U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 August 2008

CASE NO.: 2004-STA-26

In the Matter of:

JAMES M. MINNE and
ROBERT W. PRIVOTT
Complainants

v.

STAR AIR, INC.
Respondent

RECOMMENDED DECISION AND ORDER ON REMAND

This case arises under Section 405 of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. § 31105, and its implementing regulations, 29 CFR Part 1978. James Minne (Minne) and Robert Privott (Privott) (collectively Complainants) alleged that Star Air, Inc. (Respondent) violated the employee protection provisions of the STAA by removing them from the payroll and work schedule after they engaged in protected work refusals. A Recommended Decision and Order was issued by the undersigned on October 14, 2004. It was determined that Complainants engaged in protected activity when they refused to drive Respondent's vehicles based on their perception that the vehicles were not in compliance with applicable safety regulations. It was further determined, however, that Complainants had not suffered any adverse action as a result of their protected activity because they voluntarily elected not to return to their jobs with Respondent. Complainants were not granted relief under the STAA as they failed to demonstrate that they were fired or disciplined for their refusal to drive.

On October 31, 2007, the Administrative Review Board (ARB or the Board) issued an Order of Remand. The Board found that I "…did not make the determinations necessary in order to reach a conclusion as to whether Minne and Privott engaged in protected activity, or were subject to adverse action…." As a result, the Board remanded the case for further consideration of each element of Complainants' prima facie case.

In order to address the Board's remand, both parties were given until July 21, 2008 to file briefs. Complainants submitted a brief dated July 21, 2008. Respondent did not submit a brief to the court.

Protected Activity

The Board held that while I ultimately found that Complainants engaged in protected activity under 49 U.S.C. § 31105 (B)(i), I applied the wrong standard.[1] Initially, I found that Complainants had a "justified perception" that Respondent was violating numerous regulations, and, therefore, concluded that they had established protected activity. The Board stated that, in so finding, I applied the standard at § 31105(a)(1)(A), as opposed to the (B)(i) refusal provision.[2] The Board noted that under the (B)(i) provision, a complainant must prove that an *actual* violation of an applicable regulation would have occurred; a reasonable and good faith belief is not sufficient. [Emphasis added]. According to the Board, the "threshold issue" under a (B)(i) claim is whether a complainant's operation of a vehicle as scheduled would result in a violation of an applicable regulation. The Board stated, "[b]ecause a refusal under (B)(i) is not protected unless driving would have constituted a violation, and the ALJ did not determine whether driving would have constituted a violation, the ALJ's conclusion that Minne and Privott engaged in protected activity under (B)(i) was not reached in accordance with the law."

Consistent with the Board's remand, I must make a determination as to whether the Complainants would have actually violated an applicable regulation at the time(s) that they refused to drive. Stated differently, I must determine whether Respondent's efforts to correct safety violations were successful. Complainants allege that Respondent violated numerous Department of Transportation (DOT) regulations, including identification and labeling requirements (49 C.F.R. § 390.21), log book requirements (49 C.F.R. § 395.8), and numerous regulations dealing with the shipping of, and training regarding, hazardous materials.[3] Complainants further argue that the only violation remedied by Respondent was the reclassification of certain vehicles in a higher weight class. Complainants assert that other violations, including the failure to label the trucks pursuant to 49 C.F.R. §390.21, the failure to supply driver logs under 49 C.F.R. § 395.8, and the hazmat violations, continued until, at least, the time of the initial hearing.

A review of the record reveals that Respondent has violated numerous DOT regulations. 49 C.F.R. § 390.21 requires that every self-propelled commercial motor vehicle (CMV) be marked with the legal name, or single trade name, of the motor carrier operating the self-propelled CMV. The regulation further requires that the motor carrier identification number issued by the Federal Motor Carrier Safety Administration (FMCSA) appear on the vehicle preceded by the letters "USDOT." 49 C.F.R. § 390.21. Said markings must be legible and appear on both sides of the vehicle in letters that contrast with the background color of the CMV. 49

1. 49 U.S.C. § 31105 (B)(i) provides that a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because the employee refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to motor vehicle safety, health, or security.

2. Under 49 U.S.C.A. § 31105(a)(1)(A) a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because 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 or security regulation, standard, or order or has testified or will testify in such a proceeding.

3. Complainants allege a violation of the following regulations regarding hazardous materials; 49 C.F.R. §§ 172.316, 172.200-202, 172.300, 172.304, 172.504, 172.600, 172.602, 172.604, 172.700, 172.704.

C.F.R. § 390.21(c). The regulation applies to every self-propelled CMV, defined as any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property where the vehicle has a gross vehicle weight rating[4] or gross combination weight rating,[5] or gross vehicle weight, or gross combination weight, of 10,001 pounds or more, whichever is greater. 49 C.F.R. § 390.5.

Respondent's vehicles exceeded 10,001 pound weight limit and, therefore, fall within the purview of 49 C.F.R. § 390.21.[6] As such, Respondent's trucks are required to be branded with the name Star Air and the DOT number assigned to the company. The testimony, however, establishes that Respondent failed to put said information on any of the vehicles in the fleet. Minne testified that there were no US DOT numbers on the side of the vehicle he was driving at the time he left for Belleville. (TR p. 60). Privott testified that none of the commercial motor vehicles he drove contained any markings on the outside. (TR p. 109). Michael Neidert also testified that he never drove a truck with the company's name on it. (TR p. 380). Even Robert Custer, owner of Star Air, testified that his trucks were not marked because he did not believe that the law required such markings.[7] (TR pp. 254-55). Minne further testified that, as of the date of the hearing, July 14, 2004, the vehicles were still not in compliance. (TR p. 95). Minne explained that he had seen the trucks from the property adjoining Respondent's, stating that "…there is no name and base of operation. There's no DOT numbers." (TR p. 95).

Thus, the testimony establishes that the trucks were not labeled with the name of Respondent and the DOT number as required by 49 C.F.R. § 390.21. Respondent was specifically cited for the failure to properly label one of his trucks, yet no attempt was made to correct the violation. As the violation remained until the time of trial, Complainants driving to any of the shows they were scheduled to work would have resulted in an *actual* violation of 49 C.F.R. § 390.21. [Emphasis added].

Respondent also failed to comply with 49 C.F.R. § 395.8, which requires drivers to maintain in a log book, or via automatic on-board recording device, their duty status. 49 C.F.R. § 395.8. Minnie testified that he was not assigned a log book with his driving materials, and that he was not required to keep a driving log. (TR p. 52). Custer testified that he only gave log books to two employees who had Class A CDLs after the trucks were re-classified for a higher weight rating. (TR p. 247). The testimony of Custer establishes that the failure to provide log books was ongoing and had only been remedied with respect to two Class A drivers, despite the fact that

4. Gross vehicle weight rating (GVWR) is defined in 49 C.F.R. § 390.5 as "the value specified by the manufacturer as the loaded weight of a single motor vehicle."

5. Gross combination weight rating (GCWR) is defined in 49 C.F.R. § 390.5 as "the value specified by the manufacturer as the loaded weight of a combination (articulated) motor vehicle. In the absence of a value specified by the manufacturer, GCWR will be determined by adding the GVWR of the power unit and the total weight of towed unit and any load thereon."

6. A review of the load sheets indicates that all of the vehicles in Respondent's fleet (F450 4Star 2, F450 4Star 1, vehicle freight, F250 & Delta, and van with black trailer) regularly towed loads between 9,000 and 24,000 pounds. (EX 6-32, TR p. 273). With the weight of the truck/cab and the trailer added, all the vehicles in Respondent's fleet would have exceeded the 10,001 weight limit and come within the purview of 49 C.F.R. § 390.21.

7. There was some evidence presented that Respondent had a magnetic placard with the name of the company and the DOT number. Even if a magnetic placard was used, it does not meet the requirements of 49 C.F.R. § 390.21.

Privott specifically received a citation for failing to have a logbook. Since all drivers were not supplied with log books, at least up to the time of the hearing, there would have been an *actual* violation of 49 C.F.R. § 395.8 at the time(s) that Complainants refused to drive. [Emphasis added].

Complainants also allege violations of a myriad of regulations concerning the transportation of, and training regarding, hazardous materials. According to Complainants, Respondent loaded its trucks with quantities of ammunition that DOT regulations classify as hazardous. Respondent, on the other hand, asserts that the ammunition was not of sufficient quantity to qualify as hazardous. Respondent maintains that its loads were classified as ORM-D (Other Regulated Materials – Domestic), which does not require placarding or special handling.

Ammunition designated as 1.4(s) or 1.4(g), which the regulations identify as hazardous material, may be reclassified and shipped as ORM-D. Shipping material under the ORM-D classification is much simpler than shipping it under the hazardous materials requirements because there are no special handling or placarding requirements. Most small arms ammunition, such as 1.4(s), can be reclassified as ORM-D when shipped in certain configurations. See, 49 C.F.R. § 172.316. Ammunition classified as 1.4(g), which includes tracer and incendiary ammunition, can only be classified as ORM-D when it is shipped in quantities less than a total of 1,000 pounds. 49 C.F.R. § 172.504. 1.4 ammunition, regardless of whether it is (g) or (s) type, cannot be classified as ORM-D where it is shipped in containers weighing over 66 pounds. 49 C.F.R. § 172.504. Thus, any package that weighs over 66 pounds must keep its 1.4 designation and must comply with all of the requirements for the shipment of 1.4(s) materials.

The load sheets reveal that Respondent regularly carried 1.4 ammunition over the 66 pound container limit. The ammunition identified as 308 South African weighs 72 pounds per case, the 223 SA Berdan weighs 78 pounds per case, and 8mm Turkish weighs 110 pounds per case. Custer's testimony confirmed that a case of 8 mm Turkish weighs 110 pounds. (TR p. 238). The containers of the ammunition in question were not dismantled to bring them within the 66 pound weight limit. Complainants specifically testified that the sealed containers of the 8mm Turkish and the 308 South African remained intact because customers preferred to purchase them sealed. (TR pp. 57, 141-42). Thus, the weight of each type of ammunition prevented them from being reclassified as ORM-D materials. As such, the ammunition qualified as hazardous, and was subject to the shipping and labeling requirements of 1.4 materials. None of Respondent's vehicles, however, ever displayed hazmat placards, thereby establishing an *actual* violation of the regulations. (TR p. 192). [Emphasis added].

Materials shipped as 1.4(g) and 1.4(s) require shipping papers listing the hazardous materials at the beginning or in a contrasting color. 49 C.F.R. §§ 172.200-201. The shipping papers must also be prepared and retained in a specific manner. See, 49 C.F.R. § 172.201. A review of the load sheets reveals that Respondent failed to comply with the shipping paper requirements. For example, the hazardous materials do not appear first on the load sheets nor do they appear in a distinct color. Additionally, the boxes containing the hazardous material were not marked in accordance with 49 C.F.R. §§ 172.300 and 172.304, which requires that the markings appear distinct from other labels on the box and be unobscured. Markings on boxes containing the 1.4(g) ammunition, however, were routinely obscured. (TR pp. 111-12, 271, EX

4). Ron Defibaugh testified that he was instructed to paint over all 1.4 labels, including the 1.4(g), in violation of 49 C.F.R. § 172.304. (TR pp. 270-71). Testimony further established that no changes in inventory or shipping procedure have occurred since January of 2003. (TR p. 280).

Respondent further violated regulations dealing with emergency response to accidents involving hazardous materials. The regulations require that drivers whose load contains hazardous materials have certain emergency response training and contact information. See, 49 C.F.R. §§ 172.600-604. None of Respondent's drivers, with the exception of Mike Neidert, received hazardous materials training from Respondent or were supplied with contact information in the event of an emergency. (TR pp. 56, 106-7, 197).

The evidence establishes that numerous violations of DOT safety regulations, namely the failure to label the vehicles, the failure to provide a log book, and the failure to observe hazmat regulations, persisted until, at least, the time of the hearing on July 14, 2004. Respondent has admitted that the only repair that was undertaken in response to the violations identified in the citation was the reclassification of certain vehicles in a higher weight class. (TR p. 349, 351). As such, it is undisputed that the violations of DOT regulations were occurring at the time that Complainants refused to drive.[8] Complainants have met their burden to establish that driving any of the trucks in Respondent's fleet would have resulted in an actual violation of an applicable regulation.[9] Complainant's refusals to drive therefore qualify as protected activity under 49 U.S.C. § 31105 (B)(i).

Adverse Action

Complainants' complaints were initially denied because they failed to establish that they had suffered any adverse action. Specifically, I determined that Complainants were not fired or disciplined by Respondent because they voluntarily elected not to return to work. The Board held, however, that in finding that Complainants did not suffer an adverse action, I committed two errors.

The first error the Board identified was the failure to examine all three potential sources of adverse action. The Board noted that the STAA prohibits "discharge…discipline *or discriminat[ion]…regarding pay, terms, or privileges of employment*" because of protected activity. [Emphasis in original]. See, 49 U.S.C. § 31105(a)(1). The Board explained that "it is possible" that Complainants suffered discrimination when Star found replacement drivers for Complainants, yet their names remained on the assignment board and they were not offered alternative work that would eliminate the need for them to participate in possible violations. On remand, the Board directed that the possibility that Complainants were discriminated against be addressed.

8. Since the violations were not remedied by the time of the hearing, it is unnecessary to determine when each Complainant was next scheduled to drive or next appeared on the schedule.

9. The testimony established that drivers were randomly assigned a vehicle when they arrived at Respondent's facility. Since none of the trucks were labeled, drivers were never given log books, and no hazmat regulations were observed, driving any of the trucks would have resulted in an actual violation.

"[R]eplacement of an employee because he engages in a protected activity is just as much a prohibited act under the STAA as discharge for that reason." *Holloway v. Lewis Grocer Co*., 1987-STA-16, slip op. at 4 (Sec'y Jan. 25, 1988). Where an employer offers a legal work alternative after a protected refusal based on a violation, however, no adverse action has been taken. *Shoup v. Kloepfer Concrete*, 119-STA-33, slip. op. at 3 (Sec'y Jan. 11, 1996).

In the instant case, Complainants engaged in protected activity; the refusal to drive based on actual safety violations. Thereafter, Complainants were replaced by other drivers. The testimony establishes that neither Minne nor Privott was immediately removed from the assignment board; however, Custer testified that a few days before each show, he assigned other drivers to cover the shows that Complainants were scheduled to work. (TR p. 245, 310-11, 326-27, 431-32). The replacement occurred until Complainants' names were removed from the payroll in mid to late February. (TR p. 327). Despite their replacement by other drivers, Custer did not offer either Complainant an alternative position with the company, despite the availability of other positions, including "commissioned sales person over the phone" during the week. (TR p. 412). Rather, Custer testified that he would have been "happy" to give Minne and/or Privott the position if they had asked for it. (TR pp. 412-13).

It is apparent that, based on Complainants' protected activity, Respondent made the decision to replace Complainants. In so doing, Respondent was able to avoid taking responsibility for the maintenance of the trucks by substituting other drivers for Complainants. The replacement of Complainants is consistent with the statements made by Custer that he would find someone to drive the trucks if Complainants refused.[10] (TR p. 89, 132). The mere availability of a legal job alternative is not sufficient to absolve Respondent of liability. In the first instance, Custer did not actually offer the position to either Complainant. He merely stated that the jobs were available upon request. Furthermore, the job of commissioned sales representative over the phone was a position that was to be worked during the week. Both Complainants testified, however, that they worked for Respondent because they could work only during the weekends. (TR p. 96, 119). Thus, the alternative position, had it been offered, was not feasible. As such, the replacement of Complainants, and Respondent's failure to offer an alternative position to Complainants, is tantamount to discrimination. Complainants have, therefore, suffered an adverse action under the STAA.

The Board further held that I erred in finding that Complainants were not fired. Initially, I determined that it was Complainants who terminated the employment relationship by leaving voluntarily. Since I found that Complainants voluntarily quit, no adverse action could have been taken against them. The Board, relying on case law, found that it was Respondent's behavior that ultimately ended the employment relationship.

Where it is a complainant's conduct in voluntarily leaving his job that is the cause of the termination, the complainant has not suffered an adverse action. See, *Prior v. Hughes Transport., Inc*., ARB No. 04-044, ALJ No. 2004-STA-1. The Board cited to cases, however, finding that, "except where an employee has actually resigned an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee." For

10. While Custer denied that he made such comments (TR p. 391), his testimony on the issue is found not to be credible.

example, in *Ass't Sec'y & Vilanj v. Lee Eastes Tank Lines*, it was held that the employer violated the STAA when it considered complainant's refusal to drive as a "voluntarily quit" as opposed to addressing the condition raised by complainant. By implication, employer had engaged in adverse action when it decided that complainant had quit. Similarly, in *Ass't Sec'y & Lajoie v. Envtl. Mgmt. Sys., Inc*., 1990-STA-31, slip op. at 5-6 (Sec'y Oct. 27, 1992), an ALJ's determination that an employee had voluntarily quit was overturned. The Secretary held that the employer engaged in adverse action by discharging the employee when employer was not willing to address the complaints and considered complainant discharged if he failed to drive, even though employer had failed to address the complaints. See also, *Patterson v. Portch*, 853 F.2d 1399, 1406 (7th Cir. 1988)(holding that one form of termination by employer is constructive resignation; where the employee abandons (without formally resigning) his job and the employer treats the employee as if he had formally resigned).

Thus, the Board reasoned, Complainants' decision not to return to work, and Respondent's decision to remove them from the payroll, as opposed to addressing the issues they raised, "constituted a decision to terminate them for what Star presumed was job abandonment." Since any discharge under the STAA constitutes an adverse action, Complainants have established that they were terminated as a result of their protected activity in violation of the STAA.

Causation

The Board found that, while I did not directly address causation, I assumed that Respondent was justified in deciding that Complainants had left their jobs, and further assumed that Respondent did not violate the STAA for terminating them for their perceived job abandonment. The Board explained that if Complainants belief that the trucks were in violation of the regulations was correct, then their decision to stop driving may have constituted protected refusals to drive. The Board reasoned that if Complainants "…engaged in such protected refusals to drive, then it is possible that Star's decision to discharge them for job abandonment was based on protected refusals." The Board concluded that, "if Star treated protected refusals as grounds for any adverse action, including a determination that Minne and Privott had quit, then by definition Star violated the STAA."

Complainants have established that they suffered adverse action because they engaged in protected activity. Complainants engaged in protected work refusals when they refused to drive Respondent's trucks, which would have resulted in actual violations of DOT regulations. In light of the protected refusal, the Complainants were not at work. Because they were not at work, Complainants suffered adverse action when they were discriminated against and eventually terminated because of their absence. Under the circumstances, taking adverse action against Complainants because they were absent from work is the same as taking adverse action against them because they engaged in protected activity. See, *Ass't Sec'y & Ciotti v. Sysco Foods*, ARB No. 98-103, ALJ No. 1997-STA-30, slip op. at 7 (ARB July 8, 1998).

Thus, Complainants have established all the elements of a prima facie case under the STAA. Once a complainant establishes the elements of a prima facie case, "the burden of production shifts to respondent to present evidence that the alleged adverse action was motivated

by legitimate, nondiscriminatory reasons." *Galvin v. Munson Transportation*, ALJ No. 91-STA-41, slip op. at 4 (Aug. 31, 1992). Respondents have not introduced any evidence of a legitimate reason for the adverse action that they took against Complainants. Since Respondent has produced no further evidence, I find that it has violated the STAA. See, *Killcrease v. S & S Sand and Gravel, Inc.*, 92-STA-30 (Sec'y Feb. 2, 1993).

Damages

Having established that they were terminated in violation of the STAA, Complainants are entitled to relief including reinstatement and compensatory damages including back pay. 49 U.S.C § 31105(b)(3)(A). Complainants seek back pay, reinstatement (or front pay in lieu of reinstatement), injunctive or mandatory compliance with the rules, and attorney fees and costs incurred.

I. Reinstatement

The STAA expressly provides that a prevailing complainant is entitled to reinstatement. 49 U.S.C. §2305(c)(2)(B). While reinstatement is a statutory remedy, there may be cases where reinstatement is impossible or impractical. Reinstatement is considered impractical where there is hostility or animosity between the parties, where a "productive and amicable working relationship would be impossible," or where a complainant is no longer qualified to work for respondent. *EEOC v. Prudential Federal Savings and Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir.); See also, *Blum v. Witco Chemical Corp*., 829 F.2d 367 (3rd Cir.); *Dutile v. Tighe Trucking, Inc*., 93-STA-31 (Sec'y Oct. 31, 1994); *Pope v. Transportation Services, Inc*., 88-STA-8 (ALJ May 19, 1988).

I find that reinstatement is an appropriate remedy in the instant case. Complainants have indicated repeatedly that they enjoyed their job with Respondent, and that they would return to work with Respondent if they could do so legally. (TR pp. 96, 119). Respondent has not presented any evidence that there is a hostile relationship between the parties that would prevent the parties from having a "productive and amicable working relationship." As such, Complainants must be reinstated to their previous position with Respondent. Pursuant to 29 C.F.R. § 1978.109(b), an administrative law judge's decision and order concerning reinstatement shall be effective immediately upon receipt of the decision by the named person.

II. Back pay

An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA. *Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992), *citing Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec'y Aug. 21, 2986), slip op. at 50, *aff'd sub nom., Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). Back pay is awarded from the date of discharge until such time as the employer reinstates the complainant or makes him a bona fide offer of reinstatement. *Polewsky v. B & L Lines Inc.*, 90-STA-21 (Sec'y May 29, 1991). While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." *Cook v. Guardian*

Lubricants, Inc., ARB No. 97-005, ALJ No. 95-STA-43, slip op. at 14 n.12 (ARB May 30, 1997), citing *Pettway v. Am. Cast Iron Pipe Co., Inc*., 494 F.2d 211, 260-61 (5th Cir. 1974). Uncertainties as to what a complainant would have earned had he not been unlawfully discharged are to be resolved against the employer. See, *Clay v. Castle Coal & Oil Co., Inc*, 1990 STA-37 (Sec'y June 3, 1994).

The record contains very little information from which to calculate a back pay award. The parties are given a period of thirty (30) days to settle the issue of an appropriate back pay award and submit the same to the court for approval. If no settlement can be reached within thirty days, the court shall be notified, and the record will be reopened for an additional sixty (60) days for the submission of evidence, in the form of affidavits and deposition testimony, on the calculation of the award.

III. Other Relief

Respondent is further ordered to take affirmative action to abate all violations of the regulations. See, 49 U.S.C. § 31105(b)(3)(A)(i).

IV. Attorneys Fees and Costs

Complainants' counsel has thirty days to file a fully supported fee application and Respondent has twenty days in which to register any objections.

RECOMMENDED ORDER

IT IS ORDERED THAT RESPONDENT reinstate Complainants to their former positions, and take what affirmative action is necessary to abate all violations of the DOT regulations.

IT IS FURTHER ORDERED THAT both parties are given a period of thirty (30) days to settle the issue of the back pay award. If no settlement can be reached, this court shall be notified and the record will be reopened for a period of sixty (60) days for the submission of additional evidence on the calculation of back pay.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.