



**In the Matter of:**

**ROGER A. LUDER,**

**ARB CASE NO. 13-026**

**COMPLAINANT,**

**ALJ CASE NO. 2008-AIR-009**

**v.**

**DATE: January 7, 2015**

**CONTINENTAL AIRLINES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Howard T. Dulmage, Esq.; Law Offices of Howard T. Dulmage, PLLC;  
Houston, Texas**

*For the Respondent:*

**Donn C. Meindersma, Esq. and Melinda L. Kirk, Esq.; Conner & Winters,  
LLP; Washington, District of Columbia**

**Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge.**

### **ORDER AWARDING ATTORNEY'S FEES AND COSTS**

A United States Department of Labor (DOL) Administrative Law Judge (ALJ) concluded after a hearing that Continental Airlines, Inc. violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act)<sup>1</sup> when it disciplined Roger A. Luder because he complained

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<sup>1</sup> 49 U.S.C.A. § 42121 (Thomson/West 2011). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2014).

about an air safety issue.<sup>2</sup> Subsequently, the ALJ awarded Luder's attorney \$95,034.25 in fees and costs.<sup>3</sup> Continental appealed both decisions to the Administrative Review Board (ARB), which remanded them to the ALJ for further proceedings.<sup>4</sup> Following remand proceedings, the ALJ issued a decision awarding damages to Luder, which the ARB affirmed.<sup>5</sup> The ALJ then issued a second order awarding attorney's fees for subsequent costs and fees incurred, which Continental appealed.<sup>6</sup> We affirm the ALJ's attorney's fee awards.<sup>7</sup>

## STANDARD OF REVIEW

The ARB has the delegated authority to act for the Secretary of Labor in review of ALJ decisions issued pursuant to AIR 21, including attorney's fee awards.<sup>8</sup> The ARB reviews an ALJ's award of attorney's fees under an abuse-of-discretion standard and will set aside an award only if it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>9</sup>

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<sup>2</sup> *Luder v. Cont'l Airlines, Inc.*, ALJ No. 2008-AIR-009 (ALJ Nov. 6, 2009).

<sup>3</sup> *Luder v. Cont'l Airlines, Inc.*, ALJ No. 2008-AIR-009 (ALJ Feb. 18, 2010).

<sup>4</sup> *Luder v. Cont'l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009 (ARB Jan. 31, 2012); *Luder v. Cont'l Airlines, Inc.*, ARB No. 10-068, ALJ No. 2008-AIR-009 (ARB Feb. 22, 2012).

<sup>5</sup> *Luder v. Cont'l Airlines, Inc.*, ARB No. 13-009, ALJ No. 2008-AIR-009 (ARB Nov. 3, 2014).

<sup>6</sup> *Luder v. Cont'l Airlines, Inc.*, ALJ No. 2008-AIR-009 (ALJ Dec. 13, 2012).

<sup>7</sup> In their respective briefs, the parties requested the ARB to consider the total amount of attorney's fees awarded, incorporating by reference their arguments in previous briefs submitted to the ARB. We remanded the first attorney's fee award without prejudice, instructing the ALJ to consolidate any further fee awards to avoid bifurcation. We infer that the ALJ implicitly affirmed the first fee order; therefore, we find that both awards are pending before us.

<sup>8</sup> Secretary of Labor's Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). *See also* 29 C.F.R. § 1979.110.

<sup>9</sup> As noted in *Smith v. Lake City Enters., Inc.*, ARB Nos. 12-112, -113; ALJ No. 2006-STA-032, slip op. at 3 (ARB Sept. 12, 2013), "the ARB has embraced the abuse-of-discretion standard applied by federal appellate courts in the review of a district court's attorney fee award."

## DISCUSSION

As a successful AIR 21 complainant, Luder is entitled to receive all costs and attorney's fees reasonably incurred in bringing the complaint.<sup>10</sup> Reasonable attorney's fees simply means multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.<sup>11</sup> An attorney seeking a fee award must submit evidence documenting the hours worked and the rates claimed, as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs."<sup>12</sup>

Luder seeks a total of \$176,629.91 in fees and costs incurred after filing his complaint on January 3, 2008. Luder's attorney, Howard T. Dulmage, has represented him throughout the seven years of litigation. Continental does not dispute the hourly attorney or paralegal rates, or the amount of costs that Luder incurred. Therefore, we accept as final the ALJ's findings on these issues.

Continental raised several objections to both of Luder's attorney's fee requests. Continental requests that we reduce both awards because (1) some entries were allegedly duplicate charges, (2) more than half of the time-and-task entries were combined in single blocks of time rather than separating activities into separate time entries, and (3) some entries were allegedly vaguely-described and unnecessary.

The ALJ awarded Luder most of the fees and costs requested. In the first fee award, the ALJ found that the charges for attorney time and paralegal time were not duplicative but represented assistance that allowed the attorney to charge fewer hours. The ALJ disallowed some witness fees.<sup>13</sup> In the second fee order, the ALJ disallowed a

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<sup>10</sup> 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b). When an AIR 21 complainant establishes that his employer retaliated against him for whistleblowing activities, "the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing [of] the complaint upon which the order was issued." 49 U.S.C.A. § 42121(b)(3)(B).

<sup>11</sup> *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 2 (ARB Apr. 3, 2008).

<sup>12</sup> *Clemmons v. Ameristar Airways, Inc.*, ARB No. 11-061, ALJ No. 2004-AIR-011, slip op. at 4 (ARB Apr. 27, 2012).

<sup>13</sup> (Feb. 18, 2010) Order at 5.

few time entries and some travel costs to California. The ALJ determined that the challenged time-and-task entries were neither duplicative nor unnecessary but rather referred to work that assisted Luder's attorney in preparing for more than a dozen depositions, conducting a four-day trial, and submitting multiple briefs before the ALJ.<sup>14</sup> We find that the ALJ did not abuse his discretion in any of the costs and fees awarded.

### **Other issues regarding the fee petitions**

Continental erroneously argued that the ALJ lacked jurisdiction to issue an attorney's fee award while Continental's appeal on the merits was pending before the ARB.<sup>15</sup> The fact that Continental timely appealed the merits decision on November 20, 2009, did not deprive the ALJ of jurisdiction to issue a recommended fee award in a separate order.<sup>16</sup>

Continental also argued that Luder's fees should be reduced by 60 percent because Luder prevailed on only two of his five claims.<sup>17</sup> The ALJ did not abuse his discretion in finding that Luder had obtained "a high degree of success" in proving that Continental violated AIR 21 and had successfully achieved the make-whole remedy that AIR 21 provides.<sup>18</sup>

Continental objected to \$4,236.00 awarded for Luder's expert witness in the first evidentiary hearing because Luder's counsel failed to properly show the expert's qualifications in commercial aviation safety or to provide the specificity required in requesting a fee for his services.<sup>19</sup> We did not find that the ALJ abused his discretion in permitting Luder to present expert testimony related to the FAA (Federal Aviation Administration) rules and regulations related to safety issues, turbulence, the need for an inspection as required by the FAA rules, and the potential consequences of mental fatigue. The ALJ added that the time and charges for the expert's testimony were clearly

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<sup>14</sup> (Dec 13, 2012) Order at 3.

<sup>15</sup> Initial Brief of Respondent at 3-5.

<sup>16</sup> 29 C.F.R. § 1979.109(b).

<sup>17</sup> Respondent's Brief at 5-7.

<sup>18</sup> Order at 4. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (attorney's fees should not be reduced simply because plaintiff failed to prevail on every contention raised, where plaintiff obtains an otherwise excellent result).

<sup>19</sup> Respondent's Brief at 8-9.

detailed at the hearing and in an invoice dated April 7, 2009.<sup>20</sup> Based on this record, we can find no abuse of discretion in the ALJ's award of an expert witness fee and costs.

Lastly, on remand of Luder's initial fee petition, Continental argued that Luder failed to introduce psychological evidence of his damages during the trial of this case on the merits and was thus not entitled on remand to a re-opening of the record under Rule 18.54(c) or for the award of any fees related to the ALJ's re-opening of the record in that proceeding.<sup>21</sup> Upon appeal of the ALJ's decision awarding damages, the ARB affirmed the ALJ's re-opening upon remand of the evidentiary record as within the ALJ's discretion.<sup>22</sup> Consequently, we find that the ALJ acted within his discretion in awarding legal fees and costs incurred in submitting additional evidence and testimony on remand.

### CONCLUSION

We **AFFIRM** the ALJ's February 18, 2010 and December 13, 2012 orders in the corrected total amount of \$170,041.58,<sup>23</sup> plus interest from the date of this order on any unpaid amounts at the statutory rate found at 26 U.S.C.A. § 6621(a)(2).<sup>24</sup>

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

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<sup>20</sup> (Feb. 18, 2010) Order at 5. See hearing transcript (TR) at 415-41 (voir dire) and 393-414, 441-663.

<sup>21</sup> Respondent's Brief at 10-12.

<sup>22</sup> *Luder*, ARB No. 13-009, slip op. at 5.

<sup>23</sup> The ALJ made a slight mathematical error in his (Feb. 18, 2010) Order at 5-6.

<sup>24</sup> *Cefalu v. Roadway Express, Inc.*, ARB No. 09-070, ALJ No. 2003-STA-055, slip op. at 3 (ARB Mar. 17, 2011).