U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

CLARENCE SCOTT, **ARB CASE NO. 99-013**

COMPLAINANT, **ALJ CASE NO. 98-STA-8**

v. **DATE: July 28, 1999**

ROADWAY EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Philip L. Harmon, Esq., *Worthington, Ohio*

For the Respondent:
Barbara J. Leukart, Esq., Stephen E. Baskin, Esq., Michael J. Moody, Esq.,
Jones, Day, Reavis & Pogue, Cleveland, Ohio

FINAL DECISION AND ORDER

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. §31105 (1994). Complainant, Clarence Scott (Scott), filed this complaint, contending that his former employer, Respondent, Roadway Express, Inc. (Roadway), violated Section 405 when it issued disciplinary warning letters because Scott called in sick, and also when it issued subsequent warning letters for various infractions. After Roadway discharged him, Scott also contended that his discharge violated Section 405.

The Administrative Law Judge (ALJ) issued a Recommended Decision and Order (RD&O), finding that Roadway violated Section 405 when it issued the warning letters for calling in sick. Notwithstanding, the ALJ concluded that Scott's discharge did not violate the STAA. In a subsequent Order Granting Attorney Fees (Att. Fee Order), the ALJ awarded attorney fees and costs to Scott.

We accept the ALJ's factual findings and most of his legal conclusions, as we explain below. Like the ALJ, we find that issuing certain disciplinary letters to Scott was a STAA violation, but that discharging him ultimately did not constitute a violation.

PROCEDURAL HISTORY

Scott filed this complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) in September 1997, concerning various disciplinary warning letters. Prior to Roadway receiving notice of Scott's OSHA complaint, the company decided to discharge Scott because of his poor work record. Under the union contract, Scott continued to work for Roadway until his discharge was upheld in a January 1998 hearing.

The OSHA Area Director found that Scott's complaint did not have merit. Scott timely requested a hearing on his complaint before an ALJ. The parties agreed that Scott's original complaint also included the issue whether his subsequent discharge violated Section 405. A three day hearing was held in August 1998, and the ALJ issued a recommended decision in November of that year.

ISSUES FOR DECISION

This case presents several issues for review:

1)Whether, under 29 C.F.R. §1978.112(c), the ALJ should have deferred to the outcome of a hearing, conducted pursuant to the collective bargaining agreement, in which Roadway's discharge of Scott was upheld.

2) Whether Roadway violated STAA's complaint cause, 49 U.S.C.A. §31105(a)(1)(A), by disciplining or discharging Scott for making safety complaints.

3) Whether Roadway violated STAA's refusal to drive clause, 49 U.S.C.A. §31105(a)(1)(B), by retaliating against Scott for refusing to operate a vehicle when driving would have violated the "illness/fatigue" rule at 49 C.F.R. §392.3.

4) If Roadway violated the STAA, whether the ALJ correctly awarded some $13,000 in costs and attorney fees, among other remedies.

FACTUAL BACKGROUND

The following facts are important for understanding the claims and issues we discuss. Scott worked as a truck driver for Roadway, based at its Akron, Ohio facility. He was an "extra board" driver who lacked the seniority to bid on regular, fixed routes with a regular schedule of work hours. T. 309; RD&O at 5. Extra board drivers are sent wherever and whenever the company needs a delivery made. T. 310; RD&O at 5.

Under a collective bargaining agreement, Roadway's progressive discipline policy begins with issuing a letter of warning to an employee for a violation of company work rules or procedures. T. 607; RD&O at 13. The second step is a local hearing in which the company discusses with the union the appropriate sanction for the past nine months' violations in the employee's work record. T. 608; RD&O at 13. If the local hearing is deadlocked, the parties progress to a hearing before the joint state committee, whose decision is final if it upholds the discipline. T. 176. If, however, the joint state committee is deadlocked, the parties progress to a hearing before the joint area committee, and if deadlock occurs again, to a national hearing and ultimately to an arbitration at the national level. T. 177.

Over the course of Scott's five and a half years of employment with Roadway, the company took disciplinary action against him numerous times. T. 611; RX 5-168; RD&O at 13. In all, Scott received about 50 warning letters and was suspended six times. T. 610; RX 1-169-9, RX 5-168; RD&O at 13. In addition, the company discharged him on four occasions prior to the discharge at issue here. T. 610; RD&O at 22. Under the union contract, employees remained on the job pending a hearing on a discharge. CX 13-1; RD&O at 24. Just cause is required to sustain a discharge. T. 182-83; RD&O at 24.

In the case of Scott's first four discharges, at subsequent hearings the union and company agreed to a less severe sanction. T. 610-621; RD&O at 22. For example, Roadway issued Scott's fourth discharge because his recklessness had caused a truck accident, which he did not report, and because of his poor work record. RD&O at 22. At a joint area committee hearing, the discharge was reduced to an 122-day suspension without pay. T. 624-25, 629-31, 633; RX 7-15G. RD&O at 22.

There were many reasons Roadway issued warning letters to Scott, including speeding, driving an unsafe truck and misinforming the supervisor about the safety defect, being unavailable for work, violating the company's 48-hour rule, and reporting late for work.[1/] RD&O at 14-16. Other infractions included Scott's failure to follow instructions and failure to make the agreed-upon running time.[2/] *Id*.

Of particular concern in this case are two warning letters that Scott received for being unavailable for work by going on "sick call." The first letter, issued on April 1, 1997, concerned Scott placing himself on sick call from March 28 through 31 of that year. CX 2-5A; RD&O at 16. The second letter, issued on October 10, 1997, faulted Scott for being on sick call from October 5 though 9. CX 7-12A; RD&O at 17. Under Roadway's policy, an employee who was sick more than

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[1/] Under the 48-hour rule, a trucker is entitled to 48 hours off after completing six uninterrupted "tours of duty." T. 308; RD&O at 9 n.10. A driver violates the rule when he claims the 48 hours off without having completed the six uninterrupted tours. Concerning lateness, employees had two hours to report to work after receiving a telephone call; those who arrived more than two hours after the phone call were considered late. T. 665-667; RD&O at 17.

[2/] The union and management had collectively bargained the running times between points. RD&O at 9 n.8. The agreed times were considered to be averages and included breaks from driving. T. 198.

five days in one year could use a personal day or vacation day, or could take leave without pay under the Family and Medical Leave Act. T. 282; RD&O at 26. But if the employee called in sick more than five days in one year, each additional instance of taking sick leave was considered being unavailable for work and led to a warning letter. T. 281-82; RD&O at 26.

Scott protested the warning letters he received for taking the additional sick leave, informing Roadway that disciplining him for being unavailable for work when he was too ill to drive was a violation of the STAA.[3/] CX 2-5E, CX 7-12E; RD&O at 9-10, ¶¶5, 15. He attached to his protests physicians' notes indicating that he was incapacitated due to illness on the days in question. CX 2-5F, CX 7-12C.

In September 1997, Scott complained to the Occupational Safety and Health Administration (OSHA), contending that Roadway had disciplined him in April of that year for being unavailable to work when he was too ill to drive. CX 9-11; RD&O at 9.[4/] He also alleged that after April 1997, he had been disciplined for various "bogus" infractions of other work rules. That complaint initiated this proceeding.

Scott received three additional warning letters dated October 23, 1997: two for not making the agreed running time, CX 34-14A and RX 1-169-10, and one for not following instructions, which caused 15 service failures, CX 35-13A. RD&O at 15. One of the letters about not making the running time later was rescinded. RD&O at 15 n.17.

Between October 23 and 25, Scott's supervisors decided to discharge him because of his overall work record. T. 56, 855; RD&O at 23. On October 27, 1997, the company held a local hearing concerning Scott's work record.[5/] T. 657; RX 169-1; RD&O at 23. A union representative read aloud Scott's protests and rebuttals to the various disciplinary letters he had received. T. 101, 218, 462; RD&O at 23. Scott also made a statement in his own behalf, and mentioned that the

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[3/] Scott contended that driving on the days in question would have violated the Department of Transportation's "illness/fatigue rule":

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the motor vehicle.

29 C.F.R. §392.3 (1997).

[4/] Scott's statement to OSHA is dated in January 1998. An OSHA investigator interviewed Scott in September 1997, but did not transcribe Scott's statement for his signature until several months later. RX 4-171, pp. 360-62.

[5/] According to a union representative who attended the local hearing, Roadway did not consider the three October 23 warning letters at the hearing. T. 205, 207; RD&O at 23.

company had violated safety regulations. T. 466; RD&O at 23. The day after the local hearing on his discharge, OSHA sent a letter to Roadway informing the company about Scott's complaint. CX 10-16; RD&O at 10.

Scott grieved the discharge, CX 6-18, and pursuant to the collective bargaining agreement, he continued to work for Roadway pending a further hearing on his discharge. He continued to receive warning letters about work infractions, including failure to answer a work call, dishonesty and failure to complete a work shift, failure to follow the 48-hour rule, failure to follow instructions, and once again for being unavailable for work by going on sick call. RD&O at 25-16, ¶¶20 - 24.

The joint state committee held a hearing in November 1997 on Scott's grievance concerning his October 1997 discharge, RX 2-170, and upheld the discharge on January 14, 1998. CX 6-19. Consequently, Scott ceased working for Roadway in January 1998.

THE ALJ'S DECISION

At the hearing, Roadway moved for a directed verdict in its favor. The ALJ granted the motion as to Scott's contention that he was disciplined and discharged for making safety complaints, but denied it as to the contention that he was disciplined and discharged for refusing to drive when he was so ill that it would have violated the illness/fatigue rule. Consequently, both parties introduced evidence, including the testimony of witnesses.

The ALJ did not defer to the outcome of the joint state committee hearing that was held under the collective bargaining agreement because that proceeding did not address Scott's STAA claims and did not afford all of the procedural protections that are afforded in hearings before ALJs. RD&O at 29-30, 33. Therefore, the ALJ decided the merits of Scott's claims.

The ALJ affirmed his earlier finding that Scott did not establish a *prima facie* case under the STAA complaint section, 49 U.S.C.A. §31105(a)(1)(A). RD&O at 11. In the alternative, on consideration of the entire record, the ALJ found that Scott did not establish by a preponderance of the evidence that he was disciplined and discharged for making complaints protected under that section. *Id.*

Turning to the claims under the refusal to drive section, 49 U.S.C.A. §31105(a)(1)(B), the ALJ found that if Scott had driven on occasions in March, October, and November 1997, when he was ill, it would have been an actual violation of the illness/fatigue rule. RD&O at 13. The ALJ further found that Roadway's issuing disciplinary warning letters when Scott took sick leave on these three occasions was a violation of the refusal to drive clause. *Id.* at 19, 22, 29. The ALJ rejected Roadway's defense that it was merely applying its usual disciplinary policy when it issued the letters. The ALJ found that application of the policy caused a violation in this case because Scott had been forced either to drive when ill or be disciplined. RD&O at 28.

On the claim that Scott's discharge violated the refusal to drive clause, the ALJ examined the reason Roadway articulated for the discharge: his overall work record, including numerous disciplinary warning letters for various infractions, including taking sick leave after using the allotted

five days. The ALJ found that many other drivers, in addition to Scott, received disciplinary warning letters for infractions of work rules, such as delaying the freight, reporting for work late, and the like. RD&O at 19-21. Also, Roadway discharged another driver with a work record that was similar to but not as poor as Scott's. *Id*. at 22.

Turning to Scott's infractions, the ALJ found that Scott did not establish that Roadway falsified records to justify the warning letters it issued to him, as Scott had claimed. RD&O at 25. Consequently, the ALJ concluded that Roadway had many legitimate, non-pretextual reasons for disciplining Scott. *Id.*

In light of there being both legitimate and discriminatory reasons for discharging Scott, the ALJ analyzed the evidence under the "dual motive analysis." RD&O at 25. On the basis of the entire record, the ALJ found that even if Scott had not made protected safety complaints or engaged in protected refusals to drive when ill, Roadway established that it still would have fired him for "his abysmal work record." RD&O at 25.

As remedies for the STAA violation, the ALJ ordered Roadway: to expunge from its files the three warning letters issued for being unavailable for work by going on sick call and any notice of suspension pertaining to the same incidents; to compensate Scott for the costs and expenses he incurred in bringing the complaint (attorney fees and costs); to post copies of an attached Notice of Findings in conspicuous places in its Akron facility; and to maintain certain personnel records of drivers that had been submitted under discovery in a manner consistent with the ALJ's earlier issued protective order. RD&O at 33-34. The ALJ afforded Scott the opportunity to submit a detailed petition for attorney fees and costs, and afforded Roadway the opportunity to respond to the petition.

After the parties submitted the attorney fee petition and response, the ALJ issued the Order Granting Attorney Fees, in which he found that although Scott had prevailed on only one of his claims (warning letters) and not on the other (discharge), he was entitled to an award of fees for all the hours reasonably spent by his attorney in bringing both claims. The ALJ applied the rationale in *Hilton v. Glas-Tec Corp*., Case No. 84-STA-6, Sec. Final Dec. and Order Awarding Att. Fees, July 15, 1986, and found that the claim on which Scott won and the claim on which he lost were so "intertwined" that there should not be any reduction for the time spent on the claim on which Scott did not prevail. Att. Fee Order at 2.

DISCUSSION

I. Controlling Authorities

A. Standard for Determining Claims Arising Under Section 405

The STAA employee protection provision prohibits disciplining or discriminating against an employee because he has made protected safety complaints or refused to drive in certain circumstances:

(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(a).

Subsections (A) and (B) of the quoted provision are referred to as the "complaint" clause and the "refusal to drive" clause, respectively. *LaRosa v. Barcelo Plant Growers, Inc*., Case No. 96-STA-10, Rem. Ord., Aug. 6, 1996, slip op. at 1-3. Subsection (B) provides two categories of circumstances in which an employee's refusal to drive will be protected under the STAA, which are referred to as the "actual violation" and "reasonable apprehension" categories. *Ass't Sec. and Freeze v. Consolidated Freightways*, ARB Case No. 99-030, ALJ Case No. 98-STA-26, Final Dec. and Ord., Apr. 22, 1999, slip op. at 5.

The elements of a violation of the employee protection provision are "that the employee engaged in protected activity, that the employee was subjected to adverse employment action, and that there was a causal connection between the protected activity and the adverse action." *Clean Harbors Environmental Svcs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998). *See also Moon v. Transport Drivers, Inc.* 836 F.2d 226, 229 (6th Cir. 1987) (same). Under the STAA, the ultimate burden of proof usually remains on the complainant throughout the proceeding. *Byrd v. Consolidated Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, Final Dec. and Ord., May 5, 1998, slip op. at 4 n.2. The respondent's burden is one of production only, to articulate a legitimate, non-discriminatory reason for the adverse action. To prevail, the complainant must establish, by a preponderance of the evidence, that the proffered reason is a pretext for discrimination, *Clean Harbors,* 146 F.3d at 21, and that he or she was disciplined or discharged because of engaging in protected activities. *Byrd*, slip op. at 4.

There is one exception to the burden of proof remaining on the complainant. Under the "dual motive" analysis, where the trier of fact finds that there are legitimate reasons for the employer's adverse action in addition to unlawful reasons, the burden of proof shifts to the respondent to show, by a preponderance of the evidence, that it would have taken the same adverse action even if the complainant had not engaged in any protected activity. *Clean Harbors,* 146 F.3d at 21-22; *Carroll v. United States Dep't of Labor,* 78 F.3d 352, 357 (8th Cir. 1996) (under employee protection provision of Energy Reorganization Act ("ERA")); *Faust v. Chemical Leaman Tank Lines, Inc.*, Case No. 93-STA-15, Sec. Dec. and Rem. Ord., Apr. 2, 1996, slip op. at 9.

B. Standard of Review of ALJ Factual Findings and Legal Conclusions

Pursuant to the regulation implementing the STAA at 29 C.F.R. §1978.109(c)(3) (1998), if the factual findings rendered by the ALJ are supported by substantial evidence on the record considered as a whole, the Administrative Review Board is bound by those findings. *BSP Trans, Inc. v. United States Dep't of Labor,* 160 F.3d 38, 46 (1st Cir. 1998); *Roadway, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) ("*Dole").*

Pursuant to the Administrative Procedure Act, in reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision. . . ." 5 U.S.C. §557(b), *quoted in Goldstein v. Ebasco Constructors*, *Inc.*, Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992 (under ERA); *see* 29 C.F.R. §1978.109(b) (1998). Accordingly, the Board reviews the ALJ's conclusions of law *de novo. See Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) and *Dole*, 929 F.2d at 1066. *See generally Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-30 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body).

II. Analysis of Issues Presented

A. Deferral to Outcome of Other Proceeding

The ALJ recommended that the Administrative Review Board not defer to the outcome of the joint state committee proceeding held pursuant to the union contract. RD&O at 31. Under a regulation implementing the STAA, 29 C.F.R. §1978.112(c), this Board may, on a case by case basis, decide to defer to the outcome of other proceedings initiated by a complainant.[6/] That regulation provides in relevant part:

> Before the Assistant Secretary or the Secretary defers to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and

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[6/] The regulation refers to the "Secretary," who has delegated authority to issue final decisions in STAA cases to the Administrative Review Board.

that the outcome of the proceedings was not repugnant to the purpose and policy of the Act.

29 C.F.R. §112(c).[7/]

Under judicial and administrative precedent, this Board defers to the outcome of another proceeding only if that tribunal has given full consideration to the parties' claims and rights under the STAA. *Roadway Express, Inc. v. Brock,* 830 F.2d 179, 182 (11th Cir. 1987); *Brame v. Consolidated Freightways,* Case No. 90-STA-20, Sec. Fin. Dec. and Ord., June 17, 1992, slip op. at 4 n.3. The joint state committee hearing did not address Scott's STAA claims. RD&O at 31. Therefore, it was correct not to defer to the outcome of that hearing. In addition, the joint state committee hearing did not afford all of the procedural protections we require for deferral. *Id.* Accordingly, the ALJ was correct to decide the merits of Scott's STAA claims.

B. Complaint Clause

Protected activities under the STAA's complaint clause include safety complaints made to government entities such as OSHA, as well as safety "complaints that are purely internal to the employer." *Clean Harbors*, 146 F.3d at 19-14; *Ake v. Ulrich Chemical Co., Inc.,* Case No. 93-STA-41, Sec. Final Dec. and Ord., Mar. 21, 1994, slip op. at 5. We reject Roadway's contention that the only protected complaint at issue in this case was Scott's complaint to OSHA. Roadway's Statement in Support of and Opposition to the ALJ's Recommended Decision and Order (Opening Statement) at 4. We agree with the ALJ that Scott's written protests to Roadway managers were protected internal complaints. RD&O at 11.

Scott's OSHA complaint could not have motivated either the decision to issue warning letters about taking sick leave or the decision to discharge Scott, because the company received notice of the filing of Scott's complaint after it had taken those actions. T. 657, 855 and CX 10-16.

Turning to the internal complaints, we note that Scott initially wrote to Roadway in April 1997 to protest its sick leave policy as a STAA violation. CX 2-5C, D, and E. Yet the company did not seek to discharge him until some six months later, in October. Scott submitted a second internal complaint about the sick leave policy to Roadway on October 19, 1997, which was only eight days prior to the company's notice that it was discharging him. CX 7-12E; RD&O at 23. In between these two occasions, Scott received several warning letters about other infractions. RD&O at 14-16, ¶¶11 - 15.

While the closeness in time between the second internal complaint and the discharge gives rise to an inference that the internal complaint motivated the discharge, we find that the preponderance of the evidence indicates otherwise in this case. Roadway consistently stated that it was discharging Scott for his overall work record. Olszewski testified that Scott had the worst

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[7/] The quoted regulation codifies the doctrine of issue preclusion. *Ass't Sec. and Brown v. Besco Steel Supply,* Case No. 93-STA-00030, ALJ Rec. Dec. and Ord., Aug. 26, 1994, *aff'd,* Sec. Dec. and Ord., Jan. 24, 1995.

disciplinary record of all the Roadway drivers he knew. T. 749-50; RD&O at 23. Olszewski emphasized that it was not just the large number of disciplinary infractions that caused Roadway to discharge Scott, it was also the fact that Scott never attempted to conform his behavior to the work rules:

> Q: Why did you discharge Mr. Scott?
>
> A: For his overall work record specifically and the fact that he continued to repetitively violate the same infractions over and over again from one discharge to the next discharge. . . . At no point did he show the willingness or ability to improve his performance.

T. 750.

Although Scott maintained that the warning letters he received in 1997 were unjustified, he did not produce credible evidence to support that contention. For example, Roadway issued a warning letter to Scott on March 24, 1997, for failing to complete his work shift that day. RX 18. Scott and Roadway agree that upon Scott's return to the Akron facility that day, the dispatcher asked Scott if he was "done," and Scott said, "yes." RX 18, 19. Scott maintained that no one asked him if he had any available driving hours remaining. RX 19. But Teamsters Union representative Jake Adams, who had experience as a driver, testified that the proper answer to the question whether Scott was "done" would have been to state that he had 2.25 hours of driving left under the applicable hours of service rule. T. 224-25. Therefore, Scott's contention that he did not deserve a warning letter for failing to complete his shift was unconvincing, as the ALJ found. RD&O at 16.

Another example of the legitimacy of most of Roadway's disciplinary letters is the April 21, 1997, warning letter for failing to make the agreed running time on a trip from Indianapolis to Akron a few days earlier. RX 23. The warning letter states that Scott was 49 minutes late. *Id.*[8/] Scott's driving log indicated that he was delayed in traffic on the highway around Columbus, Ohio at 3 PM. T. 675. Olszewski doubted that the indication of heavy traffic was accurate since 3 PM was too early for rush hour. T. 677. Moreover, Scott's log showed that it took him 5 ½ hours to go from Columbus to Akron, whereas the usual time is 2 ½ hours. *Id.* In addition, the log showed that Scott took a one half hour break just ten minutes' drive from Akron. T. 678. For all these reasons, Roadway justifiably disciplined Scott for not making the agreed running time, which included time for meals and breaks.

It is undisputed that Roadway had tried to discharge Scott on four occasions prior to the "final" discharge that is at issue. The ALJ found that "Scott had numerous, legitimate disciplinary actions taken against him prior to his termination," and we agree. RD&O at 24.

Two of the warning letters considered when discharging him were not legitimate, however. Roadway issued warning letters to Scott for being unavailable for work on two occasions in March and October 1997 because he placed himself on the "sick board" when he had no sick days

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[8/] The letter indicates that Scott was late by .81 hour, which corresponds to 49 minutes.

remaining. RD&O at 26. We agree with the ALJ's analysis that issuing the two warning letters to Scott violated the STAA:

> Application of Roadway's absenteeism policy to Scott under the circumstances of this case presented Scott with an untenable choice. He could drive in violation of federal regulations prohibiting the operation of a commercial motor vehicle "while the driver's ability or alertness is so impaired . . . through . . . illness . . . as to make it unsafe for him/her to drive." 49 C.F.R. §392.3 (1997). Alternatively, he could refuse to drive and be given a letter of warning. This is precisely the kind of situation that STAA's anti-retaliation provision is designed to protect against. 128 Cong. Rec. 29192 (1988).
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> To permit an employer to rely on a facially-neutral policy to discipline an employee for engaging in statutorily-protected activity would permit the employer to accomplish what the law prohibits.

RD&O at 27-28. *See also Asst. Sec. and Ciotti v. Sysco Foods of Philadelphia*, ARB Case No. 98-103, ALJ Case No. 97-STA-00030, Final Dec. and Ord., July 8, 1998, slip op. at 8 (same), *aff'd sub nom. Sysco Food Svcs. of Philadelphia, Inc.* v. Ass't Sec. of Labor, No. 98-6265 (3d Cir. May 7, 1999) and *Asst. Sec. and Curless v. Thomas Sysco Food Svc.*, ALJ Case No. 91-STA-12, Sec. Final Dec. and Ord., Sept. 3, 1991, slip op. at 11 (issuance of "incident/verbal warning" for refusing to drive because of illness violated the STAA).

Since two of the warning letters for being unavailable for work were not legitimate, we do not consider them when determining whether Roadway legitimately dismissed Scott for his work record. However, even after excluding those letters, we find that the evidence established that Roadway had ample reason to dismiss Scott for his poor work record. Accordingly, we accept the ALJ's finding that Scott did not establish that Roadway fired him for making protected safety complaints. RD&O at 11.

C. Refusal to Drive Clause

Scott presented two claims under the STAA's refusal to drive clause, one that certain letters violated that clause, and the other that his discharge violated it. We discuss the claims in turn.

(1) Disciplinary Letters

As we explained above in the preceding section, it was not legitimate for Roadway to issue disciplinary warning letters to Scott for being unavailable for work when he was too ill to drive. Scott's work duties consisted of driving a truck. When Scott informed his superior that he was not reporting to work because he was ill, he was refusing to drive. The issue for decision is whether that refusal to drive violated the STAA.

Medical records support the ALJ's finding that if Scott had driven when ill on March 29 through 31 and again on October 5 through 8, 1997, an actual violation of the illness/fatigue rule

would have occurred because Scott's "ability or alertness was so likely to become impaired through illness . . . as to make it unsafe for him to begin to operate the motor vehicle." RD&O at 13. On the first occasion in March, the treating physician diagnosed "probable gastroenteritis," with its unpleasant and disabling symptoms: right lower quadrant pain, diarrhea, and chills. CX 1-23.

On the second occasion of illness, in October, the treating physician diagnosed degenerative joint disease of the left hip and asthma that was exacerbated by exposure to fumes. CX 3-24B. The doctor advised Scott to continue to use a drug, Naprosyn, for the hip pain and to take Motrin as well. The doctor noted that Scott should be careful when combining the two drugs. The physician stated that because of the pain, Scott should be off work for two more days after the visit, which occurred on October 6. *Id.*

Two days later, Scott returned to the doctor because his left hip pain continued, he was finding it difficult to operate the clutch in his car, and it would have been even more difficult to operate the heavy clutch in a truck. CX 3-24D. The physician prescribed an additional pain medication "to be used very sparingly, not to be used when he is driving." *Id.* The doctor ordered that Scott remain off work that day (October 8) and the next. *Id.*

Roadway did not introduce any evidence contradicting the physicians' reports indicating that Scott should not work due to illness or pain. Consequently, we accept the ALJ's finding that if Scott had driven on those occasions, it would have violated the illness/fatigue rule. RD&O at 13. Therefore, disciplining Scott for being unavailable for work on those occasions violated the refusal to drive clause.

We agree with the ALJ that the "STAA does not preclude an employer from establishing reasonable methods or mechanisms for assuring that a claimed illness is legitimate and serious enough to warrant a protected refusal to drive." RD&O at 29 n.23; *see also Ciotti,* slip op. at 8 (same). Scott's refusals to drive in March and October 1997 likely would have been found valid under such a review mechanism, since he produced physician statements excusing him from work due to pain and illness.[9/]

[9/] Scott placed himself on sick call one additional time, on November 27, 28, and 29, 1997 and received another disciplinary warning letter for unexcused absence. RD&O at 18. Scott did not provide any physician's excuse for this absence, which coincided with the Thanksgiving holiday. RD&O at 19 n.18. At his deposition, Scott claimed that he could not recall if he saw a physician for this claimed illness. RX 4-171 at 326. Noting that Scott's claim of illness in November 1997 was a "dubious assertion," the ALJ nevertheless found that Roadway's issuance of a warning letter for this absence was a STAA violation because Roadway did not challenge the legitimacy of Scott's claim. RD&O at 19 and n.19.

We agree that the stated reason for the absence is dubious because Scott did not provide any physician's note concerning it. Likewise, we agree with the ALJ that issuing the disciplinary letter violated the STAA because Roadway did not take any steps to ascertain whether Scott's claim of illness was *bona fide*.

The ALJ found that Roadway violated only the "actual violation" category of the refusal to drive clause. The ALJ stated that the "reasonable apprehension" category was not applicable in this case. RD&O at 6, 12. We disagree with that legal finding, because, as we have found in previous cases, "[a] refusal to drive that is based on an employee's concern that his or her ability or alertness is materially impaired, conditions that are addressed by the 'fatigue rule,' may qualify for protection under either the 'reasonable apprehension' or the 'actual violation' provision of the STAA." *Freeze*, slip op. at 7, and cases there cited. In this case, however, we need not determine whether there also was a violation of the "reasonable apprehension" category because it would not alter the remedies to which Scott is entitled.

(2) Discharge

When Roadway discharged Scott, the company considered, among other disciplinary actions, two warning letters it issued to him for being unavailable for work by going on sick call. But the company also considered Scott's many other infractions that did not concern safety. Therefore, there were both unlawful (sick call) and legitimate (other infractions) motives for the discharge, as the ALJ found. RD&O at 25. The ALJ further found that Roadway met its burden under the dual motive analysis by establishing that, even if Scott had not engaged in any protected activity, Roadway still would have fired him for his poor work record. *Id*.

Scott contends that Olszewski admitted that if the warning letters concerning unexcused absence had not been considered, Roadway would not have fired Scott. Complainant's Brief at 3. This contention has no support in the record, however. As the ALJ found, RD&O at 23, Olszewski testified to the contrary:

> Q: Even absent the two warning letters for unexcused absences for unavailability due to being on the sick board, would you still discharge – take[ ] the position [of] discharge of Mr. Scott?
>
> A: I believe the position [of] discharge would have been maintained, yes.

T. 750; see also T. 839 (same).

Like the ALJ, we find Olszewski's testimony credible. Among Roadway drivers, Scott had the worst disciplinary record of which Olszewski was aware. T. 749-50. Although the collective bargaining agreement required the company to consider only the last nine months of an employee's work record, it was acceptable for the company to issue "recap" letters that summarized earlier discipline that an employee received. Roadway thereby considered an employee's work record for a period longer than nine months, and Scott's record was terrible.

Roadway discharged another employee who had received fewer disciplinary warnings than Scott. For example, in a 22-month period, Driver "9" received 13 warning letters: 5 for unexcused absences due to illness and 8 for other reasons, including a speeding citation, failure to meet running times, delaying freight, and insubordination. Roadway discharged Driver 9 for his overall work record. RD&O at 19.

In comparison, in the 20-month period preceding the joint state committee hearing on Scott's final discharge, Scott received 24 disciplinary letters, of which 3 were for unexcused absences due to illness. RD&O at 14-16. In light of Roadway's discharging Driver 9, whose record was not as bad as Scott's, we credit Olszewski's statement that it would have discharged Scott even without considering the warning letters related to illness.

Therefore, we agree with the ALJ that the evidence meets the respondent's burden under the dual motive analysis because Roadway established it would have fired Scott even if he had never engaged in the protected activity of refusing to drive because of illness. RD&O at 25.

D. Remedies

In the usual STAA case, upon finding a violation we order the respondent to take affirmative action to abate the violation, to reinstate the complainant, and to pay compensatory damages, including back pay. 49 U.S.C.A. §31105(b)(3)(A). We also may assess the costs, including attorney's fees, "reasonably incurred in bringing the complaint." 49 U.S.C. §31105(b)(3)(B).

(1) Reinstatement, Back Pay, and Compensatory Damages

Because we find that Scott's discharge did not violate the STAA, he is not entitled to reinstatement or to back pay. *See James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Final Dec. and Ord., Mar. 15, 1996, slip op. at 8 (complainant who established that his suspension (with pay) violated the employee protection provision of the Clean Water Act, but whose discharge was found lawful, was not entitled to reinstatement or back pay). We accept the ALJ's findings on this issue. RD&O at 32.

Turning to the issue of compensatory damages, we note that a successful STAA complainant may be awarded compensatory damages for mental pain and suffering, embarrassment, and related consequences of the violation. *E.g., Dutkiewicz v. Clean Harbors Environmental Svcs., Inc.,* ARB Case No. 97-090, ALJ Case No. 95-STA-34, Final Dec. and Ord., Aug. 8, 1997, slip op. at 8*, aff'd sub nom. Clean Harbors Environmental Svcs., supra.* Scott testified that he suffered credit damage, aggravation, stress, and embarrassment because of his discharge. T. 497-98; RD&O at 32. We have found that the discharge was lawful, however. We find further that Scott did not establish any pain, suffering, embarrassment, or other damages that flowed from the STAA violation -- the issuance of the warning letters for being on the sick board. Therefore, we agree with the ALJ that Scott has not shown entitlement to any compensatory damages. RD&O at 32.

(2)Abating the Violation

The ALJ fashioned relief in keeping with the statutory directive to abate the violation. He ordered Roadway to expunge from its personnel files and records system the warning letters of April 1, October 10, and December 3, 1997, and any notice of suspension pertaining to Scott's taking "sick call" in March, October, and November 1977. We also order this relief.

The ALJ further ordered Roadway to post in its Akron facility a copy of a notice of findings attached to the RD&O. In relevant part, the notice states:

> Roadway's Akron facility's policy of issuing letters of warning to drivers who have no personal vacation days, sick leave or annual leave days available and do not qualify for family medical leave and who take (a) sick day(s) because their ability or alertness to drive is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the motor vehicle violated the Surface Transportation Assistance Act in this matter.

RD&O, Appendix A.

Roadway argues that it should not be required to post the notice because the ALJ upheld the discharge. Opening Statement at 2. In the alternative, Roadway asks that the posting include the language: "The STAA does not preclude Roadway from establishing mechanisms for assuring that a claimed illness is legitimate or serious [enough] to warrant a protected refusal to drive." *Id.* at 2 n.1.

We agree with the requirement to post a notice informing the employees at the Akron facility that Roadway's policy of issuing warning letters to those who are legitimately ill is a STAA violation. The notice, shall be posted for not less than 60 consecutive days in conspicuous places, including all places where employee notices are customarily posted. The notice may serve to deter Roadway from any further violations. We will include the requested amendment in the notice because employers have the right to ascertain whether a claimed illness is legitimate or serious enough to warrant a refusal to drive. *Ciotti*, slip op. at 8. *See* Appendix A (revised notice).

(3)Attorney Fees and Costs

Scott's case consisted of two claims. The first claim was that issuing the disciplinary letters for unexcused absence due to illness was in itself a STAA violation. He filed this complaint in September 1997 concerning the disciplinary letters claim. Scott's second claim is that his discharge, which was based in part on the disciplinary letters relating to illness, violated the STAA.[10/] Scott has prevailed on the first claim but not on the second.

The ALJ applied the rationale in *Hilton v. Glas-Tec Corp*., Case No. 84-STA-6, Sec. Final Dec. and Order Awarding Att. Fees, July 15, 1986, and found that the issues (claims) on which Scott won and lost were so "intertwined" that there should not be any reduction in the attorney fees for time spent on the claim on which Scott did not prevail. Att. Fee Order at 2. In the *Glas-Tec* case, the Secretary found that "the issue of whether complainant was unlawfully terminated and whether his suspension was illegal are so intertwined that trying the case merely on the suspension issue would have required essentially the same amount of effort and expense." Slip op. at 2. The

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[10/] Each claim in turn consisted of two issues, whether the adverse action was retaliation for protected complaints, and whether the adverse action was retaliation for protected refusals to drive.

Secretary held that where claims are intertwined and "not truly fractionable," there should not be a reduction in the fee for time spent on issues on which the complainant did not prevail. *Id.*

Roadway contends that the ALJ's decision not to reduce the fee award is contrary to decisions of the Supreme Court and the United States Court of Appeals for the Sixth Circuit.[11/] We will examine these cases.

In *Farrar v. Hobby*, 506 U.S. 103 (1992), the trial court found that several state officials violated federal civil rights statutes when they conspired to close the private school the plaintiff-decedent operated. The trial court awarded a nominal $1 in damages. The plaintiff sought attorney fees as the prevailing party under 28 U.S.C. §1988 (civil rights attorney fee statute). The Supreme Court held that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief (citation omitted), the only reasonable fee is usually no fee at all." *Farrar,* 506 U.S. at 115.

Similarly, in *Cramblit v. Fiske*, 33 F.3d 633 (6th Cir. 1994), the Sixth Circuit held that a district court did not abuse its discretion in awarding no attorney fees to a prevailing plaintiff in a federal civil rights case who succeeded in establishing that her home was searched unlawfully. The plaintiff in *Cramblit* received a nominal award of $1 in compensatory and $1 in punitive damages but "failed to prove actual, compensable injury, an essential element of her claim for monetary relief." 33 F.3d at 635. Roadway contends that *Farrar* and *Cramblit* support a decision in this case not to award any attorney fee or costs to Scott because he did not receive any back pay or compensatory damages.

Relying on *D.L.S., Inc. v. City of Chattanooga*, 149 F.3d 1182 (Table), 1998 U.S. App. LEXIS 11647 (6th Cir. May 28, 1998), an unpublished decision, Roadway argues that at the least, we should reduce the fee award substantially to reflect that Scott's success on the disciplinary letters claim did not benefit him directly, since his discharge was upheld and he received no damages. Att. Fee Statement at 8-9.

Roadway's argument has merit. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), another case brought under federal civil rights statutes, the Supreme Court outlined the analysis to be used when the plaintiff has "succeeded on only some of his claims for relief:"

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?
>
> * * *
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. * * *
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable

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[11/] This case arose in Ohio, which lies within the Sixth Circuit.

> hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.

461 U.S. at 434-36. The Supreme Court held in *Hensley* that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." 461 U.S. at 440.

In this case, the disciplinary letters claim and the discharge claim were interrelated in that the discharge was based on Scott's entire disciplinary record, which included two occasions on which he was unlawfully disciplined for taking sick leave when too ill to drive. That interrelationship, however, does not mean that it was reasonable to expend all of the hours involved in pursuing the second claim. There was only a small overlap in the evidence necessary to prove the two claims. The remainder of the evidence going to Scott's claim that he was disciplined for "bogus" infractions did not concern the illness/fatigue rule. Accordingly, we find it reasonable to reduce the amount of fees awarded so that they are "reasonable in relation to the results obtained." *Hensley*, 461 U.S. at 440.

If the fee petition were sufficiently detailed to permit a determination whether the attorney's time was spent on matters other than the disciplinary letters issued for illness, we would simply disallow the hours devoted to those other matters. The petition does not allow us to do so here, however. Therefore, we must reduce the claimed hours by another method. *See Hensley,* 461 U.S. at 436-37 ("There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.").

In making his case in chief, Scott presented evidence related to the disciplinary letters for illness about two-thirds of the time and presented evidence concerning the other disciplinary letters about one-third of the time. Accordingly, we will reduce by one-third the hours reasonably expended in bringing this complaint to arrive at a reasonable attorney fee.

(a) Reasonable hourly fee

Scott's counsel sought an hourly fee of $225, claiming that the fee was reasonable because of his prior experience in several STAA cases. Affidavit of Phillip L. Harmon at ¶¶5, 6, attached to Scott's Petition for Costs and Attorney Fees (Petition). Counsel also supported the claimed fee with the affidavit of another practitioner of motor carrier law, James Duvall, who stated that $225 per hour is "fair, reasonable, and consistent with such practice in the geographical area in which [Harmon] practices, to wit, Ohio and throughout the United States." Duvall Aff. at ¶5, attached to Petition.

Significantly, however, Attorney Harmon did not state that $225 per hour was his usual hourly fee. This omission is not the only problem with the reasonableness of the requested hourly fee. Counsel had an agreement with Scott that if he withdrew from the case prior to its conclusion, he would charge Scott $150 per hour for the work he performed. *See* Invoice at p. 3, attached to Petition.

We note that in the pleadings before us, Scott's counsel has not objected to the reduction of the hourly fee to $150. Accordingly, we accept the ALJ's conclusion that $150 per hour is the reasonable rate for counsel's time.

(b) Hours Reasonably Expended on Both Claims

The ALJ also found that certain hours claimed by counsel were not expended reasonably in pursuit of this complaint. He reduced the claimed hours as follows:

(1) Matters unrelated to this case: 1.08 hours on March 24, 1997 and February 11, 1998 related to Willie Smith, who is not part of this case.

(2) Excessive hours: reduction of 1.5 hours in time spent drafting a letter.

(3) Matters that should not be Roadway's responsibility to pay: 10.47 hours for communications regarding the rescheduling of the second day of Scott's deposition, and for attendance at the second day, because Scott walked out of the deposition on its first day.

Before this Board, Scott's counsel did not object to the reduction of claimed hours from 100.9 to 86.85. Accordingly, we find that 86.85 hours reasonably were expended in pursuing both claims in this case.

(c) Resulting Fee and Costs

We decided above that in light of his partial success, Scott was entitled to an attorney fee equal to two-thirds of the hours reasonably expended by his counsel in presenting both claims in this case. Accordingly, we award $150 per hour for 57.3 hours of work (.66 X 86.85 hours). Multiplying 57.3 hours times $150 per hour yields $8,595.00 in attorney fees.

Scott's counsel claimed $687.04 in costs, which the ALJ awarded. Invoice at pp. 19-20; RD&O at 5. Roadway has not objected to any of the claimed costs paid by Scott's counsel.

Nor did Roadway object to costs claimed by Scott himself: $802, including a $750 retainer paid to his attorney, mailing costs, and travel and related expenses for attending his first day of deposition. *See* Affidavit of Clarence Scott attached to Petition. The ALJ did not discuss or award the costs claimed by Scott himself, as opposed to those claimed by his counsel.

We will award the costs reasonably expended both by Scott and by his counsel. As for Scott's expenditures, the $750 retainer already has been included in the attorney fee awarded to his counsel. We will award the remaining costs claimed by Scott, $52, because that amount reasonably was expended for mailing items and for attending the first day of his deposition. Accordingly, the costs we award come to $739.04 ($687.04 + $52.00). We rely upon counsel to reimburse Scott for the money he paid himself ($802).

We find that the total of attorney fees and costs to which Scott is entitled is $9,334.04 ($8595.00 in attorney fees plus $739.04 in costs).

DISPOSITION

Accordingly, Respondent Roadway Express, Inc. is **ORDERED** to:

1. Expunge from its personnel files and records system the warning letters of April 1, October 10, and December 3, 1997, and any reference to these letters, and any notice of suspension pertaining to Complainant's taking "sick call" in March, October, and November 1997;

2. Post copies of the Notice of Findings (Appendix A), attached to this Final Decision and Order, for 60 consecutive days in conspicuous places in and about its Akron facility so that drivers may read it; and

3. Pay to Complainant's counsel the amount of $9,334.04 in attorney fees and costs reasonably incurred in bringing this complaint.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
ADMINISTRATIVE REVIEW BOARD,
U.S. DEPARTMENT OF LABOR

In the Matter of
CLARENCE SCOTT, Complainant
v.
ROADWAY EXPRESS, INC., Respondent
ARB CASE NO. 99-013, ALJ CASE NO. 1998-STA-8

Notice of Findings regarding Roadway Express, Inc., Akron Facility's Sick Call "Absence/Attendance" Policy

The Surface Transportation Assistance Act, 49 U.S.C. §31105(a)(1), provides:

(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 . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor carrier vehicle safety regulation, standard, or order . . ., 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 [himself] or the public because of the vehicle's unsafe condition. [To qualify for protection under this provision a complainant must also have sought from the employer, and been unable to obtain, correction of the unsafe condition].

Federal motor carrier regulations found at 49 C.F.R. §392.3 provide:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, *illness,* or any other case, as to make it unsafe for him/her to begin or continue to operate the motor vehicle. (*Emphasis added*).

Roadway's Akron facility has issued letters of warning to drivers who take one or more sick day(s) because their ability or alertness to drive is so impaired, or so likely to become impaired through fatigue, illness, or any other cause, as to make it unsafe for the drivers to begin or continue to operate the motor vehicle, but who have no personal vacation days, sick leave, or annual leave days available and do not qualify for family medical leave. This policy violated the Surface Transportation Assistance Act in this matter.

The Surface Transportation Assistance Act does not preclude Roadway Express, Inc. from establishing mechanisms for assuring that a claimed illness is legitimate or serious enough to warrant a protected refusal to drive.

This notice is posted by order of the Administrative Review Board, U.S. Department of Labor. It shall be posted for a period of not less than 60 consecutive days in conspicuous places at the Roadway Express, Inc. Akron Facility, including all places where employee notices are customarily posted.