In the Matter of:

ANTHONY J. CIOFANI, **ARB CASE NO. 05-020**

COMPLAINANT, **ALJ CASE NO. 2004-STA-46**

v. **DATE: September 29, 2006**

ROADWAY EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., *Trucking Justice Center,* Burnsville, Minnesota

For the Respondent:
Michael F. Dolan, Esq., and Kristin L. Parker, Esq., *Jones Day,* Chicago, Illinois

FINAL DECISION AND ORDER

BACKGROUND

Anthony J. Ciofani drove trucks for Roadway Express, Inc. out of the company's Baltimore, Maryland terminal. In 2004, Roadway issued Ciofani suspension letters on January 27, February 17, and March 1. The suspension letters were for excessive absenteeism. Roadway also issued him a suspension letter on April 9 for an unexcused absence. On March 22, 2004, Ciofani filed a complaint with the United States Department of Labor (DOL) wherein he alleged that Roadway issued the first three suspension letters after instances where he refused to drive because of dangerous road conditions, illness or fatigue, or prescription medication. Ciofani claims that Roadway's

actions violate the whistleblower provisions of the Surface Transportation Assistance Act of 1982, as amended (STAA).[1]

The STAA protects employees who engage in certain activities from adverse employment actions. The Act provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has made a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order . . . ."[2] The STAA also protects employees who refuse to drive because to do so would violate a "regulation, standard, or order of the United States related to commercial motor vehicle safety or health . . . ."[3] Also protected are employees who refuse to drive because of a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."[4]

The Labor Department's Occupational Safety and Health Administration (OSHA) investigated Ciofani's complaint and found that it had no merit. Ciofani objected and requested a hearing before a Labor Department Administrative Law Judge (ALJ). Soon thereafter, but before the ALJ hearing began, Roadway permanently withdrew the three suspension letters. Ciofani did not serve any of these suspensions, and Roadway swears he did not and will not incur any lost time, wages, or benefits as a result of the letters. Furthermore, Roadway removed all references to the suspension letters from Ciofani's personnel file and has sworn that it will not use them in any future disciplinary action.

Roadway filed a Motion to Dismiss. It argues that the complaint is moot. Ciofani filed an Opposition and argues that his complaint is not moot because he is entitled to, but has not received, attorney fees and costs and an order that Roadway abate its violations of the STAA. He also asserts that he could be subject to the same actions again. The ALJ treated Roadway's Motion to Dismiss as a motion for summary decision and granted the motion. This matter is now before the Administrative Review Board (ARB or the Board) pursuant to the STAA's automatic review provisions.[5] The parties were invited to file briefs, but only Roadway did so.

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[1] 49 U.S.C.A. § 31105 (West 1997).

[2] 49 U. S. C. A. § 31105(a)(1)(A).

[3] 49 U. S. C. A. § 31105 (a)(1)(B)(i).

[4] 49 U.S.C.A. § 31105(a)(1)(B)(ii).

[5] "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee." 29 C.F.R. § 1978.109(a)(2006).

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review an ALJ's recommended STAA decision.[6] Under the STAA, the Board is bound by the ALJ's factual findings if substantial evidence on the record considered as a whole supports those findings.[7] 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."[8] In reviewing the ALJ's conclusions of law, the Board, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[9] Therefore, the Board reviews the ALJ's conclusions of law de novo.[10]

We review a grant of summary decision de novo, i.e., under the same standard ALJs employ. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision." "[I]n ruling on a motion for summary decision, we . . . do not weigh the evidence or determine the truth of the matters asserted . . . ."[11] Viewing the evidence in the light most favorable to, and drawing all inferences in favor of the

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6 *See* 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the STAA).

7 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).

8 *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

9 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

10 *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

11 *Stauffer v. Wal-Mart Stores, Inc*., ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6-7 (ARB Nov. 30, 1999).

nonmoving party, we must determine the existence of any genuine issues of material fact. We also must determine whether the ALJ applied the relevant law correctly.[12]

DISCUSSION

The ALJ recommended that Ciofani's complaint be dismissed because no genuine issue of fact exists as to whether the complaint is moot. Roadway permanently withdrew the suspension letters, removed all reference to them in Ciofani's personnel file, and swore that it would not use the letters in any future discipline toward Ciofani. Furthermore, Ciofani did not serve the suspensions or suffer any loss of time, pay, or benefits as a result of the letters, nor would he suffer such losses in the future. Moreover, the ALJ found that Ciofani did not prove that his case falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. We have reviewed the record and find that substantial evidence on the record as a whole supports the ALJ's findings. Those findings are therefore conclusive.

The ALJ's decision thoroughly and fairly discusses and evaluates the relevant facts underlying this dispute and correctly applies relevant law. Therefore, we adopt and attach the ALJ's Recommended Decision and Order and **DENY** Ciofani's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[12] *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith*, 475 U.S. 574 (1986).