



In the Matter of:

DAVID L. MURRAY,

ARB CASE NO. 00-045

COMPLAINANT,

ALJ CASE NO. 99-STA-34

v.

DATE: December 29, 2000

AIR RIDE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

Appearances:

For the Complainant:

Stephen M. Nassau, Esq., *O'Toole, Rothwell, Nassau & Steinbach, Washington, D.C.*

For the Respondent:

Yvette Armas Rose, Esq., Michael P. Maddow., Esq., *Meyers & Alterman, Washington, D.C.*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA) and its implementing regulations. 49 U.S.C.A. §31105 (West 1997); 29 C.F.R. Part 1978 (1999). Section 31105 prohibits employer retaliation against employees who make complaints related to violations of commercial motor vehicle safety laws (§31105(a)(1)(A)), employees who refuse to drive when operation of the vehicle would violate federal commercial vehicle safety regulations, standards, or orders (§31105(a)(1)(B)(i)), and employees who refuse to drive because of a “reasonable apprehension of serious injury” (§31105(a)(1)(B)(ii)). David L. Murray filed a complaint against Respondent Air Ride, Inc. (Air Ride) alleging that he had been terminated from his position as a truck driver in retaliation for having engaged in activity protected by Section 31105. The Occupational Safety and Health Administration investigated and determined that Murray’s complaint lacked merit. Thereafter, Murray requested a hearing before a Department of Labor Administrative Law Judge (ALJ). Following a hearing on the merits, the ALJ ruled

^{1/} This appeal has been assigned to a panel of two Board members, as authorized by Secretary’s Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

in Murray's favor and ordered reinstatement and other relief. Recommended Decision and Order (RD&O). Murray then petitioned for attorney's fees and expenses, which the ALJ granted in a Recommended Supplemental Order Awarding Attorney's Fees (RSO). The parties timely filed briefs with this Board in favor of and in opposition to the ALJ's decisions.

We have jurisdiction over this case pursuant to 29 C.F.R. §1978.109(c)(2). We review the ALJ's findings of fact under the substantial evidence standard. *Id.* at §1978.109(c)(3). Our review of questions of law is *de novo*. 5 U.S.C. §557(b) (1996).

BACKGROUND

The ALJ's findings of fact are largely undisputed and are supported by substantial evidence in the record as a whole. David Murray, a truck driver with over 15 years of experience, was employed as a driver for Air Ride, which had a contract to transport packages for Airborne Express. The trucks used by Air Ride were leased from Rollins Leasing Corporation (Rollins), which was responsible for maintenance and repair of the tractors. Murray's assignment was to drive six days a week from Landover, Maryland, to Allentown, Pennsylvania, and back. Murray's assignment consisted of picking up Airborne cargo in Landover, Md, driving to Hunt Valley where additional Airborne cargo was loaded, and driving to Allentown. At Allentown, Murray's cargo was offloaded, and the trailer was loaded with other Airborne cargo, which Murray then drove back to Landover. The only modification in this schedule occurred on Saturday nights, when Murray was to stay overnight in Allentown before taking his load back to Landover the next day. Air Ride's delivery of Airborne Express cargo was extremely time-sensitive. At the time of the incident which led to Murray's termination he had driven the truck involved (Truck 401551) for over 50,000 miles, and therefore was especially familiar with the way the truck handled under a wide variety of situations.

In the early hours of Saturday, January 16, 1999, as Murray was driving from Allentown, Pennsylvania to Landover, Maryland, his truck erratically began to slow to well below the speed limit. This problem occurred on hills and on flat highway. Murray believed that the problem related to a malfunction of the governor^{2/} on his truck and was a repeat of a problem that he had experienced earlier in the week.^{3/} However, the truck's tendency to randomly

^{2/} The governor is a device in the fuel system which limits the tractor's maximum speed. The governor on Murray's tractor was set at 68 mph.

^{3/} On January 11-12 Murray had experienced similar problems while driving the truck from Landover to Allentown. When he reached Allentown, Murray reported the condition of the vehicle to the Air Ride supervisor on duty and to Rollins, which had its maintenance and repair personnel in Allentown. On his Rollins vehicle inspection report Murray wrote: "Governor on Truck is messing up. Truck[']s speed is not constant. Truck slows down at will, truck is a safety hazard." Murray also described the problem on his daily inspection report, which he submitted to Air Ride at the end of the week.

(continued...)

decelerate was more severe than it had been prior to the Rollins maintenance earlier in the week. When going uphill the truck would decelerate to 35-45 miles per hour, and then unexpectedly accelerate. The problem intensified as Murray approached Landover. Murray was concerned about the safety of driving with the truck in this condition and tried unsuccessfully to reach Air Ride on his cell phone. Concerned about delivering his cargo late, however, Murray did not pull off the highway to call Air Ride. In order to provide a margin of safety, Murray turned on his flashers whenever his truck slowed, and tried to warn other truck drivers via C.B. radio.

When Murray arrived in Landover at approximately 7:30 a.m. on January 16, he promptly notified his dispatcher of the problems he was having. Murray was concerned that because the trip back to Allentown involved many more inclines than the trip from Allentown to Landover, he would experience even more difficulty in making the return trip that coming evening.^{4/} Murray was also concerned about the weather conditions, which were conducive to the formation of invisible “black” ice on the highways. Murray was concerned that unexpected deceleration and acceleration might cause his vehicle to skid on the ice. Because he was not scheduled to make the trip to Allentown for approximately 12 hours, and he thought there was sufficient time to make a switch, he informed the dispatcher that he would not drive Truck 401551 to Allentown because its mechanical problems made it unsafe to drive and requested that Air Ride provide him with another truck to make the trip. In the alternative, Murray offered to drive Truck 401551 if Air Ride would assume responsibility should anything go wrong on the trip to Allentown. Air Ride’s dispatcher, after consulting with the company’s vice president, Glen Beecher, and Air Ride’s CEO -- both of whom were located in Ohio and believed that it was safe for Murray to drive the truck to Allentown -- refused to order a different truck for Murray, refused to accept liability for anything that might happen should Murray drive Truck 401551 to Allentown, and told him he should make the run to Allentown “or else.” Murray again refused, based upon his safety concerns, and the dispatcher told him to call in on Monday.

When Murray called in on Monday January 18, the dispatcher told him that he had been terminated. After attempting to talk with Beecher that day, Murray finally reached him on January 20. Beecher reiterated that Murray was fired and described the incident that occurred on January 16 as “the straw that broke the camel’s back.” Murray described the condition of

^{3/}(...continued)

Because Truck 401551 was due for its 90 day preventative maintenance on January 13, Rollins personnel decided to address Murray’s concerns at that time. Thus, from January 13-14 Truck 401551 underwent maintenance and repair. However, there is no indication that any work was performed on the truck’s governor. During the period that Truck 401551 was undergoing preventative maintenance and repair, Murray was assigned another truck to drive.

^{4/} Murray would have been scheduled to leave Landover at approximately 8:30 p.m. and arrive in Allentown at approximately 12:15 a.m. on Sunday, January 17.

the truck and his fear that the unsafe condition might have caused an accident. However, Beecher responded that Murray had been given a chance to keep his job by driving the truck back to Allentown, but that Murray had chosen not to do so. Neither Beecher, the dispatcher, nor the CEO had inspected the vehicle prior to terminating Murray.

DISCUSSION

I. Violation of Section 31105.

The STAA whistleblower provision states in relevant 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

* * * *

(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. §31105(a).

To prevail on a claim under Section 31105, the complainant must prove that he or she engaged in protected activity as defined in subsections 31105(a)(1)(A), 31105(a)(1)(B)(i), or 31105(a)(1)(B)(ii); that his or her employer was aware of the protected activity; that the employer discharged, disciplined or discriminated against him or her; and that there is a causal connection between the protected activity and the adverse employment action. *BSP Trans., Inc. v. United States Dep't Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987).

We have thoroughly reviewed the record in this case. We find that substantial evidence in the record supports the ALJ's comprehensive findings and carefully articulated conclusion that Murray was terminated because he engaged in activities protected by the STAA. With regard to the issue of protected activity, as the ALJ found, it is uncontroverted that Murray refused to drive his vehicle because he was afraid that, with the governor apparently malfunctioning, it would be hazardous to drive from Landover to Allentown on a night when there was a possibility of black ice, and the route had significant uphill stretches.^{5/} In fact, company vice president Beecher confirmed that Murray said that he would drive his scheduled route from Landover to Allentown if Air Ride would provide a different truck or agree to protect him from any potential liability arising out of driving the malfunctioning truck back to Allentown. Even more telling, Beecher testified that he and other Air Ride officials had believed Murray's description of the problems he was having with the truck on January 16. Beecher simply asserted that it was Air Ride's belief that the situation as described by Murray was not unsafe.

Thus, the only significant question to be resolved with regard to the issue of protected activity is whether, under the circumstances faced by Murray on January 16, he had a reasonable apprehension that if he were to drive from Landover to Allentown on the night of January 16-17 he ran the risk of serious injury to himself or the public because of the vehicle's unsafe condition, as required by Subsection (a)(1)(B)(ii). The STAA makes clear that this "reasonable apprehension" standard is objective in nature; thus "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." 29 U.S.C.A. §311105(a)(1)(B)(2). We conclude that substantial evidence in the record supports the ALJ's finding that a reasonable person in the circumstances Murray faced on January 16 would have concluded that the unsafe condition of Truck 401551 presented a real danger that an accident might occur on the night of January 16-17.

The ALJ relied upon the following factors in reaching his conclusion in this regard. First, Murray was a very experienced truck driver, who had driven Truck 401551 "six days per week for approximately ten months and was very familiar with its operation. . . ." RD&O at 11. Second, Murray's testimony "that the truck was slowing down and speeding up sporadically during the route from Allentown to Landover on January 16" was uncontroverted and was believed by Beecher. *Id.* at 11-12. Third, the ALJ credited Murray's uncontroverted testimony that on the trip from Allentown to Landover other trucks had to take evasive action as a result of his inability to control the speed of his truck, and that based on his experience the erratic

^{5/} Murray also argued that his refusal to drive was protected under subsection 31105(a)(1)(B)(i) because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health" The ALJ ruled that "Complainant has presented such strong evidence that Complainant engaged in protected activity under (B)(ii), the reasonable apprehension provision, that I find it unnecessary to discuss (B)(i), the actual violation provision. RD&O at 11. For the same reason, we find it unnecessary to decide whether Murray's actions were protected under subsection (B)(i).

behavior of the truck was likely to cause an accident. *Id.* Fourth, the ALJ found that the weather forecast for the night of January 16-17, of which Murray was aware, compounded his concerns. *Id.* at 12. “Consistent with Complainant’s testimony, the forecast was for snow and ice on the ground, freezing temperatures at night and a slight rise in temperatures during the day . . .” *Id.* Finally, the ALJ found that “although it may have been overkill to call an eminent expert witness to establish that a truck which accelerates and decelerates without warning is a safety hazard, Dr. Garber’s^{6/} testimony clearly established that point.” *Id.*

The ALJ found Air Ride’s attempts to counter Murray’s case to be unpersuasive, and we agree. First, although Air Ride attempted to prove that Truck 401551 was in good mechanical condition after January 16, the only evidence Air Ride produced in this regard was an e-mail from an Air Ride official recounting a conversation he had with the driver who took over Murray’s route. The judge gave this document no weight, because it was highly ambiguous; we agree and accord no probative weight to the e-mail.^{7/} Furthermore, Air Ride produced none of the inspection and repair records which are required to be kept for trucks such as 401551. Although by the time of hearing the time limit for mandatory retention of those documents had passed, the ALJ found – and we do as well – that it was incredible that Air Ride officials had taken the trouble to place the allegedly exculpatory e-mail regarding Truck 401551 in Murray’s personnel folder as a precaution in case they were sued, yet failed to keep any of the presumably exculpatory official records regarding the condition of Truck 401551. We agree with the ALJ that Air Ride’s “failure to produce any records of the vehicle after January 16 should be viewed with suspicion.” *Id.* at 12. Furthermore, as the ALJ noted, Murray was not required to prove that a safety defect in fact existed. Under the STAA, a “reasonable apprehension” is enough. Here Murray’s apprehension was supported by his experience on the trip to Landover, especially when evaluated in light of his experience with the truck earlier in the week, the weather forecast and, as the ALJ found, “common sense.”^{8/}

Air Ride also argues that Murray had requested leave for the weekend of January 16-17, had been refused by Air Ride management, and that Murray’s refusal to drive Truck 401551

^{6/} Dr. Garber, Chair of the Civil Engineering Department of the University of Virginia, is an expert on issues of speed, speed safety, and speed variance in relation to traffic and accidents. Called as a witness by Murray, Dr. Garber testified in detail about the dangers caused by a truck’s tendency to slow down unexpectedly.

^{7/} In the e-mail, an Air Ride official wrote that the driver of Truck 401551 had reported to him that “the tractor was doing fine down the road but he thought it would pull a little better, but there was no surging on the throttle.” RD&O at 12. Although Air Ride argued that this report confirmed that there was nothing wrong with the Truck, it is impossible to draw that conclusion in light of the statement that the driver “thought [the Truck] would pull a little better . . .”

^{8/} In this regard, it is worth noting that the fact that Air Ride officials did not think that the truck was unsafe is largely irrelevant in the circumstances of this case where none of them examined the truck, and where Beecher actually believed Murray’s version of events. The question is whether Murray’s apprehension was reasonable.

was an insubordinate attempt to gain the weekend off in Landover, where Murray lived. Brief of Respondent [on Liability] (Res. Br. I) at 10. However, Murray testified without rebuttal that he often requested weekends off, and that those requests were usually denied. Thus, on balance, the evidence does not compel an inference that on this weekend, in particular, Murray decided to subvert the decision to deny him leave. We are also mindful of the fact that the ALJ had the opportunity to evaluate Murray's demeanor.

In order to gain the protection of the "reasonable apprehension" provision of the STAA, a complainant must have sought "from the employer, and been unable to obtain, correction of the unsafe condition." 29 U.S.C.A. §31105(a)(2). As the ALJ found, there can be no doubt that Murray complied with the requirements of this provision. Thus, we conclude that substantial evidence in the record supports the ALJ's determination that Murray engaged in activity protected by the STAA when he refused to drive Truck 401551 to Allentown on January 16.

We also agree with the ALJ's determination that Air Ride terminated Murray in retaliation for his protected refusal to drive to Allentown. Beecher admitted that if Murray had driven the truck to Allentown on January 16 he would not have been fired. Thus, although Murray had been cited for a few minor infractions early in his tenure with Air Ride, those infractions would not have caused Air Ride to terminate Murray on January 16, 1999. Indeed, prior to his refusal to drive, Murray had not received any written disciplinary notice since June 1998. Additionally, Air Ride's Termination Record states that Murray was discharged because he "refused load." RD&O at 14. Thus, there is substantial evidence in the record to support the ALJ's finding that Air Ride discharged Murray because he refused to drive to Allentown on January 16 in a truck that he reasonably believed to be unsafe. Therefore, Murray was terminated in violation of 29 U.S.C.A. §31105.

II. Damages.

The ALJ ordered that Murray be reinstated with back pay, and awarded compensatory damages. Air Ride challenges the amount of the back pay awarded on the ground that the ALJ incorrectly estimated Murray's salary at \$1,000 per week. Air Ride argues that "pay records clearly show the average weekly salary was in fact \$902.33." Brief of Respondent at 15. We have reviewed Complainant's Exhibit PP upon which the ALJ and Air Ride both rely. We are satisfied that the ALJ's determination that Murray earned approximately \$1,000 per week while employed by Air Ride is consistent with this evidence. Had Air Ride chosen to make its case before the ALJ regarding the exact salary Murray earned, the ALJ would have had an opportunity to evaluate Air Ride's argument. Air Ride chose not to do so, and in fact made no argument whatsoever regarding the amount of back pay that was due. Under these circumstances, we find no reason to overturn the ALJ's determination.

Based upon his determination regarding the amount Murray would have earned had he not been terminated by Air Ride minus the amount Murray earned from other sources, the ALJ awarded Murray "\$36,650 for the period between January 16, 1999 and October 29, 1999" (the

date Murray filed his brief with the ALJ). RD&O at 16. Based upon the ALJ's findings that Murray was due \$1000 per week in back wages for that period minus the amount he earned in other wages, we have determined that the ALJ's calculation of \$36,650 is incorrect. The corrected amount of back pay due for that period is \$36,440.^{9/} The ALJ further awarded back wages in the amount of \$560 per week for the period between October 30, 1999, and the date Murray was reinstated to his former position. The \$560 amount took into account the fact that during this period Murray was earning \$440 per week in alternate employment. The record reflects that Murray was reinstated effective March 23, 2000. Therefore, Murray is entitled to \$11,200 for that period.^{10/} Thus, Murray is entitled to a net amount of \$47,640 in back pay.

The ALJ also awarded Murray \$20,000 in compensatory damages:

Complainant has requested \$500,000 for emotional pain and suffering and mental anguish. I do believe that Complainant has suffered emotional pain and stress as a result of his wrongful termination; however, \$500,000 is ridiculously high, and Complainant has failed to put forth a reasonable monetary estimate of such damages. Based on the totality of the record and decisions in similar cases, I award Complainant \$20,000 for emotional distress.

RD&O at 15. Air Ride challenges this award as arbitrary and capricious. Res. Br. I at 16. We find this modest award reasonable under the circumstances. Murray testified that as a result of his unlawful discharge he was required to file for bankruptcy, and as a result "I lost vehicles. I had to sell things. Just bad, that's all." Transcript at 87. In addition, a hernia which he developed while working for Air Ride went untreated and worsened. *Id.* at 88. Finally, Murray testified that he had gained weight from depression and stress, that he has had trouble sleeping, and that his self-esteem has been damaged. *Id.*

In light of the fact that Murray was terminated, was as a consequence required to declare bankruptcy and divest himself of his belongings, and was also unable to seek treatment for his hernia, we conclude that the ALJ's award of \$20,000 for the emotional distress Murray suffered as a consequence is supported by substantial evidence.

^{9/} From January 16, 1999 through August 27, 1999: 32 weeks x \$1000 = \$32,000- \$600 in other wages = \$31,400. From August 28, 1999 through October 29, 1999: \$9,000 (9 weeks x \$1,000 per week) - \$3,960 (9 weeks x \$440 per week (other wages)) = \$5,040.

^{10/} From October 30, 1999 through March 18, 2000: \$11,200 (20 weeks x \$560). From March 18, 2000 through March 22, 2000: \$320 (4 days x \$80 per day).

III. Interest.

The ALJ ordered pre-judgment interest on the back wages owed Murray. RD&O at 15. As the ALJ correctly noted, interest is to be calculated in accordance with 26 U.S.C. §6621. *Johnson v. Roadway Express, Inc.*, ARB Case No. 99-111, ALJ Case No. 1999-STA-5, Dec. and Ord. of Remand, Mar. 29, 2000, slip op at 17-18; *see* 29 C.F.R. §20.58(a)(1999). Moreover, interest owed is to be compounded quarterly. *Ass't Sec'y of Labor and Harry D. Cotes v. Double R Trucking, Inc.*, ARB Case No. 99-061, ALJ Case No. 98-STA-34, Supp. Dec. and Ord., Jan. 12, 2000, slip op. at 3. Murray is also entitled to post-judgment interest (calculated in the same manner as pre-judgment interest) for any period between the issuance of this final order and the payment of the back pay award.

IV. Attorney's Fees.

In his Recommended Supplemental Order Awarding Attorney's Fee (RSO), the ALJ applied the hourly rate requested by Murray's attorney, \$335.00 per hour for 1999, and \$340.00 per hour for the year 2000. The total in fees and expenses awarded to Murray's attorney was \$52,398.75. Air Ride objects both to the hourly rate determined by the ALJ to be reasonable and to the number of hours of service credited by the ALJ. We have evaluated the ALJ's detailed opinion on attorney's fees, find it to be complete and well reasoned, and with one noted exception adopt it. We also take this opportunity to clarify the Board's position regarding reasonable hourly rates.

To the extent that we have not already done so in other attorney's fees decisions, we explicitly adopt the view articulated by the Court of Appeals for the District of Columbia Circuit in *Save our Cumberland Mountains, Inc. v. Hodel (SOCM)*, 857 F.2d 1516, 1524 (D.C. Cir. 1988)(en banc) that "the prevailing market rate method . . . used in awarding fees to traditional for-profit firms and public interest services organizations" should "apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals." *See also Covington v. District of Columbia*, 57 F.3d 1101 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 916 (1996).

Counsel for Murray asserts without contradiction that the rates he normally charges clients asserting public interest rights reflect his commitment to "public spirited non-economic goals." Complainant's Petition for Attorneys' Fees and Costs (Pet.) at 9. We therefore conclude that the *SOCM* and *Covington* principles should apply to the determination of a reasonable hourly rate applicable to Murray's counsel in this case.

Air Ride argues that Counsel should be bound by the \$235 per hour he charged in 1999 and \$250 per hour he charged in 2000 for clients pressing public interest claims and "who can afford something in the neighborhood of commercial rates." Brief of Respondent in Opposition to Recommended Supplemental Order Awarding Attorney's Fee (Res. Br. II) at 2. However, under *SOCM* and *Covington*, which we have adopted as our standard, the fact that an

attorney often charges below-market rates for public interest clients does not preclude such an attorney from charging higher, market rates in other public interest litigation.

The ALJ had a more than adequate basis for the determination that \$335.00 and \$340.00 hourly rates are prevailing rates in Washington, D.C., the community in which this case was litigated. The *Laffey* Matrix, applied in cases before the U.S. District Court in the District of Columbia and relied upon by complainant's counsel, supports these figures. See *Laffey v. Northwest Airlines*, 572 F. Supp. 354, 371 (D. D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). Counsel also submitted affidavits from three attorneys in practices similar to his, all of whom stated that the *Laffey* Matrix is an accurate reflection of the usual rates charged by attorneys in Washington, D.C. in similar cases.

Moreover, we agree entirely with the ALJ that Murray's counsel's experience, reputation and expertise would enable him to command top dollar should he choose to do so. Complainant's Petition for Attorneys' Fees and Costs (Pet.), Exh. B at 4. As Counsel's submissions in this case establish, he is an attorney with superior skills, experience and judgment. Thus, we find the hourly rate awarded by the ALJ just and reasonable.

Air Ride also argues that Murray's counsel should not be compensated for hours he spent working on Murray's case before June 29, 1999, when "Complainant was indisputably prosecuting the complaint pro se." Res. Br. II at 8. However, it is clear from Murray's Petition for Attorney's Fees that he first retained counsel in order to attempt to negotiate a settlement with Air-Ride. Pet. at 1.^{11/} Counsel's listing of time (Pet. Ex. A) shows that he was preparing a letter to Air Ride as late as March 8-9, 1999. Therefore, it appears that at most 4.7 hours^{12/} were billed for a period when Counsel was not representing Murray. We will deduct an amount representing 4.7 hours from Counsel's award.

Citing *Hilton v. Glas-Tec Corp.* 84 STA-6, Sec'y Dec. and Ord., July 15, 1986, Air Ride argues that Counsel is not entitled to fees for time spent in preparing his fee petition. However, more recent decisions by the Secretary of Labor have taken the opposite, and we believe the correct, position. See *Spinner v. Yellow Freight System Inc.*, 90-STA-17, Sec'y Final Dec. and Ord., slip op. at 5 (awarding fees for preparation of fee application and response to opposition); *Clay v. Castle Coal and Oil Co. Inc.*, 90-STA-37, Sec'y Final Dec. and Ord., slip op. at 8 (noting that "prevailing parties routinely are awarded fees for attorney time spent in preparation of the fee application itself. . . ;" citing B. Schlei & P. Grossman, Employment

^{11/} Contrary to Air Ride's assertion (Res. Br. at 6), attorney's fees are recoverable for time spent on a case prior to the actual filing of the complaint. See, e.g. *Webb v. County Board of Education of Dyer County*, 471 U.S. 234, 243 (1984).

^{12/} These hours cover the period from March 26, 1999, through June 17, 1999. By June 28, 1999, it is evident that Counsel was once again representing Murray.

Discrimination Law (2d ed. 1983) at 1485 and n. 48), *rev. on other grounds*, 55 F.3d 41 (2d Cir. 1995).

Finally, we emphasize that Murray's counsel did an exceptional job representing his client at all levels of this proceeding, in keeping with his extensive experience. As the ALJ stated:

By way of introduction, it must be noted that complainant's counsel did an outstanding job representing the complainant in this matter. He is a highly competent attorney who demonstrated his expertise in the litigation of employment discrimination cases throughout the course of this proceeding.

RSO at 1. We note that Air Ride found it necessary to employ two attorneys to defend – unsuccessfully as it turns out -- against Murray's claim. We commend Murray's counsel, and wish that attorneys with his skill and dedication would appear before this Board with greater regularity.

ORDER

1. The reinstatement of David L. Murray, ordered by the ALJ on February 29, 2000, shall remain in effect.

2. Air Ride shall pay David L. Murray back wages of \$47,640. Respondent shall assign Complainant retroactive fringe benefits status to the extent that it would affect his current or future entitlement to benefits. Air Ride shall pay to David L. Murray prejudgment and postjudgment interest on the back wages, compounded quarterly and calculated pursuant to 26 U.S.C. §6621 and 29 C.F.R. §20.58(a)(1999).

3. Air Ride shall pay David L. Murray damages of \$20,000.

4. Air Ride shall pay David L. Murray's counsel, Stephen M. Nassau, an attorney's fee, including expenses, totaling \$50,800.75.

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Member