Express,Inc. each submitted a Motion for Summary Decision requesting a ruling in their favor. For the following reasons we remand the case for a hearing.

BACKGROUND

Samsel has worked as an over-the-road driver for Roadway for eleven years. He is approximately 5 feet, 5 inches tall and weighs 350 pounds. Respondent Roadway Express, Inc.'s Memorandum of Law in Support of Its Motion for Summary Decision (Resp. Mem.), Exhibit 8. He and other drivers with limited seniority were not assigned to

drive specific tractors but instead were required to drive whatever tractor was assigned to them on a particular day. Some of those tractors contain re-manufactured seats that are larger than the seats originally installed in the tractors. Samsel does not allege that the size of these re-manufactured seats violated any statute or regulation.

Samsel set forth the facts giving rise to this case as follows:

> Beginning on or about November 29, 2001 and on the subsequent dates of November 30, 2001, December 6, 2001, March 28, 2002 and May 16, 2002, Mr. Samsel was assigned to drive a tractor owned by Roadway Express, Inc. on certain runs from the White Pine, Tennessee facility to other Roadway Express Terminals. On each of these dates, the tractors to which Mr. Samsel has been assigned had been modified in some fashion that caused the steering wheel to rub against the stomach of Mr. Samsel. On each of these occasions, Mr. Samsel notified management employees of Roadway Express that the steering wheel protruding into his stomach created an unsafe condition as contemplated by the [STAA] and by Article 16 of the National Master Freight Agreement that governs the terms and conditions of Mr. Samsel's employment with Roadway Express. At the time of his complaint, Mr. Samsel asked to be dispatched in a vehicle that did not have this unsafe condition, but his request was denied. Prior to the dates in question, Mr. Samsel had made similar requests and had been given a tractor that did not have this problem…Mr. Samsel asserts that the denial of the opportunity to make his assigned runs and/or the willful failure to pay his guaranteed call in time constitutes an "adverse action" as contemplated by the STAA.

Complainant's Pre-Hearing Statement at 1-2. On April 10, 2002, Samsel filed a complaint with the Occupational Safety and Health Administration (OSHA) stating that he was "sent home without pay for complaining about vehicle safety." Discrimination Case Activity Worksheet, Allegation Summary. OSHA denied Samsel's complaint, whereupon Samsel requested a hearing before an Administrative Law Judge (ALJ).

On February 27, 2003, Roadway filed a Motion for Summary Decision requesting that Samsel's complaint be dismissed because Samsel neither engaged in protected activity nor was subjected to adverse action. Roadway also contend that Samsel "cannot establish that a causal connection exists between [his] alleged participation in protected activity and the subsequent non-existent adverse action." Resp. Mem. at 22.

On March 13, 2003, Samsel filed a Cross Motion for Summary Decision as well as a Response to Respondent's Motion for Summary Decision. In his Memorandum in

Support of Motion for Summary Decision, Samsel contends that "based upon the submission of the Respondent, the undisputed facts and the Response of the Complainant, this Court is compelled to enter a Summary Decision on behalf of the Complainant. The only fact remaining for this Court to decide is the amount which the Complainant is entitled to be paid for the trips he missed, or for the guaranteed call in time for each of those occasions when he was sent home."

The parties engaged in a telephonic conference with the ALJ on March 14, 2003. According to Roadway, the parties agreed during the conference to limit the issue on summary decision to Samsel's request for "call-in pay." On March 17, 2003, the ALJ issued an Order Canceling Hearing and Setting Briefing Schedule, directing the parties to file briefs "pursuant to the conference call on March 14, 2003."

On March 21, 2003, Samsel filed a Supplemental Memorandum of Law in Support of Motion for Summary Decision (Compl. Supp. Mem.). The memorandum describes the issue on summary decision as follows:

> Under the analysis set forth in *Roadway Express, Inc. v. Dole*, 929 F.2d 1060 (5th Cir. 1991), given that the Respondent, Roadway Express, Inc. obligated itself under Article 50, §2 of the National Master Freight Agreement ("NMFA") to pay call-in time to employees if they are called into work and not put to work, is Respondent discriminating against the Complainant by failing to pay him call-in time?

Compl. Supp. Mem. at 1.[1]

On April 4, 2003, the ALJ issued a Recommended Decision and Order Granting Respondent's Motion for Summary Decision and Denying Complainant's Cross Motion for Summary Decision (R. D. & O.). The ALJ found that Samsel engaged in protected activity when he refused to drive Roadway's vehicles "based on his perception of an unsafe condition, i.e., the steering wheel's unsafe contact with his stomach." R. D. & O. at 6. The ALJ also held that although Samsel engaged in protected activity, he was not subjected to adverse action because "employers are not required to extend special economic treatment to those who justifiably refuse to perform work based upon safety concerns." R. D. & O. at 7. Finally, the ALJ found that:

[1] Article 50, § 2 of the NMFA states that "[e]mployees called to work shall be allowed sufficient time, without pay, to get to the garage or terminal, and shall draw full pay from the time ordered to report and registers [sic] in. All employees put to work shall be guaranteed a minimum of eight (8) hours pay, at the current minimum hourly rate. If not put to work, employee shall be guaranteed six (6) hours pay at the rate specified in this Agreement."

> [T]he intended meaning of Article 50, Section 2 is to guarantee call-in pay to drivers not put to work, based upon circumstances attributable to Roadway or circumstances outside of the driver's control . . . To extend a broader interpretation to Article 50, Section 2, as requested by the complainant in this matter, would only "open the door" to flagrant abuse, by allowing drivers to collect "call-in pay" when not put to work for reasons attributable to their own conduct or behavior.

R. D. & O. at 8.

ISSUE BEFORE THE BOARD

Whether there is no genuine issue of material fact and Respondent or Complainant is entitled to summary decision as a matter of law.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's recommended decision under 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the STAA). We review a grant of summary decision de novo, i.e., under the same standard employed by ALJs. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision." "[I]n ruling on a motion for summary decision, we . . . do not weigh the evidence or determine the truth of the matters asserted . . . ." *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6-7 (ARB Nov. 30, 1999). Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact. We also must determine whether the ALJ applied the relevant law correctly. *Cf. Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith*, 475 U.S. 574 (1986); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099 (9th Cir. 2000) (summary judgment under Rule 56, Fed. R. Civ. P.).

DISCUSSION

A. The STAA, Generally

The STAA provides, in pertinent part:

> (a) Prohibitions. -
> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because -
> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (B) the employee refuses to operate a vehicle because -
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105. The Supreme Court discussed the underlying purposes of the employee protection provision of the STAA in *Brock v. Roadway Express Inc.*, 481 U.S. 252, 107 S.Ct. 1740 (1987):

> Section 405 was enacted in 1983 to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations. *See, e. g.*, 128 Cong. Rec. 32698 (1982) (remarks of Sen. Percy); id., at

> 32509-32510 (remarks of Sen. Danforth). Section 405 protects employee "whistle-blowers" by forbidding discharge, discipline, or other forms of discrimination by the employer in response to an employee's complaining about or refusing to operate motor vehicles that do not meet the applicable safety standards. 49 U.S.C. App. 2305(a), (b).

Id. at 258.

To prevail under the whistleblower protection provision of the STAA, a complainant must prove that he engaged in protected activity and the employer was aware of the activity, that he was subjected to adverse employment action, and that a causal connection existed between the protected activity and the adverse action. *Ass't Sec'y & Helgren v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-44, slip op. at 4 (ARB July 31, 2003).

B. Summary Decision Is Denied As There Are Disputed Genuine Issues Of Material Fact

Although the parties and ALJ asserted that no material facts were in dispute, a review of the record indicates otherwise.

First, we note that during a conference call among the parties and the ALJ, the parties purportedly agreed to the material facts and the issues for summary decision. *See* Order Canceling Hearing and Setting Briefing Schedule; Compl. Supp. Mem. at 2-3; Respondent's Supplemental Brief To Its Motion for Summary Decision (Resp. Supp. Br.) at 2. Whatever agreement existed apparently was not reduced to writing, since no document reflecting the stipulated facts and the particular issue or issues for summary decision is in the record. The parties' briefs dispute both which facts were stipulated and the scope of the issues to be determined.[2] Complainant apparently understood the

[2] See Resp. Supp. Br., page 2, footnote 1: "To the extent Complainant sets forth supposed stipulations of fact, these should not be deemed Respondent's admissions since the Administrative Law Judge is well aware of the stipulations that had been reached between the parties and those that had not been reached between the parties. Further, REX objects to Complainant's assertion of any alleged facts which Complainant puts forth in either his initial Response and Counter-Motion for Summary Decision and Supporting Memorandum of Law or his Supplemental Memorandum of Law in Support of Motion for Summary Decision which exceed the narrow issue presented for decision by the Administrative Law Judge." Roadway asserted that the parties and the ALJ had agreed "the only issue for determination is whether Complainant suffered an adverse action under the STAA because he did not receive "call in" pay under Article 50, Section 2, of the NMFA." Resp. Supp. Br. at 2.

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agreement as including stipulations of fact which (Complainant contends) establish protected conduct and causation, and thereby (according to Complainant) entitle Complainant to summary decision as a matter of law. Roadway, however, denied both that it agreed to any admissions, and that it agreed that any issue other than adverse action (whether Complainant suffered an adverse action because Roadway did not pay him call-in pay under the National Master Freight Agreement (NMFA)) would be determined in the summary decision.[3]

Moreover, despite Roadway's assertion that whether Complainant suffered an adverse action was the sole agreed upon issue for consideration, the ALJ's decision states that the parties agreed that the case should be decided as a matter of law, and includes determinations as to protected conduct, and employer knowledge of protected conduct, as well as adverse action. (R. D.& O. at 4, 6, 8). It thus appears that material facts were in dispute and that there was a lack of common understanding as to the issues for summary decision. Nevertheless, we proceed to decide whether summary judgment is appropriate based upon the ALJ's decision and the record before us.

Based upon that record, we determine that a genuine issue of material fact exists as to whether Roadway subjected Samsel to an adverse action by not paying him "call in pay' under Article 50, Section 2 of the NMFA. Therefore neither party is entitled to judgment as a matter of law.

Article 50, Section 2 of the NMFA states in relevant part:

> All employees put to work shall be guaranteed a minimum of eight (8) hours pay, at the current minimum hourly rate. If not put to work, employee shall be guaranteed six (6) hours pay at the rate specified in this Agreement.

Resolution of whether Samsel was subjected to adverse action depends upon whether Samsel was entitled to "call in pay", which in turn depends upon whether Samsel was "put to work" or "not put to work." The parties differ as to whether or not he was "put to work."

Roadway contends that Samsel was "put to work" when he was given an assignment and therefore not entitled to "call in pay." Respondent Roadway Express Inc.'s Memorandum of Law in Support of Its Motion for Summary Decision (Resp.

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[3] See Complainant's Supplemental Memorandum of Law In Support Of Motion for Summary Decision (Compl. Supp. Mem.), pages 2-3. See Resp. Supp. Br., page 2, footnote 1, cited above.

Mem.) at 20; Resp. Mem., Exhibit 1 (Declaration of Mike Woody).[4] In addition, Roadway states that the purpose and intent of Article 2 of the NMFA is to provide drivers who are called and arrive at work ready, willing and able to drive their scheduled route with a guarantee of some pay in the event they do not end up driving their scheduled route due to circumstances attributable to REX (i.e. mechanical failure or scheduling error) or, alternatively, circumstances outside of the driver's control, such as weather. Should a driver not drive as a result of his or her not being ready, willing, and able to drive their [sic] scheduled route, the driver is not entitled to receive call-in pay." *Id.* Roadway submits that "[a]lthough Complainant may have arrived to work ready, and willing to drive . . . he nonetheless claimed he was not able . . . ." *Id.* Roadway also argues that an interpretation providing "call in pay" under these circumstances would be counter to the current administration of Article 50 Section 2. It notes that an employee who becomes ill after arriving at work, and therefore returns home, is not compensated under Article 50 Section 2 (but instead receives benefits under a separate Article). Resp. Supp. Br. at 13.

Samsel contends that he was sent home after refusing to drive illegally and was "not put to work."[5] He states that he reported as required and presented himself ready, willing and able to work. Samsel submits that he never withheld his services, the language of Article 50, Sec. 2 mandates payment, and there is no policy establishing exceptions to that mandate. Thus he was entitled to "call in pay," and Roadway's refusal to pay was an adverse action. Comp. Resp. at 4.

Therefore, a genuine issue of material fact exists as to whether Roadway put Samsel to work. Thus, a genuine issue of material fact exists as to whether Roadway subjected Samsel to an adverse action.[6]

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[4] The Declaration of Mike Woody states at paragraph 9 that: "Roadway Express, Inc. does not pay call-in pay under Article 50, Section 2, of the National Master Freight Agreement when a driver is put to work but refuses to perform the work. Accordingly, Mr. Samsel was not paid call-in pay under Article 50, Section 2, of the NMFA when he did not drive his assigned route on or about November 29, 2001." Resp. Mem., Exhibit 1

[5] The OSHA report of Samsel's complaint summarizes his allegation as "Complainant was sent home without pay for complaining about vehicle safety." Discrimination Case Activity Worksheet. Samsel states that "[c]ontrary to assertions by counsel for the Respondent, the Complainant never withheld his services, he was sent home when he refused to operate an unsafe vehicle." Complainant's Response to Respondent's Motion for Summary Decision (Comp. Resp.) at 5.

[6] We observe that the ALJ sought to determine this issue by finding that the language of Article 50 Section 2 was ambiguous, resolving the ambiguity by divining the "intended meaning" of that provision, and deciding that payment was not available based upon the intended meaning. For this purpose, he had before him only Respondent's arguments as to the purpose and intent of the provision and statements of the parties, made during a

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Accordingly, since there are genuine issues of material fact in dispute as to whether Roadway subjected Samsel to an adverse action, the ALJ erred in granting Roadway summary decision and dismissing Samsel's complaint.

Because we find that there are genuine issues of material fact in dispute as to whether Roadway subjected Samsel to adverse action, we need go no further in determining that neither party can be entitled to summary decision.[7]

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conference call, that they were unaware of any circumstances where the provision had been interpreted or administered to provide pay to drivers who did not drive their assigned route due to circumstances attributable to the driver. R. D. & O at 8. This was an insufficient basis for the determination. Summary judgment is disfavored where agreement language is ambiguous, particularly where extrinsic evidence of the intent of the parties is absent. *See* 27A Fed. Proc.: L. Ed. § 62:747 at 1 (2004) ("Where the contract is ambiguous -- that is, susceptible of more than one construction -- then summary judgment in an action on that contract ordinarily is inappropriate."). *See also* 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2730.1, fn.13 (2004). In this case such evidence would include documents and testimony regarding the terms "put to work" and "not put to work" for purposes of entitlement to "call in pay" under Article 50 Section, particularly the intent of the parties signatory to the NMFA in adopting the "call in pay" provision and their custom and practice in implementing it.

[7] We note, however, that in order for a refusal to drive to be protected under 49 U.S.C.A. § 31105 (B)(ii), the section under which Samsel seeks coverage, the driver's apprehension (of serious injury to the employee or the public because of the vehicle's unsafe condition) must be found to be objectively reasonable. The ALJ did not make this determination in finding that Samsel engaged in protected conduct. Moreover, it is axiomatic that one cannot refuse to do that which it is physically impossible for one to do. Further, we point out that it appears that there are genuine issues of material fact as to the reason for Roadway's action. Finally, we draw the attention of the parties and the ALJ to this Board's decisions determining that an employer does not violate the STAA by taking adverse action because a driver cannot meet job requirements. *See Sosnoskie v. Emery, Inc.*, ARB No. 02-010, ALJ No. 2002-STA-21 (ARB Aug. 28, 2003); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-33 (ARB Oct. 31, 2003).

CONCLUSION

For the foregoing reasons, we **DENY** the parties' Motions for Summary Decision and we **REMAND** this case to the ALJ for further proceedings in accordance with this decision.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge