



In the Matter of:

MICHAEL BACKUS,

ARB CASE NO. 06-129

COMPLAINANT,

ALJ CASE NO. 2005-ERA-008

v.

DATE: September 30, 2008

**INDIANA MICHIGAN POWER
COMPANY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

John T. Burhans, *Burhans Law Offices*, St. Joseph, Michigan

For the Respondent:

**Donn C. Meindertsma, Melinda L. Kirk, *Conner & Winters*,
Washington, District of Columbia**

FINAL DECISION AND ORDER

Michael Backus filed a complaint alleging that the Respondent, Indiana Michigan Power Company (I&M), terminated his employment in violation of the employee protection provisions of the Energy Reorganization Act (ERA)¹ and its implementing

¹ 42 U.S.C.A. § 5851 (West 2007). Congress has amended the ERA since Backus filed this complaint. Energy Policy Act of 2005, Pub. L. 109-58, title VI, § 629, 119 Stat. 785 (Aug. 8, 2005). We need not decide whether the amendments would apply to this case, which was filed before their enactment date, because even if the amendments applied, they are not at issue in this case and thus would not affect our decision.

regulations.² A United States Department of Labor Administrative Law Judge (ALJ) concluded in a Recommended Decision and Order (R. D. & O.) that I&M did not violate the ERA when it fired Backus. For the following reasons we affirm the R. D. & O.

BACKGROUND

1. Backus' Duties and I&M Policies

I&M hired Backus in 1987 to work as a Mechanic in the Maintenance Department of its Donald C. Cook Nuclear Power Plant, located in Bridgman, Michigan. He performed repairs on various systems and structures within the plant. His direct supervisor was David Luther, an I&M Mechanical Maintenance Supervisor. The mechanics in the Maintenance Department were organized under a collective bargaining agreement (CBA) between I&M and the International Brotherhood of Electrical Workers (IBEW).³

At all relevant times, mechanics at the Cook Plant generally worked an eight-hour daily shift with a one-half hour meal time. The day shift ran from 7:30 a.m. until 4:00 p.m., while the afternoon shift ran from 3:30 p.m. until 12:00 a.m. Mechanics' hours were subject to I&M's Working Hour Limits (WHL) Policy, which was consistent with Nuclear Regulatory Commission (NRC) guidance on work hour limits. The policy indicated that workers were not to work more than: (1) 16 hours straight; (2) 16 hours in a 24-hour period; (3) 24 hours in a 48-hour period; or (4) 72 hours in a week.⁴

Under both the CBA and the WHL Policy, workers were allowed a break of at least eight hours following a 16-hour work period.⁵ Under the CBA, if any part of the eight-hour rest period fell within an employee's regularly scheduled shift, and he was released from work by management, the employee was paid for that part of the rest period. This was sometimes referred to as "rest pay."⁶

Maintenance needs occasionally required mechanics to work overtime in the form of additional hours or additional eight-hour shifts. In assigning overtime, supervisors

² 29 C.F.R. Part 24 (2007).

³ Joint Exhibit (JX) 8.

⁴ JX 9.

⁵ JX 8 at 15; JX 9 at IM000585.

⁶ JX 8 at 15; Transcript (Tr.) 909.

followed the procedures in I&M's Overtime Assignment Guidelines. Under these guidelines, supervisors maintained a list of overtime hours worked by the mechanics. The list ranked mechanics with the least number of overtime hours at the top, descending to those with the most hours at the bottom.⁷

If overtime was required, the I&M supervisor serving as "duty supervisor" for the week assigned work according to a process known as a "call-out." The duty supervisor determined which mechanics had the technical qualifications necessary for the overtime task and, starting at the top of the list, asked the eligible mechanics if they wished to volunteer for the assignment. If an insufficient number of mechanics volunteered, the duty supervisor went down the list a second time and forced the mechanic(s) with the fewest hours to work.⁸

I&M used a Fitness for Duty (FFD) Policy that required employees to report "immediately to their supervisor, management, or individual directing work, if unfit for duty [due to] fatigue, stress, medical conditions or treatments, etc."⁹ Pursuant to this policy, an employee could ask to be dismissed from work due to fatigue.¹⁰ All plant employees received annual training on the policy, and it allowed employees to seek redress above the supervisory level. Backus attended FFD Policy training on March 8, 2004.¹¹

Mechanics were also required to comply with the Rules of Conduct set forth in the employee handbook. The handbook indicated that a violation of any of the rules constituted grounds for disciplinary action, including discharge. Rule 24 indicated that discipline could be imposed for an employee's "failure to report for [a] regular assignment or refusal to work [an] overtime assignment without reason satisfactory to the company."¹² Rule 25 permitted discipline for "willful disobedience, insubordination, or failure to carry out any reasonable order."¹³

⁷ JX 4, 20.

⁸ Tr. 1231, 1530-36.

⁹ JX 6 at 1-7.

¹⁰ *Id.*; Tr. 1236.

¹¹ JX 12 at IM000323.

¹² JX 7 at IM001040.

¹³ *Id.*

2. The May 3 and 4, 2004 Call-Outs

The Cook Plant had a total of six condensate booster pumps (CBP), and each CBP had a discharge check valve to ensure that water discharged from the CBP did not flow back into it. On May 3, 2004, I&M mechanics began replacing components on one of the CBP discharge check valves. I&M management predicted that the mechanics would not be able to complete the task by the end of the afternoon shift. Jeff McLelland, the General Supervisor, asked Larry Woods, a Mechanical Maintenance Supervisor, to conduct an overtime call-out to obtain mechanics to continue work on the project.

Backus was working the day shift when Woods requested volunteers for a shift to commence at 10:30 p.m. on May 3. Backus volunteered. He asked Woods if, by working the overtime shift, he would receive “rest pay” for his May 4 day shift. Woods told Backus that he would ask McLelland. After speaking to McLelland, Woods told Backus that he had made a mistake and that the overtime shift was scheduled to start at 12:00 a.m. on May 4. Backus then declined the overtime. I&M did not force Backus to work this midnight shift.¹⁴

On May 4, 2004, Backus returned to work his regular day shift. IMP mechanics, including Backus, continued work on the CBP discharge check valve. John Arnold, Production Coordinator, was supervising the project. Due to continued difficulty with the task, Arnold concluded that another overtime shift was necessary. He asked DeWayne Timmons, the duty supervisor of the week, to schedule four mechanics to work an additional shift beginning at 10:30 p.m. on May 4.¹⁵

Timmons asked for volunteers. Backus and three other mechanics volunteered for the additional shift. After receiving volunteers, Timmons consulted with Joseph Giuffre, the Mechanical Maintenance Manager, who told Timmons to change the start time of the assignment to 12:00 a.m. on May 5. When Timmons informed the mechanics that he had changed the start time of the shift to midnight, all four mechanics declined the overtime request.¹⁶

Timmons used the overtime list to determine who would be forced to work the overtime assignment. Backus was high on the overtime list, so Timmons told him that he was being forced to work the midnight shift. Because Backus’ day shift ended at 4:00 p.m., he would be allowed an eight-hour rest period before the beginning of the midnight shift. Backus asked if he would receive rest pay for his regular day shift on May 5 following work on the midnight shift. Timmons told Backus that he was expected to

¹⁴ Tr. 709-710, 970, 1421-29.

¹⁵ Tr. 1462-72.

¹⁶ Tr. 713-14, 1528-36.

work both the midnight shift and his regular shift the following day, which meant that he would be required to work 16 hours in a row.¹⁷

Backus told Timmons that management had manipulated the start time to deprive him of rest pay. He also questioned Timmons' authority to force him to work the midnight overtime shift. According to Backus, he also told Timmons that forcing him to work both the midnight shift and his regular day shift was "unreasonable" and "unsafe."¹⁸ Backus did not inform Timmons that, since he had worked through lunch during his regular day shift on May 4, he would have been eligible for a rest period for his regular shift on May 5. And he did not inform Luther, his direct supervisor, about any concerns regarding the overtime assignment.¹⁹

Timmons forced three other mechanics to work overtime. He told Robert Bates, one of those mechanics, that he was required to report for the midnight overtime shift as well as his regular day shift the following day. Bates showed up for the overtime assignment but, at around 5:30 a.m., he became fatigued. Bates was relieved from duty, and he left the plant at 7:30 a.m. on May 5. Backus never reported for the midnight shift.²⁰

On May 6, I&M conducted a fact-finding meeting to determine why Backus failed to report for a forced overtime assignment. Backus, Luther, Donna Kelly (I&M's Human Resources Administrator), and William Scally (a Maintenance Mechanic and Vice President of IBEW Local 1392) attended the meeting. At the meeting, Backus and Scally questioned I&M's authority under the CBA to force mechanics to work overtime. Backus stated that one of the reasons he refused the overtime assignment was his belief that he would not have received rest pay for his regular shift the following day.²¹ He also said that it would have been "unreasonable" and "not safe" for him to have worked his regular day shift following a midnight shift.²² But Backus did not indicate during the meeting that he had told Timmons that the assignment was unsafe.

Giuffre and Kelly contacted Backus by telephone on May 7, 2004, and informed him that he was suspended for refusing an overtime assignment. Following this phone call, Kelly and Giuffre discussed Backus' refusal to report for overtime with I&M

¹⁷ Tr. 717, 1536-44.

¹⁸ Tr. 716-17, 721.

¹⁹ Tr. 986.

²⁰ Tr. 100, 118-121, 1542-43.

²¹ *Id.* at 9.

²² JX 21 at 4.

managers Ken Rollins (Maintenance Department Head), Paul Carteaux (Human Resources Manager), and Mike Finisssi (Plant Manager). They concluded that Backus' May 4, 2004 refusal to work overtime constituted insubordination. I&M discharged Backus on May 12, 2004, for his "failure to report for [an] overtime assignment as required."²³

4. Backus' ERA Complaint and Arbitration Award

Backus filed an ERA complaint with the Occupational Safety and Health Administration (OSHA) in July of 2004. He alleged that I&M discharged him from employment because he had engaged in ERA-protected activity. OSHA conducted an investigation and, on January 26, 2005, dismissed the complaint. Backus requested a hearing on his complaint before an ALJ.

While the complaint was pending before the ALJ, IBEW grieved Backus' discharge. On December 16, 2005, an arbitrator with the Federal Mediation and Conciliation Service issued a Decision and Award in which he concluded that Backus had no justification for refusing the May 4, 2004 overtime assignment. The arbitrator ordered that Backus be reinstated because he had not received adequate notice of the penalty for refusing the assignment. The arbitrator also held that, due to his insubordinate behavior, Backus was not entitled to any damages.²⁴

The ALJ issued an R. D. & O. on Backus' ERA complaint on July 5, 2006. He concluded that Backus had not engaged in ERA-protected activity when he refused the May 4 overtime assignment. Backus filed a petition for review of the R. D. & O. with this Board. Beyond reinstatement, Backus requests back pay, compensatory damages, corrections to his personnel file, posting of a decision in his favor, and attorney's fees and costs.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the ALJ's decision.²⁵ We review questions of law de novo.²⁶ When the parties appealed and filed their briefs with the Board, we reviewed

²³ JX 10 at IM001611.

²⁴ Complainant's Post-Hearing Brief, Exhibit 1 at 18-20.

²⁵ See Secretary's Order 1-2002, 76 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating the Secretary's authority to review ALJ recommended decisions under the ERA and other statutes set out at 29 C.F.R. § 24.100, 24.110 (2007)).

²⁶ 5 U.S.C.A. § 557(b) (West 1996).

questions of fact under the ERA de novo.²⁷ A new regulation calls for substantial evidence review.²⁸ Substantial evidence is that which is “more than a mere scintilla.” It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁹

Neither party has requested leave to supplement or amend its brief in light of the change in the standard of review for questions of fact. We therefore assume that neither party considers the change in the standard of review material to this case.³⁰ In any event, applying either standard of review, we conclude that I&M did not violate the ERA.

DISCUSSION

The ERA provides that an employer may not “discharge” or “otherwise discriminate” against an employee “with respect to his compensation, terms, conditions or privileges of employment” because the employee has engaged in certain protected activities. These activities include: (1) notifying an employer about an ERA or Atomic Energy Act (AEA) violation, (2) refusing to engage in a practice made unlawful by the ERA or AEA, and (3) commencing, causing to be commenced, testifying, assisting, or participating in an ERA or AEA proceeding.³¹

To prevail on his claim, Backus must prove by a preponderance of the evidence that he engaged in protected activity, that I&M knew about the activity and took adverse action against him, and that his protected activity contributed to the adverse action.³² Even if Backus proves that I&M violated the ERA, I&M may avoid liability if it demonstrates “by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of” protected activity.³³

²⁷ See *Sayre v. VECO Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-007, slip op. at 2 (ARB May 31, 2005).

²⁸ 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b).

²⁹ *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998).

³⁰ Cf. Fed. R. App. P. 28(j) (the parties have the burden of calling the court's attention to any pertinent and significant authorities that came to the parties' attention after its brief has been filed).

³¹ 42 U.S.C.A. § 5851(a).

³² 42 U.S.C.A. § 5851(b)(3)(C); see *Pierce v. U.S. Enrichment Corp.*, ARB Nos. 06-055, -058, -119, ALJ No. 2004-ERA-001, slip op. at 11 (ARB Aug. 29, 2008); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 7-8 (ARB Sept. 30, 2003).

Protected activity includes making an informal complaint about nuclear safety hazards to a supervisor. But such a complaint must implicate nuclear safety definitively and specifically.³⁴ Additionally, a whistleblower complaining about the employer's violation of the ERA must have actually believed that the employer was in violation, and that belief must be reasonable for an individual in the same circumstances with the same training and experience.³⁵

Backus argues that he engaged in ERA-protected activity on May 4, 2004, when he told Timmons that he would not work both the midnight shift and his day shift.³⁶ But the ALJ found credible Timmons' testimony that Backus did not mention any safety concerns during their conversation.³⁷ And Timmons' testimony was supported by the testimony of Kurt Layman, a mechanic who overheard the conversation between Backus and Timmons.³⁸

We conclude that, even if we accept Backus' contention that he called the assignment "unsafe," his statement to Timmons did not definitively and specifically implicate nuclear safety. At the hearing on his complaint, Backus stated, "I told him that I could not fulfill that assignment. It was unreasonable. It was unsafe."³⁹ Backus may have told Timmons that the assignment was "unsafe" and "unreasonable," but these words by themselves do not, in the context of this case, implicate nuclear safety. As we have noted in previous cases, "the ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern."⁴⁰

³³ 42 U.S.C.A. § 5851(b)(3)(D); *see also Pierce* at 11; *Kester* at 7.

³⁴ *Devine v. Blue Star Enters., Inc.*, ARB No. 04-109, ALJ No. 2004-ERA-010, slip op. at 6 (ARB Aug. 31, 2006), citing *Kester*, slip op. at 7-8.

³⁵ *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 27-28 (ARB July 14, 2000).

³⁶ Complainant's Brief at 33-34.

³⁷ R. D. & O. at 42-43.

³⁸ Tr. 73-75.

³⁹ *Id.* at 721. *See also* Tr. 720, 754, 920, 1015, 1021.

⁴⁰ *Abbasi v. Constellation Energy Group, Inc.*, ARB No. 06-136, ALJ No. 2006-ERA-007, -011, slip op. at 4 (ARB June 30, 2008), citing *American Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998).

Backus' testimony regarding his discussions with Timmons focused on the issues of rest pay and his rights under the CBA. According to that testimony, when Backus refused to work, he did not provide Timmons or any other I&M manager with any information indicating how the assignment jeopardized nuclear safety at the plant. Because he was an experienced mechanic who had previously worked irregular hours, simply stating that the assignment was "unsafe" was insufficient to invoke the ERA.

When Backus spoke to Timmons, he did not allege a violation, commence a proceeding, or refuse to engage in a practice made unlawful by the ERA or AEA. We therefore agree with the ALJ's conclusion that "[t]he preponderance of the evidence does not show that [Backus] implicated safety concerns to Mr. Timmons when he refused the forced overtime."⁴¹

We also agree with the ALJ's conclusion that, even if Backus told Timmons that the assignment was "unsafe" and "unreasonable," he did not have a reasonable belief that I&M violated the ERA by requiring him to show up for the shift that started at 12:00 a.m. on May 5, 2004.

The record indicates that Backus would have worked eight and one-half hours on May 4, 2004, prior to the start of the midnight shift. He therefore would have qualified for a rest period for his regular shift on May 5.⁴² Backus contends that he did not know about his entitlement to this rest period when he refused to work. But he, and not Timmons, was responsible for keeping track of his own hours.⁴³ When Timmons told Backus that he was expected to work his regular shift following the midnight shift, Backus had not told Timmons that he had already worked eight and one-half hours.⁴⁴

Even if Backus had not been eligible for a rest period following the midnight shift, the assignment from Timmons was neither unlawful nor a violation of the CBA.⁴⁵ Backus testified that he and other I&M mechanics had worked 16-hour shifts. One of those mechanics, Carl King, worked the shift that began at midnight on May 5, as well as his regular day shift, thereby working a 16-hour double shift as permitted by law.

Backus completed his regular shift at 4:00 p.m. on May 4, and he would have been given an eight-hour rest period prior to the start of the midnight shift. In addition, the FFD Policy would have permitted him to report to a manager or supervisor and

⁴¹ R. D. & O. at 42.

⁴² *Id.* at 768-70, 908, 1163.

⁴³ *Id.* at 766.

⁴⁴ *Id.* at 771.

⁴⁵ JX 21 at 4; Tr. 990-92.

request dismissal during either the midnight shift or his regular day shift on May 5 if he had become too tired to continue.⁴⁶ Such was the case with Bates, who was unable to complete the assignment and was sent home without reprimand.

Finally, we agree with the ALJ's conclusion that Backus did not engage in ERA-protected activity during either the May 6, 2004 fact-finding meeting or the May 7, 2004 phone call.⁴⁷ At the fact-finding meeting, Backus focused on what he perceived were his rights under the CBA. And Backus testified that, during the phone call, he again called the overtime assignment "unsafe."⁴⁸ But the record does not contain any evidence that, during either the meeting or the phone call, Backus recounted his reporting of a nuclear safety concern to Timmons when he refused the forced overtime.

In sum, it was not reasonable for an individual with the same training Backus had acquired as an I&M Maintenance Mechanic to believe that the overtime assigned to him on May 4, 2004 jeopardized nuclear safety. We conclude that Backus' refusal to work did not constitute protected activity under the ERA, an essential element of his case, and therefore his entire claim must fail.

CONCLUSION

The ALJ correctly concluded that Backus did not prove that he engaged in ERA-protected activity. Therefore, we **AFFIRM** the ALJ's R. D. & O. and **DENY** Backus' complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁴⁶ JX 6; Tr. 1306.

⁴⁷ R. D. & O. at 44-46.

⁴⁸ Tr. 808-09, 811.