U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ASSISTANT SECRETARY FOR OCCUPATIONAL SAFETY AND HEALTH, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY

and

JEFFREY A. FREEZE,

COMPLAINANT,

v.

CONSOLIDATED FREIGHTWAYS,

RESPONDENT.

ARB CASE NO. 99-030

ALJ CASE NO. 98-STA-26

DATE: April 22, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jeffrey A. Freeze, *York, Pennsylvania, pro se.*

For the Department of Labor:
Henry L. Solano, Esq., Joseph M. Woodward, Esq., Donald G. Shalhoub, Esq., Daniel J. Mick, Esq., Mark J. Lerner, Esq., Maria Van Buren, Esq.
U.S. Department of Labor, Washington, D.C.

FINAL DECISION AND ORDER

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. §31105 (1994). On December 24, 1998, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order finding that Consolidated Freightways (CF) had discriminated against Jeffrey A. Freeze

(Freeze) in violation of the STAA. Specifically, the ALJ concluded that CF was liable under the STAA for initiating a termination action against Freeze following his January 9, 1998 refusal to accept a work assignment.[1/] We agree with the ALJ that CF retaliated against Freeze for engaging in activity protected by the STAA, and, in order to clarify the application of the pertinent law to the facts in this case, we supplement the ALJ's analysis of the liability issue. In regard to the question of Freeze's remedy in this case, we agree with the ALJ that CF is liable for back pay, with interest, for the sixty-day suspension that was ultimately imposed against Freeze, and liable for the cost of maintaining Freeze's medical insurance during that sixty-day period. Although we agree with the ALJ's award of $150 in damages for expenses incurred by Freeze in his pursuit of a related union grievance, we provide clarification regarding the award of such expenses as compensatory damages, in response to the Assistant Secretary's objections to that award.

DISCUSSION

I. Findings of facts and conclusions of law -- standard of review

Pursuant to the regulation implementing the STAA at 29 C.F.R. §1978.109(c)(3) (1998), if the factual findings rendered by the ALJ are supported by substantial evidence on the record considered as a whole, we are bound by those findings. The factual findings rendered by the ALJ in this case are in accord with the standard provided by Section 1978.109(c)(3), and we adopt those factual findings.

Pursuant to the Administrative Procedure Act, in reviewing the ALJ's conclusions of law we act, as the designees of the Secretary, with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C. §557(b), *quoted in Goldstein v. Ebasco Constructors, Inc.,* Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992 (applying analogous employee protection provision under the Energy Reorganization Act, 42 U.S.C. § 5851); *see* 29 C.F.R. §1978.109(b) (1998); *see generally Mattes v. United States Department of Agriculture,* 721 F.2d 1125, 1128-30 (7th Cir. 1983) (relying, *inter alia*, on *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano,* 621 F.2d 829 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body). In our review of this case, we have carefully considered the legal conclusions rendered by the ALJ. *See Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389-90 (8th Cir. 1995); *see generally BSP Trans, Inc. v. United States Dep't of Labor,* 160 F.3d 38, 48 n.2 (1st Cir. 1998) (discussing distinction between rejection of ALJ's factual findings and ALJ's legal conclusions).

II. Factual background

[1/] As discussed *infra,* CF initially terminated Freeze's employment following the events of January 9, 1998. Hearing Transcript (HT) at 43-44 (Freeze). The termination action was changed to a sixty-day suspension without pay pursuant to the decision of an arbitration panel that disposed of a grievance filed by Freeze under his union contract. *Id.*; HT at 57-59 (Freeze), 117-18 (Kudrick).

These facts are of particular relevance to the analysis that follows:

During the pertinent timeframe, Freeze was employed by CF as a truck driver working out of its York, Pennsylvania terminal. HT at 13 (Freeze). CF operates seven days a week and, under the Department of Transportation hours of service rules, Freeze was required to complete an eight-day log of his hours worked, and was prohibited from driving after having logged seventy hours of on-duty time in eight days. HT at 17-19; *see* 49 C.F.R. Part 395. On January 8, 1998, CF called Freeze at 9:30 p.m. and instructed him to report to work at the York, Pennsylvania terminal by 11:30 p.m. HT at 22-23 (Freeze); GX 7, 8.[2/] Freeze did so, and was assigned a run from York to Allentown, Pennsylvania. HT at 25-28 (Freeze). Following a fifteen minute pre-trip inspection of the truck equipment, Freeze left the York terminal to drive to Allentown at 12:30 a.m. on January 9, 1998. *Id.* At 2:15 a.m., Freeze took a safety break, which entailed stopping the truck to get out and walk around briefly, and which required about fifteen minutes. HT at 27 (Freeze). Freeze arrived at the Allentown terminal at 3:00 a.m. *Id.* Including the safety break but not the pre-trip inspection, the York to Allentown drive had taken two hours and fifteen minutes. Freeze spent fifteen minutes at the Allentown terminal, leaving the freight that he had hauled there and picking up other trailers. *Id.* at 28.

At 3:15 a.m., Freeze left the Allentown terminal and drove to the Harrisburg, Pennsylvania rail yard, where the trailers he was hauling were emptied, and he completed a pre-trip inspection of the truck equipment. *Id.* Freeze was at the Harrisburg site from 5:00 a.m. until 6:00 a.m. *Id.* at 29. Freeze returned to the York terminal from the Harrisburg site at 6:45 a.m. *Id.* at 30. At that time, the CF dispatcher then on duty at the York terminal, John Baer, asked Freeze to take an assignment to drive to Alexandria, Virginia, and back to the York terminal. *Id.* at 30-31. Freeze advised Baer that he did not have an adequate number of work hours remaining under "the 70-hour rule." *Id.* at 31-32. As an alternative, Baer asked Freeze to accept another York to Allentown assignment, and Freeze did so. *Id.* at 32-33. Although Freeze was hauling a time sensitive load, Baer did not advise Freeze of that fact. HT at 92-93 (Baer).

Freeze left the York terminal for Allentown at 7:30 a.m. on January 9, 1998. *Id.* at 33; GX 8. At about twenty miles from the York terminal, Freeze stopped to take a meal break; when he opened his log book to add an entry for the meal break, he "realized" that he did not have an adequate number of hours remaining under the 70-hour rule to complete the run to Allentown legally. HT at 34-35, 54-55 (Freeze). Freeze then drove back to the York terminal, arriving there at 8:52 a.m. *Id.* at 35; GX 10; *see* GX 8. Baer asked Freeze why he had returned without completing the Allentown run. HT at 36 (Freeze). Baer and Freeze then discussed the issue of how many hours Freeze had remaining under the 70-hour rule. *Id; see* R. D. & O. at 2. Using a computer to calculate Freeze's hours, Baer explained to Freeze that he had an adequate number of hours remaining when Freeze initially began the York/Allentown run at 7:30 a.m. HT at 36-37 (Freeze), 94-99, 103-05 (Baer). Freeze initially had difficulty following Baer's calculations, then agreed with Baer that he had made a mistake in returning before completing the York/Allentown run. *Id.* Freeze then

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[2/] Evidentiary exhibits cited herein are referred to as follows: Government Exhibit, GX; Employer's Exhibit, EX.

determined that, at that time, he had only two hours remaining.[3/] HT at 37 (Freeze); *but see* HT at 96 (Baer)(could not recall discussing 70-hour rule with Freeze).

Baer then offered Freeze "an opportunity to correct the situation" by again undertaking the York/Allentown run at that time. HT at 37 (Freeze); *see* GX 11; HT at 98 (Baer). Freeze declined, citing the 70-hour rule and stating that he was "too tired."[4/] HT at 37-39 (Freeze). Baer relayed the information concerning this incident to CF management at the York terminal, who decided to terminate Freeze and prepared a letter to that effect the same day. HT at 101-03 (Baer), 124-26 (Kudrick); GX 11.

III. Analysis of liability issue

The elements of a violation of the STAA employee protection provision are "that the employee engaged in protected activity, that the employee was subject to adverse employment action, and that there was a causal connection between the protected activity and the adverse action." *Clean Harbors Environmental Services, Inc. v. Herman,* 146 F.3d 12, 21 (1st Cir. 1998), *quoted in Madonia v. Dominick's Finer Food, Inc.,* ARB Case No. 99-001, ALJ Case No. 98-STA-2, Jan. 29, 1999, slip op. at 3. In regard to the threshold issue of whether Freeze had engaged in an activity that is protected by the STAA, the ALJ concluded that "concern over the number of hours one has been driving may constitute protected activity . . . ," but did not analyze the evidence of potentially protected activity under the pertinent legal standards. R. D. & O. at 4. The starting point for such analysis is a review of the pertinent criteria provided by Section 405 of the STAA:

> (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 --

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[3/] Freeze testified that the discussion with Baer concerned the 70-hour rule. HT at 36-37; *see* HT at 34-35. Baer testified that the discussion concerned the ten-hour daily limit on driving hours, rather than the 70-hour eight-day on-duty prohibition on driving, both of which are provided by 49 C.F.R. §395.3. HT at 94-99, 103-04; *see* n.6 *infra.* Although the ALJ credited Freeze's testimony, R. D. & O. at 2, the ALJ's recommended decision states that Freeze was concerned with the ten-hour daily limit on driving hours, rather than the 70-hour rule. R. D. & O. at 4. Based on the record in this case and the ALJ's other findings regarding the 70-hour rule, we construe the R. D. & O. statement on page 4 concerning the ten-hour rule to be a clerical error.

[4/] Based on the facts then available to Freeze, *see Yellow Freight Systems, Inc. v. Reich,* 38 F.3d 76, 83 (2d Cir. 1994), we agree with the ALJ's conclusion that Freeze could rely on a projected trip time in excess of two hours in drawing his conclusion that the York/Allentown run would put him in violation of the 70-hour rule. R. D. & O. at 4; *see* HT at 108 (Kudrick, testifying that it takes "[a]pproximately two hours, two hour and fifteen minutes" to drive from York to Allentown); EX 3.

> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (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.

49 U.S.C. §31105(a)(1) (1994). Subsections (A) and (B) of the foregoing provision are referred to as the "complaint" clause and the "refusal to drive" clause, respectively. *See LaRosa v. Barcelo Plant Growers, Inc.,* ARB Case No. 96-STA-10, Rem. Ord., Aug. 6, 1996, slip op. at 1-3. Subsection (B) provides two categories of circumstances in which an employee's refusal to drive will be protected under the STAA, which are referred to as the "actual violation" and "reasonable apprehension" categories. 49 U.S.C. §31105(a)(1)(B)(i), (ii) (1994).

In support of the complaint in this case, the Assistant Secretary cites two Department of Transportation regulations that relate to the driver's fitness to safely operate a commercial motor vehicle and which are codified at 49 C.F.R. §§392.3 and 395.3(b) (1998). The first of these provisions, Section 392.3, is referred to as the "fatigue rule,"[5/] the other provision is one of the "hours of service" rules[6/] found at Part 395 of Title 49 of the Code of Federal Regulations. *See*

[5/] The fatigue rule provides:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. However, in a case of grave emergency where the hazard to occupants of the commercial motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place at which that hazard is removed.

49 C.F.R. §392.3 (1998).

[6/] Section 395.3 provides:

> §395.3 Maximum driving time.
>
> (a) Except as provided in §§ 395.1(b)(1), 395.1(f), and 395.1(i), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:

(continued...)

Cortes v. Lucky Stores, ARB Case No. 98-019, ALJ Case No. 96-STA-30, Fin. Dec. and Ord., Feb. 27, 1998. As indicated by the factual background provided *supra,* Freeze engaged in various activities related to the fatigue and hours of service rules.

Under the complaint clause, an employee's raising of a concern -- either formally or informally -- that is related to commercial motor vehicle safety standards constitutes protected activity. *See LaRosa,* slip op. at 3-5; *Ass't Sec'y of Labor and Moravec v. HC & M Transportation,* Case No. 90-STA-44, Sec. Dec., July 11, 1991, slip op. at 1-9. The raising of a concern regarding a violation of a commercial motor vehicle safety standard is protected by the STAA, regardless of whether the record establishes that such violation actually occurred. *See Yellow Freight Systems, Inc. v. Martin,* 954 F.2d 353, 356-57 (6th Cir. 1992).

Whether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances surrounding such refusal under the particular requirements of each of the two refusal to drive provisions. Under the "actual violation" category, a refusal to drive is protected only if the record establishes that the employee's driving of the commercial motor vehicle would have been in violation of a pertinent motor vehicle standard. *Yellow Freight Systems, Inc. v. Reich,* 38 F.3d 76, 81 (2d Cir. 1994); *Cortes,* slip op. at 4 (citing *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993)). Under the "reasonable apprehension" category, the employee's refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public. *Reich,* 38 F.3d at 82; *Jackson v. Protein Express*, ARB Case No. 96-194, ALJ Case No. 95-STA-38, Fin. Dec. and Rem. Ord., Jan. 9, 1997; *Brown v. Wilson Trucking Corp.,* Case No. 94-STA-54, Sec. Dec. and Rem. Ord., Jan. 25, 1996, slip op. at 4 and cases there cited. The statute requires an employee who refuses to drive under the foregoing provision to advise the employer regarding the perceived safety defect, thus providing an

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[6/](...continued)

> (1) More than 10 hours following 8 consecutive hours off duty; or
> (2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.
>
> (b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after --
>
> (1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
>
> (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. §395.3 (1998).

opportunity for the employer to address the concern and possibly to correct the source of that concern. *LaRosa,* slip op. at 3 and cases there cited.

A refusal to drive that is based on an employee's concern that his or her ability or alertness is materially impaired, conditions that are addressed by the "fatigue rule," may qualify for protection under either the "reasonable apprehension" or the "actual violation" provision of the STAA. *Turgeon v. Maine Beverage Container Services, Inc.,* Case No. 93-STA-11, Sec. Dec., Nov. 30, 1993, slip op. at 2-7; *Mace v. ONA Delivery Systems,* Case No. 91-STA-10, Sec. Dec., Jan. 27, 1992, slip op. at 7-8. An employee's refusal to drive that is related solely to the hours of service rules, and not also based on a reasonable fear that the undertaking of the driving assignment would pose a serious risk of injury, may qualify for protection only under the actual violation provision. *See Ass't Sec'y and Boyles v. Highway Express, Inc.,* Case No. 94-STA-21, Sec. Dec., July 13, 1995, slip op. at 3-4.

Pertinent to the protected activity element of Freeze's case, the evidence of record indicates that the following actions were taken by Freeze on January 9, 1998. At approximately 6:45 a.m., he declined an assignment that would have required him to drive from the York terminal to Alexandria, Virginia, and back to York, citing the 70-hour rule. R. D. & O. at 2; HT at 30-31 (Freeze), 88 (Baer). Between 7:16 a.m. and 8:52 a.m., while on his second York/Allentown run since midnight, Freeze concluded, based on a miscalculation of his hours, that he would be driving in violation of the 70-hour rule if he attempted to complete the York/Allentown round trip. R. D. & O. at 2; HT at 32-35, 55, 67-69 (Freeze). By 8:52 a.m., Freeze had returned to the York terminal, where he discussed his hours under the 70-hour rule with Baer and explained his return. R. D. & O. at 2; HT at 38-41(Freeze), 90 (Baer). When Baer pointed out Freeze's miscalculation and again dispatched Freeze on the York/Allentown run, Freeze declined on the basis that to undertake the assignment at that time would clearly put him in violation of the 70-hour rule. R. D. & O. at 2; HT at 37-39, 57 (Freeze). Freeze testified that another reason that he declined the final York/Allentown dispatch was because he was tired and that he had expressed that concern to Baer. HT at 38-39, 41; *see* R. D. & O. at 2.

The foregoing activities include both refusals to drive and the raising of safety related complaints. Because it is based on a miscalculation, Freeze's interruption of his 7:30 a.m. York/Allentown run cannot qualify for protection under the actual violation provision. *See Boyles,* slip op. at 3. In addition, Freeze's testimony does not indicate that he interrupted that run to return to the York terminal because he was reasonably apprehensive that his ability or alertness was materially impaired at that time, thus posing a risk of serious injury to himself or the public if he completed the assigned York/Allentown run. *See* HT at 31-41, 55, 90 (Freeze); *cf. Mace*, slip op. at 7-8 (finding that complainant had failed to establish that a reasonable person would have concluded that serious risk was posed and/or that complainant's ability or alertness were materially impaired). Thus, Freeze's interruption of his York/Allentown run did not constitute protected activity under the STAA.

Nonetheless, Freeze's final refusal to accept Baer's assignment of the York/Allentown run does qualify to invoke protection under both the actual violation and reasonable apprehension provisions of the STAA. Based on Freeze's testimony, which was credited by the ALJ, the record supports the conclusion that Freeze declined Baer's final assignment of the York/Allentown run

because he was concerned about his ability to make the drive safely,[7] in addition to his concern about completing the drive within the two hours and eight minutes that remained available for him to drive under the 70-hour rule. HT at 18-23, 34-42, 54-57, 60-70 (Freeze); GX 1-8; *see* R. D. & O. at 2; *cf. Sickau v. Bulkmatic Transport,* Case No. 94-STA-26, Sec. Dec., Oct. 21, 1994 (complainant fatigued with an inadequate number of hours remaining to drive). As the ALJ found, the evidence supports the conclusion that the York/Allentown run would have taken more than two hours and eight minutes, thus putting Freeze in violation of the 70-hour rule under Section 395.3(b)(2). *Cf. Turgeon,* slip op. at 5-6 (reconstructing hours of service based on estimated length of time spent driving between destinations).[8]

The evidence thus establishes that Freeze engaged in activity protected by the STAA on January 9, 1998. Knowledge that Freeze had engaged in protected activity is also established by the evidence, which indicates that Baer advised the CF decision-makers regarding the circumstances surrounding Freeze's refusal to accept Baer's final dispatch of the York/Allentown run. HT at 101-03 (Baer), 124-26 (Kudrick). The final issue to be determined is whether Freeze's protected activity contributed to the adverse action taken against him by CF. *See Clean Harbors Environmental Services,* 146 F.3d at 21.

The termination letter from CF advises Freeze that he was being terminated because "you directly refused a work order which was assigned to you by management of Consolidated Freightways, even after you were given an opportunity to resolve the situation." GX 11. As previously indicated, Freeze's refusal of Baer's final dispatch of the York/Allentown run clearly qualifies for protection under the STAA. The ALJ thus properly concluded that the evidence established a causal connection between CF's action against Freeze and the protected activity engaged in by Freeze on January 9, 1998. R. D. & O. at 4; *see Clean Harbors Environmental Services,* 146 F.3d at 23. At hearing, CF offered testimony that the action against Freeze was based on his failure to follow an established company practice. Baer and William Kudrick, the York terminal manager, testified that Freeze's return to the York terminal, after having begun his last run to Allentown, violated a company policy requiring drivers to telephone into the dispatcher whenever they encountered any difficulty with completing an assigned run. HT at 91, 100 (Baer), 118-21 (Kudrick). We agree with the ALJ's rejection of CF's evidence on this point, R. D. & O. at 4. Particularly in view of both documentary and testimonial evidence indicating that Freeze would have

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[7] At the time Freeze declined the final assignment, he had not slept for more than 24 hours. HT at 23. When Freeze had last slept prior to the morning of January 9, he had slept twelve hours, obviously in an attempt to prepare himself to be fully rested when next called by CF. HT at 20-23 (Freeze); GX 5, 6, 7; *see generally Somerson v. Yellow Freight System, Inc.,* ARB Case Nos. 99-005/-036, ALJ Case Nos. 98-STA-9/-11, Feb. 18, 1999, slip op. at 12-19 (addressing the "serious issue" of driver fatigue and cases involving that issue that have been decided under the STAA).

[8] We also note that Freeze's raising of a concern about the hours of service rules when he declined Baer's assignment of the Alexandria, Virginia, run qualifies as a protected complaint under the STAA. *See LaRosa*, slip op. at 3-5, and cases there cited.

avoided disciplinary action had he accepted Baer's final dispatch of the Allentown run on January 9, 1998, we agree with the ALJ's conclusion that the evidence does not establish that Freeze's return from the Allentown run was the basis for the termination decision. R. D. & O. at 4; HT at 37 (Freeze), 98 (Baer); GX 11. We further conclude that CF failed to establish that it would have taken the termination action against Freeze in the absence of his refusal to accept Baer's final dispatch of the York/Allentown run on January 9, 1998. *See Clean Harbors Environmental Services,* 146 F.3d at 23-25; *Madonia,* slip op. at 3 (citing *Mt. Healthy City School District Bd. of Education v. Doyle,* 429 U.S. 274 (1977) regarding dual motive analysis).

IV. Remedy

As previously stated, we agree with the ALJ's award of back pay with interest and of the cost to Freeze of maintaining his medical insurance during the sixty-day suspension period. *See* 49 U.S.C. §31105(b)(3)(A)(iii) (1994); 29 C.F.R. §1978.109(a)(1998). The Assistant Secretary objects to the ALJ's award of $150 in damages for expenses incurred by Freeze in attending a union arbitration hearing on the January 9, 1998 termination action taken by CF. In support of his objection, the Assistant Secretary urges that Freeze's arbitration hearing expenses do not qualify as costs "reasonably incurred by the complainant in bringing the complaint," as provided for by Section 405(b)(3)(B) of the STAA, 49 U.S.C. §31105(b)(3)(B) (1994).

We agree with the Assistant Secretary that Freeze's arbitration hearing expenses do not qualify as litigation costs under Section 405(b)(3)(B).[9/] *See Spinner v. Yellow Freight System, Inc.,* Case No. 90-STA-17, Sec. Dec., Sept. 23, 1992, *aff'd sub nom. Yellow Freight System, Inc. v. Martin,* 983 F.2d 1195 (2d Cir. 1993); *see also McCafferty v. Centerior Energy*, ARB Case No. 96-144, ALJ Case No. 96-ERA-6, Sept. 24, 1997, slip op. at 6 and cases cited therein (discussing the "plain language" doctrine of statutory construction). We conclude, however, that an award of $150 for the expenses incurred by Freeze in pursuing his union grievance at hearing is proper as a compensable damage under Section 405(b)(3)(A)(iii), on the following basis.

The STAA specifically allows for the recovery of "compensatory damages, including back pay." 49 U.S.C. §31105(b)(3)(A)(iii) (1994). The courts, the Secretary of Labor and this Board have construed this and similar whistleblower protection provisions to provide for "make whole" pecuniary remedies including the recovery of direct financial losses and consequential damages. *See Blackburn v. Martin,* 982 F.2d 125, 129-133 (4th Cir. 1992); *Smith v. ESICORP, Inc.,* ARB Case No. 97-065, ALJ Case No. 93-ERA-16, Fin. Dec. and Ord., Aug. 27, 1998, slip op. at 5 n.4; *Polgar v. Florida Stage Lines,* ARB Case No. 97-056, ALJ Case No. 94-STA-46, Ord., Mar. 31, 1997, slip op. at 3-4; *Creekmore v. ABB Power Systems Energy Servs., Inc.,* Case No. 93-ERA-24, Dep. Sec. Dec., Feb. 14, 1996, slip op. at 16-30; *Ass't Sec'y and Lansdale v. Intermodal Cartage Co.,* Case No. 94-STA-22, Sec. Dec., July 26, 1995, slip op. at 6-7, *aff'd sub nom. Intermodal Cartage Co. v.*

[9/] Section 405(b)(3)(B) of the STAA is implemented by Section 1978.109(a) of the pertinent regulations, which provides that a prevailing complainant's remedy should include an award of "the complainant's costs and expenses (including attorney's fees) reasonably incurred in bringing and litigating the complaint." 29 C.F.R. §1978.109(a) (1998); *see also* 29 C.F.R.§1978.104(a)(1998) (regarding issuance of preliminary order by Ass't Sec'y).

Reich, 113 F.3d 1235 (6th Cir. 1997) (table); *cf. Jones v. EG&G Defense Materials, Inc.*, ARB Case No. 97-129, ALJ Case No. 95-CAA-3, ARB Final Dec. and Ord., Sept. 29, 1998, slip op. at 21 and n.17 (holding that complainant had failed to establish that property foreclosures were causally linked to his termination and concluding that those financial losses therefore did not qualify as compensatory damages). In the instant case, there is a direct causal link between CF's retaliatory termination of Freeze and Freeze's expenditure of $150.00 to attend the arbitration of his union grievance. Freeze's challenge to the January 9, 1998 termination action through the union grievance proceeding resulted in Freeze's reinstatement to his former position with CF following a sixty-day suspension. Freeze's pursuit of the union grievance in this matter thus effectively served to mitigate his back pay losses, which is consistent with a terminated complainant's obligation under the STAA. *See generally Cook v. Guardian Lubricants, Inc.,* ARB Case No. 97-055, ALJ Case No. 95-STA-43, Second Dec. and Ord. of Rem., May 30, 1997, slip op. at 5-11 and cases there cited (addressing complainant's obligation to mitigate back pay losses); *cf. Creekmore,* slip op. at 29 (holding that complainant's job search expenses were compensable). In view of the circumstances in this case, as well as the prominent role played by negotiated grievance proceedings in cases arising under the STAA, *see* 29 C.F.R. §1978.112 (1998), we hold that the ALJ properly awarded Freeze $150 in damages to cover the expense of attending the arbitration hearing.

ORDER

Accordingly, Respondent Consolidated Freightways is **ORDERED** to:

1) Pay Complainant Jeffrey A. Freeze back pay in the amount of $7,300.43, plus interest at the rate provided at 26 U.S.C. §6621 (1994), to accrue from the date that each salary payment would have been paid during the sixty-day suspension period.

2) Pay Complainant Jeffrey A. Freeze damages to compensate for Freeze's maintenance of his health insurance in the amount of $621.35.

3) Pay Complainant Jeffrey A. Freeze damages to compensate for expenses incurred by Freeze in attending the arbitration hearing in South Carolina in the amount of $150.00.

4) Expunge from the Respondent's records any reference to the termination and suspension actions against Complainant Jeffrey A. Freeze that were initiated on January 9, 1998.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member