In the Matter of:

GERALD AGEE, ` **ARB CASE NO. 04-182**

COMPLAINANT, **ALJ CASE NO. 04-STA-40**

v. **DATE: December 29, 2005**

ABF FREIGHT SYSTEMS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Gerald Agee filed a complaint under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified at 49 U.S.C.A. § 31105 (West 1997). Agee alleged that his employer, ABF Freight System, Inc., (ABF) violated § 31105(a)(1)(B)(i) by issuing a warning notice on October 22, 2003, citing Agee for being absent due to illness.

On September 27, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) granting ABF's Motion for Summary Judgment. The R. D. & O. is now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2005). Neither party chose to file a brief before this Board.[1]

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[1] On October 5, 2004, the Board issued a Notice of Review and Briefing Schedule advising the parties of their right to file a brief in support of or in opposition to the R. D. & O. by October 27, 2004. The Board requested each party to inform the Board by letter, telephone, or facsimile if he did not intend to file a brief.

ABF duly advised the Board by letter that it did not intend to file a brief. Agee did not file a brief or indicate his intent not to do so. The record in this case reflects that Agee received the Board's briefing notice by certified mail on October 12, 2004, and personally

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C), Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), and 29 C.F.R. § 1978.109(c)(1).

We review grant of summary decision de novo, i.e., under the same standard the ALJ employs. As set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and a party is entitled to summary judgment as a matter of law. *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 98-STA-28, slip op. at 2 (ARB Dec. 31, 2002).

DISCUSSION

STAA prohibits motor carrier employers from retaliating against truck drivers who refuse to operate a commercial motor vehicle because doing so could "violate[] a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C.A. § 31105(a)(1)(B)(i).

According to his complaint, on October 19, 2003, and for several days thereafter, he refused to operate commercial motor vehicles for ABF because "his ability and alertness were so impaired due to illness that it would have been unsafe for him to operate a commercial motor vehicle on the highways." Complaint at 2, ¶ 5. On October 22, 2003, ABF issued warning letters to Agee "in retaliation for the aforementioned protected activity." *Id.* at 3 ¶ 10. The letter stated in pertinent part:

> On October 19, 2003, you removed yourself from availability for work. There have been discussions with you in the past regarding excessive absenteeism, with the most recent discussion being on June 2, 2003, however, you have continued to remove yourself from availability for work by marking off sick and/or personal. . . .
>
> In accordance with Article 46 of the Central Region Over-The-Road Supplemental Agreement, this is a warning letter for Excessive Absenteeism.

Respondent's Motion for Summary Decision, Attachment 1D (Written warning) (filed July 23, 2004).

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signed for it. Accordingly, we deem Agee to have notified the Board of his intent not to file a brief in opposition to the R. D. & O. and we proceed to review without benefit of briefs.

In his STAA complaint, Agee contended that the written warning violated a federal motor carrier safety regulation, 49 C.F.R. § 392.3 (2005), that prohibits motor carriers from requiring truck drivers to drive while likely to be impaired through fatigue or illness. Consequently, he argued, ABF violated § 31105(a)(1)(B)(i). Agee requested that ABF be ordered to expunge the written warning from its files, pay Agee's expenses and attorney fees, and "abate its violations of the Act." Complaint (filed Feb. 11, 2004).

It is undisputed that Agee was a member of a bargaining unit represented by the International Brotherhood of Teamsters and subject to a Collective Bargaining Agreement. Under the Agreement, ABF could discipline a driver for absenteeism only within nine months of issuing a written warning. Respondent's Motion for Summary Decision, Attachment 1 (Declaration of Mike Lewis, ABF Linehaul Manager), Attachment 1A (Bargaining Agreement excerpt). It is further undisputed that ABF's October 23 warning letter to Agee constitutes a written warning within the meaning of the Collective Bargaining Agreement.

Pursuant to the Agreement, the October 23 warning expired on July 22, 2004. Thereupon, ABF moved for summary decision, arguing that the case had become moot. ABF relied on Board precedent holding that even though the Administrative Procedure Act permits the Board to issue advisory opinions, the Board will generally not decide controversies that become moot during the course of litigation. *See e.g., Lane v. Roadway Express, Inc.*, ARB No. 03-006, ALJ No. 02-STA-38, slip op. at 3 (ARB Feb. 27, 2004) ("although administrative proceedings are not bound by the constitutional requirement of a 'case or controversy,' the Board has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot"); *Migliore v. Rhode Island Dep't of Envtl. Mgmt.*, ARB No. 99-118, ALJ Nos. 98-SWD-3, 99-SWD-1, 99-SWD-2, slip op. at 4 (ARB July 11, 2003) ("the policy concerns that militate against the rendering of advisory opinions in Article III courts are also relevant to the question of whether the Board should issue [an order]").

Agee argued that the case was not moot because he has not been made whole, since his attorney fees and litigation expenses have not been paid. Alternatively, Agee argued, the controversy over ABF's right to issue the warning falls within the exception to the mootness doctrine for controversies that are capable of repetition yet evade review due to the passage of time. Complainant's Brief Opposing Motion for Summary Judgment (filed Aug. 17, 2004).

Before turning to the merits of ABF's mootness arguments, we note that a written warning is not an adverse employment action within the meaning of STAA absent evidence of a tangible job consequence. *See West v. Kasbar, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005) (and cases discussed therein). Agee challenges only the issuance of the warning; he makes no claim that the warning resulted in a tangible job consequence. Thus, the complaint does not allege a prima facie case of unlawful retaliation. *Id.* ("Because West failed to allege an essential element of

his legal claim (adverse action), his complaint fails as a matter of law"). For that reason alone, Agee's complaint should be dismissed without a hearing.

With respect to Agee's claim that his attorney fees and costs save the case from mootness, Agee is incorrect as a matter of law. An "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)). Litigation fees and expenses may be a consequence of Agee's decision to prosecute his § 31105 complaint, but they are not the subject matter of the litigation. Indeed, § 31105(b)(3)(B) specifically stipulates that an employee is entitled to attorney fees and costs only if the Secretary decides that the employer violated the act.[2]

Nor does Agee's complaint fall within the exception to mootness for controversies that are capable of repetition yet evade review. "The 'capable of repetition, yet evading review' exception to mootness applies in those exceptional cases where a plaintiff makes a reasonable showing that he or she will again be subjected to the sanction." *Sysco Food Servs. v. Martin*, 983 F.2d 60, 62 (6th Cir. 1993). This doctrine is limited to situations where (1) the challenged action is too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Id.*; *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The party invoking this exception has the burden of proving both prongs. See *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005).

Agee argues that the warning letter itself demonstrates a reasonable likelihood that ABF will again issue him a written warning for refusing to drive on an occasion when he is ill and unable to drive safely. Complainant's Brief Opposing Motion for Summary Judgment at 3. The written warning does not support Agee's claim. It clearly states that it is being issued for excessive absenteeism over a period of time and that the October 19 incident was merely the latest and precipitating event. "There have been discussions with you in the past regarding excessive absenteeism . . . however, you have continued to remove yourself from availability for work by marking off sick and/or personal." Respondent's Motion for Summary Decision, Attachment 1D. Thus, the letter does not demonstrate a reasonable likelihood that ABF will in future give Agee a written warning for refusing to drive when he is impaired by illness.

Nor has Agee even suggested that the nine-month limit on a warning's effectiveness makes the challenged action too short to be fully litigated prior to its cessation or expiration. Agee's failure even to mention an essential basis for invoking

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[2] In a similar vein, Agee argues that his request for an injunction against future violations saves the case from mootness. But again, Agee's right to relief arises only if the Secretary decides that the employment action of which Agee complains violated the Act. 49 U.S.C.A. § 31105(b)(3)(A) ("If the Secretary decides, on the basis of the complaint, a person violated subsection (a) of this section, the Secretary shall order the person to" abate the violation, offer reinstatement, and pay compensatory damages). Thus, the remedy request cannot vitalize the controversy over whether a violation was committed in the first instance.

the exception constitutes waiver of the argument. *Hall v. United States Army*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-00005, slip op. at 6 (ARB Dec. 30, 2004) (failure to present argument or pertinent authority waives argument).

In sum, the parties do not disagree on any material fact. This Board cannot redress Agee's alleged injury from a warning notice that no longer has any disciplinary or other effect. Neither Agee's attorney fees nor his request for injunctive relief preserves this case from mootness. Agee has not shown that a § 31105 complaint based on a written notice issued pursuant to the local bargaining agreement in effect in 2003 necessarily evades review or that it is reasonably likely that ABF will issue such a notice to him in future.

CONCLUSION

Accordingly, we **GRANT** ABF's Motion for Summary Decision and dismiss the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge