U.S. Department of Labor

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

In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

ARB CASE NO. 97-103

ALJ CASE NO. 96-STA-5

PROSECUTING PARTY,

DATE: September 17, 1997

and

KENNETH BURKE,

COMPLAINANT,

v.

C.A. EXPRESS, INC.

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

On May 20, 1997, the Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R. D. and O.) in this case arising under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1997). The ALJ recommended that the complaint be granted and awarded back pay.

The ALJ found that Respondent C.A. Express, Inc. (Express), wrongfully terminated Complainant Kenneth Burke (Burke), in retaliation for "complaints to the Respondent regarding the safety of Respondent's vehicles." R. D. and O. at 14. The ALJ relied upon subparagraph (B)(ii) of 49 U.S.C.A. §31105, regarding the "drivers' perceived threat of danger due to the operation of a commercial vehicle." R. D. and O. at 8.[1/] *Yellow Freight Systems, Inc. v. Reich*,

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[1/] The STAA provides, in pertinent part, as follows:

(continued...)

38 F.3d 76, 82 (2nd Cir. 1994). The ALJ found that Burke made "numerous complaints to Respondent's owner (Mr. Auckerman, Jr.) concerning the vehicles he was assigned to drive. R. D. and O. at 4. Further, the ALJ credited Burke's testimony, as supported and corroborated by the testimony of several other drivers, in holding that Express failed to repair the trucks that were identified as having safety defects.

Finally, the ALJ rejected the various alternative reasons put forth by Express as justification for the termination decision and concluded that, "[t]he evidence demonstrates that the Complainant was terminated for engaging in a protected activity namely, reporting safety concerns and violations to his employer in accordance with DOT regulations." R. D. and O. at 13.

The findings of fact, including the stipulations of the parties set out in the R. D. and O., are supported by substantial evidence and we adopt them as conclusive. 29 C.F.R. §1978.109(c)(3). Further, the ALJ's conclusions of law are fully supported by the applicable law and the record evidence.

Regrettably, we must remand the matter to the ALJ for a revision of the amount of back pay awarded. At page 15 of the R. D. and O., the ALJ awarded Complainant $5,754.48 in back

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[1/](...continued)

> (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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> (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.
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> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. §31105 (West 1997).

pay, computed to cover the period from his December 21, 1994 termination until he allegedly waived reinstatement to his former position on February 18, 1995. We agree, however, with the position of the Acting Assistant Secretary that, "[a] waiver of reinstatement is valid only when the employer has made an unconditional offer of reinstatement." Acting Assistant Secretary's Brief at 13, citing *Cook v. Guardian Lubricants*, ARB Case No. 97-055, May 30, 1997, slip op. at 2-5. Since there is no evidence of such an offer here (only of Complainant's acceptance of a part-time job with the R.M. Neff Company), we agree with the argument that the appropriate cut-off date regarding Complainant's back pay eligibility is April 30, 1995, when he was hired at a commensurate rate of pay. *See* R. D. and O. at 14.

Burke is, therefore, entitled to a back pay award of $11,936.20 (18.5 weeks -- from December 21, 1994 through April 30, 1995 -- times $645.20[2/] per week), less any interim earnings. We know that Burke worked part-time at Neff Company for some time, but do not know the total amount of wages he earned during this interim period. Upon remand, the ALJ shall determine the total amount of income earned by Burke at the Neff Company and subtract that amount from the back pay identified above. Interest shall be assessed on this amount pursuant to 29 U.S.C. §6621.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[2/] The weekly sum is calculated based upon a forty hour work week at $16.13 per hour.