In the Matter of:

DANNY JOHNSON,

COMPLAINANT,

v.

ROADWAY EXPRESS, INC.,

RESPONDENTS.

ARB CASE NO. 01-013
(Formerly 99-111)

ALJ CASE NO. 99-STA-5

DATE: December 30, 2002

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., *Truckers Justice Center, Eagan, Minnesota*

For the Respondent:
Sally J. Scott, Esq., *Franczek Sullivan, P.C., Chicago, Illinois*

FINAL DECISION AND ORDER

This case, which 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), is before the Board for the second time. Complainant Danny Johnson (Johnson) alleged that his employer, Respondent Roadway Express, Inc. (Roadway), violated the STAA when it discharged him effective March 29, 1995, because he had been unavailable for dispatch on February 19, 1995. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order in which he concluded that Roadway had violated § 31105 and ordered that Johnson be reinstated, but denied an award of back pay.[1] The ALJ issued a subsequent order recommending that Roadway pay Johnson's attorney for costs incurred and services rendered. On review this Board affirmed the finding of liability and the order of reinstatement, but reversed portions of the ALJ's back pay determination, and remanded the case

[1] Citations to the record are as follows: Recommended Decision and Order (ALJ I);Decision and Order of Remand (ARB I); Recommended Decision and Order on Remand (ALJ II); Hearing Transcript, 1999 (TR. I ___); Hearing Transcript, 2000 (TR II ____); Joint Exhibit (JEX ___); Complainant's Exhibit (CEX ___); Respondent's Exhibit (REX ___).

for further proceedings regarding relief. The ALJ's subsequent Recommended Decision and Order on Remand, which recommended the award of back pay, damages, and attorney fees and costs, is now before us for review, along with the ALJ's two orders recommending attorney fees and costs.

We have jurisdiction pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c) (2002).

BACKGROUND

In this section we briefly discuss the procedural history and facts that relate to the issues of relief which are presently before us.

I. Johnson's Post-Termination Employment

Roadway terminated Johnson's employment in March 1995 and reinstated him in compliance with the ALJ's preliminary order in August 1999. Johnson testified at the first hearing regarding several positions for which he applied during that period:

- **April or May 1995.** Johnson applied for a truck driving position with Yellow Freight but heard nothing. He made no efforts to determine the status of his application.
- **May 1995**. Johnson was offered and refused a job as a truck driver with Burlington Truck Lines, because he did not want to drive all over the U.S.
- **Summer 1995.** Johnson applied for a position with CRST, but refused an offer of a position as a driver trainer.
- **Summer 1995.** Johnson declined a driving position with Heartland Express of Iowa because he did not want to move to the East Coast.
- **November 1995-September 1996.** Johnson was employed driving a concrete truck and setting up concrete forms for Arrowhead Construction. He resigned because the company was out of funds.
- **October 1996-March 1997.** Johnson worked as a driver for Celadon Trucking. He resigned to relocate in the South.
- **April 1997.** Johnson worked two weeks for EVI Services, Inc., as a truck driver. He resigned because of a work shortage.
- **June 1997.** Johnson worked three weeks for DOT Leasing as a truck driver. He resigned because of a work shortage.

- **July 1997-August 1997**. Johnson worked as a driver with Aaron's Limousine Service until the company went out of business.
- **September 12-October 24, 1997**. Johnson worked as a truck driver for Laura Stewart, quitting when he was not paid.
- **January 1998-March 7, 1998**. Johnson worked as a truck driver for Landstar Poole until he was discharged for cause.
- **April 1998.** Johnson worked as a truck driver for Trans-State Lines. He resigned because of stress and hours of work.
- **May-August 1998.** Johnson worked for CRST. He resigned because of a job dispute.
- **August-November 1998.** Johnson worked for DeKalb Transportation. He was laid off.
- **March-May 1999.** Johnson worked as a truck driver for Chieftain Contract Service. He resigned to work for Pro Truckers because Pro paid more.
- **May-July 1999.** Johnson worked for Pro Truckers as a driver at Saturn. He resigned to accept reinstatement by Roadway.

II. The First Recommended Decision and Order

The ALJ recommended that Roadway be held liable for retaliatorily discharging Johnson, ordered that Roadway reinstate Johnson immediately, and recommended that Johnson be awarded back pay. However, the ALJ concluded that Johnson's entitlement to back pay ended in May 1995 when he did not accept the truck driving position with Burlington Truck Lines. The ALJ found that the Burlington position was substantially equivalent to Johnson's former truck driving position with Roadway, and that his refusal of the Burlington job offer showed a willful disregard for his own financial interests. The ALJ therefore limited Johnson's back pay award to $11,930.40 for the period March 29, 1995, through May 31, 1995. The ALJ also ordered "Roadway to restore other benefits which Johnson was entitled to, including, but not limited to health and welfare contributions to which Johnson would have been entitled" for that period.[2]

III. The Board's Decision and Order Remanding the Case

On review the Board affirmed the ALJ's determination that Roadway had terminated Johnson's employment in violation of the STAA's refusal to drive provision. The Board also affirmed the ALJ's determination that Johnson was entitled to an award of back pay. However,

[2] In a September 3, 1999 Order Granting Attorney Fees, the ALJ recommended that Roadway pay Johnson's attorney $28,757.16 for fees and expenses.

the Board reversed the ALJ's recommendation that back-pay entitlement be cut off as of the date Johnson declined the Burlington Truck Lines position:

> Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer the allocation of the burden of proof is reversed, *i.e.*, it is the employer's burden to prove by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment . . . .
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> The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment . . . . We find that Roadway failed to prove either of these two elements.
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> First, Roadway failed to prove that other comparable jobs were available. In an effort to meet the first prong of its affirmative defense, Roadway argued below that there was a "well-documented shortage of drivers." . . . However, the bald assertion that there was a need for drivers is not the sort of specific proof that Roadway needed to provide to show that there were substantially equivalent positions available. . . . On this ground alone we could find that Roadway failed to prove failure to mitigate. However, we also find that Roadway did not prove that Johnson failed to exercise due diligence in mitigating his damages when he declined a position with Burlington Truck Lines.

ARB I at 14-15 (citations omitted). With regard to the Burlington Truck Lines position, the Board concluded that substantial evidence in the record as a whole did not support the ALJ's finding that the position was substantially equivalent to the position Johnson held at Roadway. The Board therefore concluded that it was "necessary to remand this case to the ALJ to determine if or when Johnson's back pay entitlement was tolled." ARB I at 17. The Board noted that the record did not reflect whether Johnson was reinstated in compliance with the ALJ's preliminary order of reinstatement. "Of course, reinstatement would toll the running of back pay entitlement." *Id.* The Board instructed that income earned from interim employment should be deducted from any back pay award.

The Board also ordered the ALJ to determine whether Johnson's discharge from Landstar Poole in 1998 affected back pay entitlement. In addition the Board ruled:

> On remand the ALJ should determine the amounts due Johnson in order to restore [Johnson's benefits]. In particular, the ALJ should determine: 1) whether and in what amount Roadway is responsible

> for payment of Johnson's medical expenses which would have been covered by the health and welfare fund; . . . 2) whether and in what amount Johnson is entitled to vacation pay for the period between his discharge and his reinstatement; . . . and 4) whether and to what extent Roadway must contribute the necessary pension funds on behalf of Johnson for the period from the date of his discharge until the date of his reinstatement.

ARB I at 17. The Board also ordered that pre- and post-judgment interest should be awarded.

Finally, the Board noted that neither party had an opportunity to brief the ALJ's recommended attorney fees award. The Board ruled that "[s]ince we are remanding this case for further action by the ALJ, Johnson's attorney may submit to the ALJ an augmented fee petition for work before the Board and upon remand." ARB I at 18.

IV. Proceedings before the ALJ on Remand

On remand the parties entered into a stipulation regarding several issues relating to back pay. In addition, Roadway sought to introduce evidence regarding the availability of comparable driver positions during the period between Johnson's refusal of the Burlington job and his reinstatement. Johnson objected, arguing that the Board's remand did not afford Roadway a second opportunity to establish the availability of such positions. However, the ALJ approved Roadway's request and held an evidentiary hearing at which witnesses from three different trucking companies testified regarding the availability of work for drivers during the period 1995 through 1999. The ALJ also heard testimony regarding Johnson's employment after his termination by Roadway.

V. The ALJ's Recommended Decision and Order on Remand

The ALJ reiterated the Board's holding that once it is established that an employee was terminated unlawfully, it is the employer's burden to prove that the employee did not exercise reasonable diligence in finding other suitable employment. The ALJ noted that the employer may meet that burden by proving there were other substantially equivalent jobs available and the complainant failed to make reasonable efforts to find and retain such a position. With regard to the first issue – the availability of substantially equivalent employment – the ALJ held that the Board's remand did not preclude him from considering on remand Roadway's evidence regarding the availability of truck driver positions at three unionized trucking companies during the relevant period. However, because Johnson would have had to start at the bottom of the seniority list and would have been paid less than his position at Roadway – where he had over fifteen years of seniority, the ALJ ruled that those positions would not have constituted substantially equivalent employment. ALJ II at 15.

In the alternative, the ALJ found that Roadway had failed to prove that Johnson did not make reasonable efforts to find employment. "From the stipulations of facts, between 1995 and 1998, Johnson worked at various jobs as a driver, laborer and truck driver for twelve different

employers. I find that Johnson made sufficient efforts to mitigate his damages and find other employment." ALJ II at 16.

The ALJ also found that Johnson's departure from several positions – Arrowhead Construction, Celadon Trucking, EVI Services, DOT Leasing, Aaron's Limousine, and Laura Stewart – did not adversely affect Johnson's back pay eligibility. However, the ALJ found that the conduct that led to Johnson's termination from Landstar Poole was sufficiently egregious that it tolled Roadway's back pay liability. Therefore the ALJ limited back pay liability to the period March 29, 1995, through March 7, 1998, the date Johnson was terminated from Landstar Poole. ALJ II at 19.

The ALJ used the "representative employee" method to calculate back pay, averaging the amount earned by the driver immediately above and immediately below Johnson on Roadway's seniority list as of his termination date. The ALJ rejected arguments by Roadway that the weekly rate derived from this method should be reduced because both prior to his termination and after his reinstatement Johnson routinely had earned less than the average of the representative employees. Holding that uncertainties regarding back pay amounts must be resolved against the employer, the ALJ also rejected Roadway's arguments that Johnson not be awarded back pay for vacation days in excess of three weeks and for sick days because historically Johnson used all of his vacation and sick days. The ALJ calculated total wages and pension benefits which would have accrued to Johnson and subtracted from that amount Johnson's interim earnings, and $11,930.40 in back pay which Roadway paid to Johnson following the ALJ's initial decision, awarding a total of $150,908.00 in back pay.

The ALJ also recommended that Roadway pay $17,371.96 to the Teamsters Local 710 Pension Fund for Johnson's account, and ordered that interest be paid on the back pay in accordance with 26 U.S.C.A. § 6621 (West 1989). In a Supplemental Order the ALJ recommended an award of $20,454.93 in attorneys fees and expenses.

STANDARD OF REVIEW

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

In reviewing the ALJ's 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.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law *de novo. Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

On review Johnson argues that the ALJ erred in allowing Roadway to submit new evidence with regard to the availability of substantially equivalent employment, and challenges the ALJ's determination that back pay entitlement should be tolled as of the date of Johnson's termination by Landstar Poole. In all other respects Johnson urges that we adopt the ALJ's recommended decision. On the other hand, Roadway argues that the ALJ erred in finding that employment with the three unionized trucking companies was not substantially equivalent to Johnson's employment with Roadway, in rejecting Roadway's back pay calculations, and in finding Johnson entitled to vacation and sick day pay. We discuss these issues in turn.

I. The Introduction of Additional Evidence regarding the Availability of Substantially Equivalent Positions

As noted above, in ARB I the Board determined that Roadway had not proved that Johnson failed to mitigate damages both because Roadway did not introduce evidence that comparable jobs were available and because Roadway did not prove that the Burlington job which Johnson declined was a comparable job.[3] The Board remanded the case to the ALJ to determine: 1) "if or when Johnson's back pay entitlement was tolled" (noting that the ALJ had ordered Johnson's reinstatement and the date of reinstatement might establish the outer limit of back pay entitlement) and 2) whether Johnson's discharge by Landstar Poole affected his back pay entitlement. ARB I at 17.

On remand, Roadway argued to the ALJ that the scope of the Board's remand order permitted the introduction of evidence regarding the availability of comparable truck driver jobs – *i.e.,* the first prong of the mitigation test. Johnson opposed the introduction of such evidence, arguing that the Board already had decided the availability issue, and that the law of the case doctrine precluded its relitigation.

The ALJ allowed the evidence regarding availability to be admitted. He first acknowledged that the Board had already held that Roadway had failed to prove that comparable jobs were available. ALJ II at 2. Quoting from MOORE'S FEDERAL PRACTICE, he also ruled that "[a] decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation . . . ." ALJ II at 3. The ALJ recognized that one of the functions of the mandate doctrine (which is really a subset of the law of the case doctrine) is to assure "the obedience of inferior courts to the decisions of superior courts." *Id*. (citation omitted). Nevertheless, the ALJ permitted the testimony of officials of three trucking firms regarding the availability of such positions during the 1995-1999 period. The ALJ explained this ruling in his recommended decision:

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[3] This is not a case in which the employer proved that the former employee made no effort to secure suitable employment and therefore the employer was relieved of the burden of providing availability of substantially equivalent jobs. *See, e.g., Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 54 (2d Cir. 1998); *Quint v. Staley,* 172 F.3d 1, 15 (1st Cir. 1999)

> [T]he Board explicitly invited the taking of new evidence. It wrote that it was unaware whether Roadway had reinstated Johnson as I had directed and observed that such reinstatement would toll his entitlement to back pay. Moreover the record contains no post-hearing evidence. Thus, new evidence is necessarily required to fill this void between May of 1995 when Johnson declined the job offer from Burlington and the date of the complainant's reinstatement, August 2, 1999.
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> * * * *
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> In conclusion, I determine that it is appropriate, under the Board's ruling, for me to receive and consider both evidence of record and new evidence concerning when and if the complainant's entitlement to back pay ceased.

ALJ II at 4.

However, the ALJ found that the positions about which the witnesses testified were not substantially equivalent to Johnson's previous position at Roadway because Johnson would "start at the bottom of the seniority list with employment at [the three firms], would be paid at a lesser rate than more senior employees, and was not able to select his preferred bid . . . ." ALJ II at 15 .

On appeal, Johnson argues that the ALJ erred in allowing Roadway to relitigate the substantially equivalent position issue; while Roadway argues that the ALJ erred in finding the positions with the other trucking firms were not substantially equivalent.

We conclude that the law of the case doctrine prohibited the ALJ from entertaining new evidence regarding the availability of substantially equivalent positions. The law of the case doctrine is a corollary to the mandate rule and prohibits a lower court from reconsidering on remand an issue expressly or impliedly decided by a higher court absent certain circumstances. *See Ruud v. Westinghouse Hanford Co.*, ARB Nos. 99-023, 99-028, ALJ No. 88-ERA-33, slip op. at 14 (ARB Apr. 19, 2002); *Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1123 (7th Cir.1991); *Evans v. City of Chicago*, 873 F.2d 1007, 1013-14 (7th Cir.1989). In our previous decision we unambiguously held that Roadway had failed to introduce **any** evidence regarding the availability of other substantially equivalent jobs, and therefore failed to prove this element of its affirmative defense of failure to mitigate. The issue that the Board could not resolve, and therefore remanded to the ALJ, was when, if ever, Johnson's back pay entitlement ceased. The Board noted that if Johnson had been reinstated pursuant to the ALJ's original order, the date of that reinstatement might mark the end point for back pay accrual. However, the Board also directed the ALJ to determine whether Landstar Poole's termination of Johnson's employment on March 7, 1998, for violating company policy affected Johnson's back pay entitlement.

Because in his first decision the ALJ had ruled that Johnson's back pay entitlement ceased when he declined a position with Burlington Trucking, the ALJ had not evaluated the evidence regarding Johnson's efforts to mitigate damages subsequent to that event. Further, the Board did not engage in that evaluation, but instead remanded the case to the ALJ for further proceedings. Thus, on remand it was necessary for the ALJ to evaluate Johnson's job history between his rejection of the Burlington job and his reinstatement. In order to calculate the amount of back pay liability, it was appropriate for the ALJ on remand to allow the introduction of evidence regarding the date of Johnson's reinstatement and Johnson's employment efforts between the time of the hearing in ALJ I and the reinstatement.

However, the need to fill these factual gaps did not open the door for Roadway to introduce evidence regarding the availability of substantially equivalent jobs during the period covered by the ALJ I hearing, an issue which the Board had finally resolved. For better or for worse, Roadway chose to rely exclusively on Johnson's refusal to work for Burlington Trucking to support its failure-to-mitigate defense. As Johnson correctly points out, allowing Roadway belatedly to introduce evidence on the availability issue erroneously provided Roadway with a second bite at the litigation apple.

Roadway argues that it was appropriate for the ALJ in the remand hearing to permit the taking of evidence regarding the availability of equivalent employment, because in his original decision the "ALJ did not consider any evidence regarding the availability of equivalent employment or Johnson's mitigation efforts subsequent to May 1995." Roadway's Brief in Opposition to the ALJ's Recommended Decision and Order on Remand, at 18. This argument misses the point, which is that in the first hearing Roadway failed, at its peril, to introduce evidence on the availability issue. We conclude that the ALJ erred in allowing Roadway an opportunity to overcome its failure of proof with respect to the period prior to the first hearing. For the period between the second hearing and Johnson's reinstatement, the evidence is merely duplicative because the wages Johnson earned while employed by Pro Truckers were so close to what he would have earned with Roadway as to satisfy his burden of mitigating his damages.[4]

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[4] In light of this holding it is not necessary for the Board to decide whether the ALJ erred in ruling that the positions at the three unionized companies were not substantially equivalent to Johnson's former position at Roadway. However, we view with skepticism the ALJ's determination that a complainant can refuse subsequent employment without adversely affecting his back pay entitlement if he would be required to "start at the bottom of the seniority list, would be paid at a lesser rate than more senior employees, and [would be] unable to select his preferred bid." ALJ II at 15. In a significantly unionized industry such as the trucking industry, a complainant would always be required to begin his interim employment with a new company at the bottom of the seniority list, with all that entails. We think it unlikely that those facts in and of themselves, could, particularly after the passage of a reasonable amount of time without employment, protect a complainant from charges that he failed to mitigate his damages. *See OFCCP v. Louisville Gas & Elec. Co.*, No. 88-OFC-12, slip op. at 4 (ESA Asst. Sec'y Jan. 14, 1992) (A corollary of the substantially equivalent position requirement is that a Complainant who is unable, after a reasonable period of time, to find comparable employment must lower his sights and consider other available, suitable employment.). *OFCCP v. WMATA*, No. 84-OFC-8, slip op. at 4 (ESA Asst. Sec'y Aug. 23, 1989) (a complainant, of course, may not sit idle for ten years if substantially equivalent employment is not available). *See*

II. The Effect of Johnson's Termination by Landstar Poole on his Back Pay Entitlement[5]

Johnson began work as a driver for Landstar Poole on January 23, 1998. Landstar terminated his employment on March 7, 1998, for allowing his cousin – who did not possess a commercial driver's license – to back up the Landstar Poole truck on a public street. A police officer became involved in the incident when he apprehended that someone was attempting to back the truck into him. When the officer approached the truck Johnson's cousin fled, leaving Johnson to face the police. The police officer found six beer bottles in the cab and charged Johnson with driving under the influence. Although the DUI charge was subsequently dropped (evidently because Johnson had not been driving the truck at the time of his arrest), Landstar Poole terminated Johnson's employment over the incident. Johnson testified that allowing someone other than himself to drive the truck was a violation of Landstar Poole policy.

The ALJ found that allowing Johnson's cousin to drive the truck was "dangerous and could have resulted in injury to the public," and therefore was sufficiently egregious to toll Roadway's back pay liability. On review Johnson argues that his termination from Landstar should not be held to toll his back pay entitlement. Instead, Johnson argues that the amount he would have earned had he remained with Landstar should be deducted from the back pay accrued between March 7, 1998, and the date Roadway reinstated him.

The Board has previously held that the mitigation of damages doctrine requires that a wrongfully discharged employee not only diligently seek substantially equivalent employment during the interim period but also that the employee act reasonably to maintain such employment. *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 95 -STA-43, slip op. at 6 (ARB May 30, 1997). Moreover, "[a] failure to mitigate damages through the retention of employment will reduce the employer's back pay liability in that the back pay award will be reduced by **no less** an amount than that which the complainant would have made had he remained in the interim employment throughout the remainder of the back pay period." *Id.* (emphasis supplied).

Citing *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996) and *Patterson v. P.H.P. Healthcare*, 90 F.3d 927, 937 (5th Cir. 1996), the Board articulated the principle that "only if the employee's misconduct is gross or egregious, or if it constitutes a willful violation of company rules, will termination resulting from such conduct serve to toll the

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also Ford Motor Co. v. EEOC, 458 U.S. 219, 232-33 (1982) ("The [Title VII] claimant, after all, plainly would be required to minimize his damages by accepting another employer's offer even though it failed to grant the benefits of seniority not yet earned.") (emphasis added).

[5] On remand the ALJ found that Johnson "had justifiable reasons for leaving his employment at Arrowhead Construction, Celadon Trucking, EVI Services, DOT Leasing, Aaron's Limousine, and Laura Stewart . . .," and therefore Johnson's departure from those jobs did not amount to a failure to mitigate damages. Roadway does not challenge that ruling, and we will not disturb it.

discriminating employer's back pay liability." *Cook*, ARB No. 97-055, slip op. at 6 (footnote omitted). The Board found that Cook was not terminated for engaging in gross or egregious conduct, or a willful violation of company rules and therefore concluded that Cook's entitlement to back pay was not extinguished because of the termination. *Id.* at 8.

Applying this standard to this case, we concur with the ALJ's determination that the behavior that resulted in Johnson's termination from Landstar Poole was a willful violation of Landstar's policy and sufficiently egregious to affect Johnson's entitlement to back pay. Johnson allowed someone who was neither an employee of Landstar nor in possession of a commercial driver's license to drive Landstar's truck on a public street. This activity was dangerous to the public and could have resulted in extensive damage to Landstar's truck.

Both *Thurman* and *Patterson* relied on the Fourth Circuit's reasoning in *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277-79 (4th Cir. 1985). In that case, the court drew an analogy between the failure of a claimant to exercise reasonable diligence in the mitigation of damages by voluntarily quitting comparable, interim employment and a complainant who loses similar employment by engaging in misconduct. The court held, "To permit claimants the freedom of substantially unrestrained conduct during interim employment, unfettered by the loss of back pay, would serve only to punish the employer for the misconduct of the claimant, and be inconsistent with the requirement of exercising reasonable diligence."

In fashioning a backpay remedy for claimants who were justifiably discharged, the Fourth Circuit relied on the NLRB decision, *Knickerbocker Plastics Co, Inc.*, 132 NLRB 1209, 1215 (1961). In *Knickerbocker Plastics Co.* the NLRB held that complainants who voluntarily quit interim employment would "be deemed to have earned for the remainder of the period for which each is awarded backpay the hourly wage being earned at the time such quitting occurred." *Knickerbocker Plastics Co., Inc.*, 132 NLRB at 1215. Where the employee secures interim employment which pays a higher amount, the employer is entitled to a credit for those earnings rather than the earnings held at the time of the voluntary quit. *Id.* However, the Fourth Circuit adopted the following modification: "periods of unemployment following justified discharges are to be completely excluded from the back pay period. During such a period the claimant has excluded himself from the employment market." *Brady*, 753 F.2d at 1280. *Accord EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 670 (8th Cir. 1992) (backpay properly tolled during period between each voluntary quit and next full-time permanent position).

Applying the *Brady* rule to the facts of this case results in a complete bar to the payment of backpay between March 7, 1998, the date on which Landstar Poole terminated Johnson's employment, and the beginning of his employment with Trans-State Lines. Thereafter, the Respondent is entitled to a credit against its backpay liability for the greater of the amount of the earnings Johnson had in subsequent interim employment or the amount he was paid for his employment at Landstar Poole.

In adopting the approach of the *Brady* case, we reject Complainant's contention that *Cook* requires a reduction in back pay by only the amount which the Complainant would have made had he remained at Landstar Poole. As noted above, *Cook* sets a floor, not a ceiling on the

backpay reduction. Under these circumstances (termination of interim employment because of the employee's misconduct), reducing the backpay award to zero until new interim employment is secured is both appropriate, and consistent with *Cook*, Similarly, the approach we adopt is consistent with a correct reading of the cases cited by Respondent.

The ALJ calculated that the total of back pay and pension contributions for the period between Johnson's discharge from Roadway and the termination of his employment by Lanstar Poole amounted to $209,986.36. From that amount he subtracted Johnson's interim wages and $11,930.40, for a total of $168,279.96 in back pay liability and pension benefits. ALJ 11 at 22. However, in Appendix A the ALJ also provided calculations for Johnson's back pay award assuming that the termination by Landstar Poole did not extinguish back pay. ALJ II at 23-24. These calculations result in $225,601 for back pay liability and pension contributions. Because we find that Johnson is not entitled to backpay for the period between his discharge by Landstar Poole and his next position with TransState, the ALJ's backpay calculation in Appendix A must be reduced further to exclude payments for that period. Roadway is also entitled to a credit for the higher of the wages earned in subsequent interim employment or the wages earned while employed by Landstar Poole.

III. The ALJ's Back Pay Calculations

Roadway objects to two aspects of the ALJ's back pay calculations. We discuss each in turn.

A. Use of wages of representative employees to calculate Johnson's back pay

In an effort to narrow the issues regarding the back pay calculation, Johnson and Roadway stipulated to the wages of employees immediately above and below Johnson on the seniority list for the years that back pay was owed. However, the parties did not agree on how those numbers should be used to calculate back pay. In particular, Roadway argued that because of Johnson's attendance record, Johnson never earned total wages similar to those representative employees. Roadway presented evidence that for the years 1990 though 1994 Johnson earned only 82% of what the representative employees earned. Furthermore, during that portion of 1999 that Johnson worked for Roadway, he earned 77% of what the representative employees earned. Therefore, to award Johnson a wage representing the average of those two employees would amount to a windfall. The ALJ rejected Roadway's argument: "I will not speculate about Johnson's conduct and determine whether he would have earned less than other representative employees. I resolve the uncertainties against the discriminating employer and use the wages of comparable employees in determining Johnson's back pay award." ALJ II at 19. The ALJ therefore calculated Johnson's back pay by subtracting Johnson's interim earnings from the average amount the representative employees earned in each year. Roadway challenges this ruling on the ground that Johnson would not, in fact have earned as much as the representative employees if he had continued to be employed by Roadway. Because substantial evidence supports the ALJ's findings, we will not disturb them.

The purpose of a back pay award is to return the wronged employee to the position he

would have been in had his employer retaliated against him. *Albermarle Paper Co. v. Moody*, 422 U.S. 405 418-421 (1975) (under Title VII). Back pay calculations must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-005, slip op. at 11 n.12 citing *Beltway v. American Cast Iron Pipe Co., Inc.*, 494 F.2d 211; 260-61 (5th Cir. 1974). Roadway presented evidence that for the four years immediately preceding his termination, Johnson earned significantly less than the representative employees. Thus, although the representative employees averaged $301,222 total wages in 1990 through 1994, Johnson earned $246,486. REX 18-20. Additionally, the parties stipulated that during 1999 the average gross wages of the representative employees was $1,311 weekly. Roadway argues that in contrast, Johnson averaged only $983 in gross wages.[6] However, no evidence was presented from which a trier of fact could actually determine the source of these disparities. Without more, the bare figures upon which Roadway seeks to rely do not constitute evidence of sufficient weight to overcome the ALJ's findings. [7]

Accordingly, we affirm the ALJ's decision not to discount the amount of back pay Johnson should receive based upon the disparity between his wages and those of the representative employees.

B. The ALJ's Award of Back Pay for Vacation and Sick Pay

The parties stipulated that:

> Roadway employees that are entitled to four or five weeks of

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[6] In 1999, Johnson was employed by Roadway for 22 weeks and earned gross wages of $21,629. He also received $11,930 in back pay, for a total reflected on his W-2 of $33,559. For purposes of calculating back pay, the appropriate amount is $21,629. REX 16, 18.

[7] Johnson's earnings over the last five years he was employed by Roadway did not bear a consistent relationship to those of the representative employees. *See* Respondent's Brief, Tab 1. Contrary to Roadway's assertion that "[F]or five years Johnson earned significantly less than the employees above and below him on the seniority list," Roadway's own exhibit shows that for three of the five comparison years Johnson earned approximately $1,000 to $3,500 more than one representative employee, but approximately $7500 to $22,800 less than the other (1990-1992). For 1993, Johnson earned approximately $3,500 less than one employee and approximately $17,500 less than the other. In 1994, however, Johnson's income dipped to approximately $32,500 as compared to over $50,000 during the four preceding years, and he earned approximately $22,800 less than one employee and $31,100 less than the other. His earnings in 1999 also were lower than those of either counterpart. Thus, his earnings were not a consistent percentage of the average of the earnings of the two other employees. Applying a percentage reduction based on averaging the 1990-1994 data, as Roadway proposes, would mean applying a figure significantly influenced by the 1994 year which was very unlike Johnson's earnings from 1990-1993. Although simply averaging the earnings of the representative employees (Collins who over the period 1990-94 had much higher earnings than Johnson and Essary whose earnings over that period, while both above and below Johnson's, were more in line with Johnson's) has the problems of any such average, it does not raise the difficulty of likely under paying Johnson as Roadway's solution might.

> vacation may receive compensation for the fourth and/or fifth weeks of vacation if they do not take the vacation days. Roadway employees do not receive vacation pay in lieu of vacation for the first three weeks of vacation. Employees who do not take earned vacation within the twelve month period subsequent to the end of the anniversary year in which such vacation was earned forfeit entitlement to that vacation time off and/or pay.

ALJ II at 13. They also stipulated that Johnson would have been entitled to four weeks of vacation benefits during his 1995-96, 1996-97, and 1997-98 anniversary years, and to 30 days of vacation benefits during his 1998-99 and 1999-2000 anniversary years. ALJ II at 12. The parties also stipulated that Johnson would have been entitled to five days of sick leave per contract year, and that sick leave that was not used by March 31 of any contract year would be paid at stipulated hourly rates. ALJ II at 13.

Roadway argued that Johnson had a pattern of always using all of his vacation and sick days, and had not been able to "cash in" unused vacation and sick days during the years prior to his termination. Therefore, Roadway asserted that Johnson should not be awarded back pay for vacation days in excess of three weeks and for five sick days for each year of back pay entitlement. The ALJ, relying on his obligation to resolve uncertainties regarding how much an employee would have earned against the retaliating employer, rejected Roadway's argument. Roadway asks that we reverse this conclusion.

The documentary evidence upon which Roadway relies before us – portions of REX 16 – was, over Roadway's objection, not admitted into the record by the ALJ. And, the transcript page to which Roadway cites contains a proffer of proof, not testimony. On review, Roadway has not challenged the ALJ's exclusion of evidence; therefore we decline to review the ruling. Absent the documentary evidence and Roadway's proffer, the record does not support Roadway's assertion that Johnson should not be awarded back pay for vacation and sick days. We affirm the ALJ's finding in this regard.

The ALJ calculated that the total of back pay and pension contributions for the period between Johnson's termination and his termination by Landstar Poole amounted to $209,986.36. From that amount he subtracted Johnson's interim wages and $11,930.40, for a total of $168,279.96 in back pay liability and pension contributions. Because we find no error in the ALJ's calculation of back pay entitlement, we adopt it.

IV. Attorneys Fees and Expenses

Our prior decision reserved ruling on the fee petition because we were remanding the case for further action by the ALJ. We gave Johnson's attorney leave to file an augmented fee petition for work before the Board and upon remand. ARB II at 18.

We now have before us the ALJ's September 3, 1999 Order Granting Attorney Fees in the amount of $28,757.16, representing 117.75 hours of work billed at $225.00 per hour and

$2,263.41 in expenses. The ALJ issued a December 8, 2000 Supplemental Decision and Order Granting Attorney Fees in the amount of $20,454.93, representing 80.5 hours of work billed at $225.00 per hour and $2,342.43 in expenses. Respondent objects to the hourly rate for the fee award.

In *Clay v. Castle Coal & Oil Co., Inc.*, 90-STA-37 (Sec'y June 3, 1994), the Secretary stated that in calculating attorney fees under the STAA, he generally employs the lodestar method which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. *Accord Hensley v. Eckerhart*, 461 U.S. 424 (1983). Citing *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984), the Secretary described the method for determining the rate prevailing in a community for similar services.

> In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to – for convenience – as the market rate.

Clay, 90-STA-37, slip op. at 4.

Respondent objects to the hourly rate of $225 for several reasons: the rate exceeds the national average for firms with nine lawyers or less; the rate exceeds that charged by partners in firms which practice in cities with populations less than 500,000; and the rate exceeds that charged by attorneys with 11 to 15 years of experience. The Respondent also notes that an ALJ, in the case of *Scott v. Roadway Express*, 1998-STA-8 (ALJ Jan. 21, 1999) which it claims is similar in complexity to the present case, reduced the hourly rate from the requested $225 to $150. We find these objections unpersuasive.

In the present case, Johnson's attorney, Paul O. Taylor, Esq., submitted a fee petition that explained that his practice is nationwide and he does not handle cases at his office located in a suburb of Minneapolis, Minnesota. The fee petition notes that Mr. Taylor was employed in the trucking industry from 1974 to 1984 and was vice-president of a trucking company while in law school. In the years since law school, Mr. Taylor's practice has been almost exclusively related to representation in transportation-related matters.

His former partner, who also handles transportation legal matters, bills at a rate of $225 per hour. The two attorneys have similar experience. Mr. Taylor's fee petition also notes that an hourly rate of $225 has been approved in prior cases.

The facts of *Scott* are distinguishable from the present case and do not make it an apt

citation. In *Scott,* the attorneys fee petition stated that the attorney reserved the right to withdraw from the case if the complainant did not meet certain requirements. In the event that he did withdraw, the fee petition specified that he would be compensated at the rate of $150 per hour. The ALJ found this language to be a clearer indication of the attorney's usual rate.

After considering the factors above, we affirm the ALJ's two awards of Attorney Fees.

CONCLUSION

For the foregoing reasons we **AFFIRM** the ALJ's award of back pay, as modified by this decision. Backpay is excluded between March 7, 1998, the date Johnson's employment was terminated by Landstar Poole, and the beginning of his employment with Trans-State Lines. Thereafter, the Respondent is entitled to a credit against its back-pay liability, as calculated by the ALJ in Appendix A of his October 12, 2000 Recommended Decision and Order on Remand, for the greater of the amount of earnings Johnson had in interim employment or the amount he was paid for his employment at Landstar Poole. We also **AFFIRM** the ALJ's September 3, 1999 Order Granting Attorney Fees and the ALJ's December 8, 2000 Supplemental Decision and Order Granting Attorney Fees.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge