



In the Matter of:

**ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY & HEALTH,
PROSECUTING PARTY,**

ARB CASE NO. 96-108

ALJ CASE NO. 95-STA-37

and

DATE: September 5, 1996

PETER BIGHAM,

COMPLAINANT,

v.

GUARANTEED OVERNIGHT DELIVERY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

This case arises under Section 405 (the employee protection provision) of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1994). Before us for review is the Recommended Decision and Order (R. D. and O.) issued on May 8, 1996, by the Administrative Law Judge (ALJ). The ALJ concluded that Complainant, Peter Bigham, (Bigham) established that Respondent, Guaranteed Overnight Delivery (Guaranteed), violated the STAA by terminating him for engaging in protected activity. After a thorough review of the record, we agree with the ALJ and adopt his decision as modified herein.

^{1/} On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization were also promulgated on that date.

The findings of fact rendered by the ALJ are supported by substantial evidence in the record considered as a whole and are thus conclusive. *See* 29 C.F.R. § 1978.109(c)(3)(1995). On December 14, 1994, one of Guaranteed's dispatchers instructed Bigham to transport a loaded trailer. Bigham believed that the trailer was overweight, and after refusing to drive the load, he expressed his concerns about the load to Kenneth Moss (Moss), Guaranteed's Director of Safety. Moss confirmed Bigham's assessment, whereupon Bigham apprised the dispatcher of the problem. The dispatcher repeated his request that Bigham drive the overweight load. When Bigham repeated his refusal, he was sent home without pay by the dispatcher.

According to Bigham, Walter Riley (Riley), President of Guaranteed, called him the next day and told him that he was being laid off because there was a lack of work. Transcript (T.) 205. According to Guaranteed, Bigham asked to be laid off because he was aware that Guaranteed would be experiencing a downturn in business. T. 868, R. D. and O. at 5, 8-9. Guaranteed does not deny that Bigham was instructed to haul the overweight load.^{2/} The ALJ concluded that Bigham was fired for refusing to haul the overweight load, and we agree. Irwin testified that normally an employee is laid off only after several days have passed during which he or she has not been needed due to a lack of work. Bigham was laid off the first day he was told not to report to work. R. D. and O. at 8-9. Guaranteed may have suffered a drop in revenues in December 1994, necessitating a reduction in its work force, but Bigham's layoff was done in an unusual manner before there was a drop-off in work. We therefore adopt the determination of the ALJ that Guaranteed violated the employee protection provision of the STAA.

In assessing Bigham's request for compensatory damages, the ALJ concluded that although Bigham experienced emotional distress and mental anguish as a result of his termination, his request for \$48,000 in compensatory damages was "ludicrous." R. D. and O. at 13-14. The ALJ also indicated that of the cases cited by the prosecuting party to support this request, only one is a whistleblower case. R. D. and O. at 14. We find it necessary to note that courts have awarded compensatory damages for emotional distress caused by wrongful discharge in amounts greater than the amount requested by the prosecuting party. *See, e.g., Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992 and n.1 (8th Cir. 1984) (holding "reasonable" an award of \$50,000 for emotional distress and mental suffering based on evidence that "as a result of his discharge [plaintiff] lost his car and house, he and his wife began experiencing marital problems, and he felt that his children respected him less"); *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989) (award should have been no greater than \$50,000 where plaintiff testified "that his job loss was 'very stressful' [and] that he was angry, depressed, scared and frustrated" and his wife testified "that he was under 'tremendous emotional strain' and that they experienced significant financial difficulties"); *Ruhlman v. Hankinson*, 461 F. Supp. 145, 151 (W.D. Pa. 1978), *aff'd*, 605 F.2d 1195, 1197 (3d Cir. 1979), *cert. denied*, 445 U.S. 911 (1980) (evidence of emotional distress amounting to more than "some pressure and embarrassment" sufficient to sustain award of \$50,000).

^{2/} Steve Irwin, Guaranteed's Vice President of Operations, testified that it is Guaranteed's policy to allow drivers to decide whether to carry an overweight load, even if the load is in violation of federal law. T. 740, 867. All of the drivers who testified at the hearing stated that they had transported loads that were either overweight or suspected to be overweight. R. D. and O. at 4.

We find it appropriate to review other types of wrongful termination cases to assist in the analysis of the appropriate measure of compensatory damages in whistleblower cases. In assessing Bigham's request, we have reviewed the relevant evidence and considered the facts in light of awards in the aforementioned cases as well as other whistleblower decisions involving emotional distress. *See, e.g., Blackburn v. Metric Constructors, Inc.*, 86-ERA-4, Sec. Dec. and Ord., August 16, 1993; *Lederhaus v. Paschen*, Case No. 91-ERA-13, Sec. Dec. and Ord., Oct. 26, 1992, slip op. at 10-14, and cases cited therein; *McCouston v. TVA*, Case No. 89-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op. at 18-22, and cases cited therein. After reviewing the observations and accounts of Bigham's emotional distress, we increase the ALJ's recommended amount and award Bigham \$20,000 in compensatory damages.

ORDER

Guaranteed is hereby ordered to:

1. Offer Bigham reinstatement to a position commensurate with his experience, expertise, compensation and position that he held at the time of his termination of employment on December 14, 1994.
2. Compensate Bigham for back pay at a rate of \$708 a week from his December 14, 1994 termination through the date of reinstatement. Guaranteed is ordered to pay interest on the foregoing amount, to be calculated pursuant to 26 U.S.C. § 6621, and to accrue until such time as the foregoing back pay amount is paid;
3. Pay Complainant damages in the amount of \$20,000 in compensation for distress suffered as the result of his termination.
4. Compensate Bigham for any health insurance premium payments and any out of pocket health care expenses that would have been made by insurance absent the wrongful termination. Further, all 401(k) contributions that would have been made by Guaranteed except for the wrongful termination shall be paid.

5. Expunge from its files all adverse references to the protected activities of Bigham and shall refrain from providing adverse information to any third party about his job performance.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member