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Issue Date: 18 November 2004

CASE NO.: 2004STA00046

IN THE MATTER OF:

ANTHONY J. CIOFANI,
Complainant,

v.

ROADWAY EXPRESS, INC.,
Respondent.

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

Statement of the Case

This case involves a claim of retaliation under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. A. § 31105 (STAA or Act) and the Regulations found at 29 C.F.R. Part 1978. The Respondent filed a Motion to Dismiss Complaint's Objection to the Secretary's Findings & Order contending that the complaint should be dismissed as moot, because no controversy exists between the parties. The Respondent has withdrawn the disciplinary letters that were the subject of the complaint. Complainant filed an Opposition to the motion contending that this complaint is not moot, because Complainant's attorney fees and costs have not been paid, Respondent has not been ordered to abate its violations of the Act, and "there is a reasonable expectation that he will be subjected to the same adverse action again."

Respondent's motion will be evaluated under 29 C.F.R. Part 18, specifically § 18.40 (Motion for Summary Decision), and § 18.41 (Summary Decision). All reasonable inferences have been made in favor of Complainant, the nonmoving party. See *Lane v. Roadway Express, Inc.*, ARB No. 03-006, ALJ No. 02-STA-38 (ARB, Feb. 27, 2004).

Findings of Fact

Anthony J. Ciofani (Complainant) works as an over-the-road truck driver for Roadway Express, Inc. (Respondent). On January 27, 2004, Respondent issued Complainant a suspension letter for "excessive absenteeism" when he did not report to work. The Respondent later issued Complainant a suspension letter on February 17,

2004 for "excessive absenteeism." On March 1, 2004, Respondent issued Complainant another suspension letter for "excessive absenteeism" for not reporting to work.

On or about March 22, 2004, Complainant filed a timely complaint with the Occupational Safety and Health Administration ("OSHA") claiming that Respondent disciplined him in retaliation for refusing to operate one of its trucks when the road was covered with an eight inch snowfall, when he was taking prescription medication after dental work, and on other occasions when he was too ill and fatigued to operate a commercial motor vehicle.

Complainant alleged that Respondent violated the STAA. Section 31105(a)(1) of the STAA prohibits discharging, disciplining, or discriminating against an employee regarding pay, terms, or privileges of employment, because – "(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 . . . ."

The Federal Motor Carrier Safety Regulations, at 49 C.F.R. § 392.3, state 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.

The Regulations further state at § 392.14, the following about hazardous conditions:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated.

On May 4, 2004, the OSHA Regional Administrator found that the Respondent did not discriminate or retaliate against Complainant by issuing the disciplinary letters, and thus, did not violate 49 U.S.C.A. § 31105. The Regional Administrator further found that "Respondent disciplined Complaint because of his chronic unexcused absenteeism and the discipline was unrelated to adverse weather conditions or prescribed medication." The investigation evaluated evidence related to Complainant's suspension letters dated January 27, February 17, and March 1, 2004, as raised by Complainant's March 22, 2004 complaint.

On May 20, 2004, Complainant filed a timely objection and request for hearing pursuant to 49 U.S.C.A. § 31105(b)(2)(B) and 29 C.F.R. § 1978.105.

On June 14, 2004, Respondent rescinded Complainant's January 27, 2004 suspension letter. At a grievance hearing on or about June 21, 2004, Respondent withdrew the remaining February 17, 2004 and March 1, 2004 suspension letters. Also, on June 21, 2004, Respondent changed an April 9, 2004 suspension letter for an unexcused absence to a verbal warning. The April 9, 2004 letter was not part of Complainant's complaint.

Complainant did not serve any of the above mention suspensions for which he complained (January 27, February 17, and March 1) and all references to these suspension letters have been removed from his personnel file. By an August 25, 2004 affidavit -- submitted by Respondent separately from the Motion to Dismiss -- the manager of Complainant's worksite stated that Respondent has permanently withdrawn Complainant's "January 27, 2004, February 17, 2004, and March 1, 2004 suspension letters, all references to such suspension letters have been removed from Mr. Ciofani's personnel file, and Roadway will not use the withdrawn suspension letters in any future disciplinary action." This manager also stated in his affidavit that the Complainant "did not serve any of the withdrawn suspensions and, therefore, he did not and will not incur any lost time, wages or benefits related to such suspensions."

Conclusions of Law and Discussion

In accordance with 29 C.F.R. § 18.40 (Motion for Summary Decision), "Any party may . . . move with or without supporting affidavits for a summary decision on all or any part of the proceeding." The administrative law judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters official noticed show that there is no genuine issue as to any material fact and that a party is entitled to a summary decision." Pursuant to 29 C.F.R. § 18.41, "Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard." Since I will also consider additional documents in the case file, including the initial complaint, OSHA investigation, and Respondent's August 25, 2004 affidavit (Complainant was provided extra time to respond to this affidavit), I will evaluate Respondent's motion as a Motion for Summary Decision. See also *Lane v. Roadway Express, Inc.*, *supra*, footnote 2 at page 3, which suggests this is the proper way to evaluate such a motion under these circumstances.

The issue to be determined is whether the complaint is moot as, advocated by Respondent, because there is no remaining issue in controversy since (1) no suspensions were served, and (2) Respondent withdrew the suspension letters from Complainant's personnel records. Complainant argues this complaint is not moot, because (1) Complainant's attorney fees and costs have not been paid, (2) the Respondent has not been ordered to abate its violations of the Act, and (3) Complainant

believes "there is a reasonable expectation that he will be subjected to the same adverse action again."

Article III of the United States Constitution limits federal courts to the adjudication of actual, ongoing cases and controversies. *Deakins v. Managham*, 484 U.S. 193, 199 (1988). An actual controversy must exist at all stages of review, and not simply on the date the action was initiated. *Rettig v. Kent City School Dist.*, 788 F.2d 328, 330 (6th Cir.), *cert. denied*, 478 U.S. 1005 (1986). A case will become moot when the requested relief is granted or no live controversy remains. *Deakins*, 484 U.S. at 199; see also *Lane v. Roadway Express, Inc.*, supra.

The Administrative Review Board (ARB), in *Lane v. Roadway Express*, *supra*, provides relevant guidance to this issue of mootness. *Lane,* at pages 2-3, held that "Under Article III of the Constitution, the jurisdiction of federal courts extends only to actual case and controversies. A federal court may not adjudicate disputes that are moot." *Lane* further held that "Although administrative proceedings are not bound by the constitutional requirement of a "case or controversy," the Board has considered the relevant legal principles and case law developed under the doctrine in exercising its discretion to terminate proceedings as moot." In addition, the ARB held in *Lane* that "Mootness results "when events occur during the pendency of the litigation which render the court unable to grant the requested relief" . . . Allegations become moot when a party "has already been made whole for damage it claims to have suffered." . . . The burden of demonstrating mootness rests on the party claiming mootness." (with supporting citations).

When Complainant filed his Opposition to the Motion to Dismiss, he did not dispute the fact that the subject disciplinary letters have been withdrawn and will have no impact on Complainant. However, Complainant states he has not received all that he is entitled under the STAA. His "attorney fees and costs have not been paid, and the Respondent has not been ordered to abate its violations of the Act. Complainant is entitled to this type of relief under the Act." Complainant further states that "Even if the controversy herein were moot, the Secretary may still adjudicate this matter if there is a reasonable expectation that the same complaining party would be subjected to the same action again."

I find that the Complainant's complaints related to the three disciplinary letters, which were the subject of his initial complaint to OSHA, are moot. The letters have been withdrawn, the Complainant received no adverse consequences from the letters, and Complainant does not dispute this result. As to these disciplinary letters, there is not longer any dispute in controversy. In a similar case, the Sixth Circuit found an employee's STAA complaint to be moot, because his letter of warning for refusal to work as a truck driver on the advice of a physician, was removed from his record prior to the administrative hearing. See *Thomas Sysco Food Services v. Martin*, 938 F.2d 60 (6th Cir. 1993).

As explained below, I also find that Complainant's contentions are not persuasive that this dispute is not moot, due to his claim for attorney fees and costs, his request for an order to abate, and his belief he could be subjected to the same action in the future.

Plea for Attorney Fees

Under the statutory requirements of the STAA, Complainant does not qualify for attorney fees or costs. 49 U.S.C. § 31105(a)(3)(B) authorizes the Secretary, upon the Complainant's request and following the issuance of an order that § 31105(a) was violated, to assess costs incurred by the Complainant in bringing the complaint (including reasonable attorney fees). However, the Secretary found this complaint to be without merit and dismissed the complaint. In *Lane v. Roadway Express, Inc., supra*, the ARB stated 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 fees at this time." The Secretary did not issue an order under § 31105(a)(3)(A) in favor of the Complainant; therefore, I find that Complainant is not entitled to receive the costs incurred by bringing the complaint, nor attorney fees, while advocating his case before the Secretary or for the present *de novo* matter.

Order to Abate

Complainant contends that this claim is not moot since Respondent has not been ordered to abate its violations of the STAA. Pursuant to 49 U.S.C. § 31105(b)(3)(A), "If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to – (i) take affirmative action to abate the violation . . . ." However, for this case the Secretary has not found a violation; the Secretary has investigated the complaint and determined the complaint has no merit. The investigation found that there was "not reasonable cause to believe that Respondent violated 49 U.S.C. § 31105."

In addition, there is nothing left to abate. The Respondent has withdrawn the three letters of suspension that were the subject of the complaint. Complainant now possesses an affidavit from the workplace manager stating that these three letters have been removed from Complainant's personnel file, and can't be used for any disciplinary action. Respondent is not engaged in any ongoing activity that this tribunal can direct it to abate.

Capable of Repetition, Yet Evading Review

An exception to the mootness doctrine applies to those exceptional cases where a complainant makes a reasonable showing that he or she will again be subjected to the sanction. *ConnAire Inc. v. Secretary, United States Dep't of Transp.*, 887 F.2d 723, 725-726 (6th Cir. 1989). Complainant has not demonstrated a recurring injury such that this exception to mootness should apply. Here, the Complainant has not yet demonstrated the first or any injury or violation. 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. Secretary, United States Dep't of Transp., supra.*

The ARB provides further guidance in *United States Dep't of the Navy*, ARB No.96-185 (ARB May 15, 1997). The ARB declined the Navy's request to issue an advisory opinion to quash disputes that could possibly arise in the future. The Navy contended that the case should be reviewed because the Navy believed the case fell within the "capable of repetition yet evading review" exception to the mootness doctrine. The ARB, at page 3, found that "mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of "reasonable expectation" or "demonstrated probability" of recurrence necessary for application of the exception." The ARB added, at page 3, that "There is nothing to preclude a contractor from raising the issue presented here in the context of a live case or controversy."

Although Complainant referenced the exception to the mootness doctrine in his memorandum in opposition to dismiss, he did not reference any facts that would warrant application of the exception to this case. The record contains no evidence that Complainant will again be subject to the consequences of these three warning letters. The suspension letters of January 27, February 17, and March 1, 2004 were all withdrawn by June 21, 2004. The manager of Complainant's worksite has stated by affidavit that no action was taken related to the letters, and now the letters have been removed from Complainant's personnel file and will not be used for any disciplinary reasons. Now, those letters can not be utilized against Complainant.

Whether Respondent may issue Complainant another disciplinary letter or action for a future matter in violation of the STAA is too speculative to keep this current controversy from being moot. Thus far, the case file does not show that the Secretary has found any actions by Respondent toward Complainant that have violated the STAA. If the Complainant has future complaints based upon any potential future disciplinary actions regarding Complainant's attendance, he has the option to address them in a new complaint. The circumstances between the Respondent and Complainant do not present an exceptional situation such that any alleged violation could escape review. For Complainant's current complaint, he took his allegations to his union and to OSHA; each entity provided him a review.

Therefore, I find the Complainant has not demonstrated that the facts and circumstances of case support the "capable of repetition, yet avoiding review" exception.

In summary, the pleadings and other information within the case file show that there is no genuine issue as to any material facts, Complainant's complaint is moot, and Respondent is entitled to a summary decision.

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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WILLIAM S. COLWELL
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, N.W., Washington, D.C. 20210. See 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996). The parties may file with the Administrative Review Board, U. S. Department of Labor, briefs in support of or in opposition to the Recommended Decision and Order within 30 days of issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c).

WSC: bdw