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Issue Date: 27 September 2004

In the Matter of:

GERALD AGEE,
Complainant,

CASE NO: 2004 STA 40

v.

ABF FREIGHT SYSTEM, INC.,
Respondent.

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Statement of the Case

This case involves a claim of retaliation under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (STAA or Act). Respondent has filed a motion for summary decision asserting that the claim should be dismissed as moot because no case or controversy exists between the parties. Claimant opposed the motion contending that (1) a remedial abatement order is available, (2) he has not been made whole in that his attorney's fees and costs have not been paid, and (3) his injury falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. Claimant has filed a declaration by his attorney that Claimant has incurred attorney's fees and travel expenses in prosecuting his claim, to support his contention that the complaint is not moot. All reasonable inferences have been made in favor of Claimant as the nonmoving party. *See Lane v. Roadway Express, Inc.*, 2002-STA-38 (ARB, Feb. 27, 2004).

Findings of Fact

Gerald Agee (Claimant) worked for ABF Freight Systems, Inc. (Employer) as a commercial vehicle driver. Slightly before midnight on October 18, 2003, Claimant called his supervisor and explained that he could not work his shift the following day because he was sick. Claimant alleges that his "ability and alertness were so impaired due to illness that it would have been unsafe for him to operate a commercial vehicle on the highways." *Complaint of Gerald Agee*. In response, Employer issued a warning notice on October 22, 2003 citing Claimant for habitual absenteeism.

On February 11, 2004, Claimant filed a claim against Employer alleging that Employer violated the STAA. Section 31105(a)(1)(B)(i) of the STAA prohibits discharging or discriminating against an employee if the employee refuses to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." Federal Motor Carrier Safety Regulation § 392.3 states, in relevant part, that:

> 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.

Claimant alleged that reporting to work on October 19 would have resulted in a violation of § 392.3, and thus, Employer's warning notice violated the STAA. Claimant requested that Employer be ordered to: (1) expunge the disciplinary letter from Claimant's file, (2) abate its violations of § 31105, and (3) pay Claimant's costs and attorney's fees.

On March 22, 2004, the Regional Administrator for the Occupational Safety and Health Administration (OSHA) found that Employer did not discriminate or retaliate against Claimant by issuing the warning notice and, thus, did not violate 49 U.S.C. § 31105. Claimant filed a timely objection and request for a hearing pursuant to 49 U.S.C. § 31105(b)(2)(B) and 29 C.F.R § 1978.105.

At all times relevant to this suit, Claimant was a member of a bargaining unit represented by the International Brotherhood of Teamsters and was subject to a Collective Bargaining Agreement (Agreement). Under the Agreement, employers could not discipline employees for habitual absenteeism unless they first issued a warning notice informing the employee that the absenteeism was unacceptable. The Agreement also dictated that the warning notice "shall not remain in effect for a period of more than (nine) 9 months from the date of the warning." Per the Agreement, the disciplinary letter filed against Claimant was no longer in effect as of July 22, 2004.

Conclusions of Law and Discussion

An "Administrative Law Judge may enter summary judgment . . . if pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40. There is no genuine issue of material fact because it is undisputed that the warning notice no longer has any effect under the Agreement, and Employer has not disputed that Claimant incurred attorney's fees and costs. At issue is whether, as a question of law, the case is moot. Employer has the burden of demonstrating mootness. *See Lane v. Roadway Express, Inc.*, 2002-STA-38 (ARB, Feb. 27, 2004).

Article III of the United States Constitution limits federal courts to the adjudication of actual, ongoing cases and controversies. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). "An

actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Gilbert v. Nix*, 990 F.2d 1044 (8th Cir. 1993) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)); s*ee also Thomas Sysco Food Serv. v. Martin*, 983 F.2d 60, 62 (6th Cir. 1993). Although administrative proceedings are not bound by the constitutional requirement of a "case or controversy," the Administrative Review Board (ARB) has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot. *United States Dep't of the Navy*, ARB No. 96-185 (May 15, 1997).

In its *Motion for Summary Decision*, Employer argues that Claimant's complaint is moot because the nine month period required by the Agreement has passed and the warning notice issued on October 22, 2003 no longer has any effect. Thus, Employer contends, this tribunal no longer has any power to redress Claimant's injuries. Claimant concedes that it is no longer necessary to expunge the warning notice from his personnel file, but argues that his case is viable because Claimant is entitled to an order "directing [Employer] to abate its violations of the Act, as well as an award of attorney fees and costs." *Complainant's Brief Opposing Motion for Summary Judgment*, Case No. 204-STA-00040 (August 11, 2004). Claimant further alleges that the Secretary can adjudicate his claim because there is a reasonable expectation that "the same complaining party would be subject to the same action again." This tribunal concludes that the case is moot.

Plea for Attorney's Fees

The availability of attorney's fees for a prevailing party does not prevent a case from becoming moot. The United States Supreme Court and the ARB have both dealt summarily with arguments to the contrary. In *Lewis v. Continental Bank Corp*, the Supreme Court acknowledged that a finding of mootness would defeat Continental's claim for attorney's fees. The Court wrote: "This interest in attorney's fees is, of course, 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). In *Lane v. Roadway Express, Inc.*, the ARB dismissed the argument in a footnote. "Lane is only entitled to attorney's fees if an order has been issued under 49 U.S.C. § 31105(3)(B), following a decision that the STAA has been violated. Since no such decision and order have been issued, Lane is not entitled to attorney's fees at this time." *Lane v. Roadway Express, Inc.*, 2002-STA-38 (ARB, Feb. 27, 2004). Claimant is only entitled to attorney's fees if he prevails under § 31105. Claimant has not so prevailed. His potential entitlement to attorney's fees is not a sufficient interest to save his claim from mootness.

Order to Abate

Claimant's demand for an order "directing [Employer] to abate its violations of the Act" does not present an actual case or controversy. A claim becomes moot if "the injury is healed and only prospective relief has been sought or when it becomes impossible for the court, through the exercise of its remedial powers, to do anything to redress the injury." *United States Dep't of the Navy*, ARB No. 96-185 (May 15, 1997). Claimant alleges that Employer violated § 31105 by issuing the warning notice on October 22, 2003. Claimant has not alleged an ongoing violation of the Act. His injury was, in effect, healed when the effect of the October 22, 2003 warning

notice expired pursuant to the Agreement. Employer never exploited the warning notice. Employer is not engaged in any ongoing activity that this tribunal can direct it to abate. Any prediction of such activity in the future would be purely speculative. An order to abate would simply be an order forbidding future violations of the Act. Claimant's demand is therefore a demand for prospective relief. It is impossible for this tribunal to redress Claimant's alleged injury, since the warning notice is no longer effective.

Capable of Repetition, yet Evading Review

Claimant has not demonstrated a recurring injury sufficient to save the case from mootness. The "capable of repetition, yet evading review" exception to the mootness 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." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). "The exception applies only in 'exceptional situations' and only when both factors are simultaneously present." *Missouri ex. rel. Nixon v. Craig*, 163 F.3d 482, 485 (8th Cir. 1998); *see also ConnAire, Inc. v. Sec'y, United States Dep't of Transp.*, 887 F.2d 723, 725-26 (6th Cir. 1989). While the issuance of a warning notice could recur, the record does not demonstrate any likelihood that it will recur. Claimant has not identified a pattern of violations by Employer. He has pointed only to an isolated incident. Nor has Claimant alleged that he expects to miss work in the future and will be wrongfully disciplined for so doing. There is also a probability that Claimant would have significant control over whether such a circumstance would arise. In any event, because of the time constraints imposed upon such whistleblower complaints, this tribunal will not assume that a challenged action could not be fully litigated prior to the prescribed expiration of a warning notice under the Agreement. Thus, the exception to the mootness doctrine for cases "capable of repetition, yet evading review" does not apply. *See Nixon v. Craig*, 163 F.3d 482 (8th Cir. 1998).

Claimant argues that the warning notice itself creates such an expectation of recurrence. The notice states: "This warning letter is being issued with the understanding that future incidents of this nature will result in more severe disciplinary action up to and including discharge." The notice, by its very purpose, warns Claimant of the possibility of future sanctions. This possibility, however, terminated nine months after Employer issued the notice. The sanctions threatened in the notice are the very sanctions that have become moot because the *sine qua non* of their invocation is the now wholly ineffectual warning notice. Under the Collective Bargaining Agreement, Employer cannot base "more severe disciplinary action" on the notice.

Because this tribunal cannot redress Claimant's alleged injury from a warning notice that no longer has any disciplinary or other effect, because there is no genuine dispute as to any material fact, because the challenged action has not been shown to be reasonably likely to recur, and because the existence of attorney's fees and costs is insufficient to preserve a case or controversy in this circumstance, this case is moot. Summary judgment in favor of Respondent is therefore appropriate.

RECOMMENDED ORDER

Respondent's motion for summary decision is granted, summary judgment is entered in favor of Respondent, and the complaint under the STAA is dismissed with prejudice.

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Edward Terhune Miller
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).