



In the Matter of:

LAWRENCE J. RUDOLPH,

ARB CASE NO. 14-080

COMPLAINANT,

ALJ CASE NO. 2009-FRS-015

v.

DATE: JUN 28 2016

**NATIONAL RAILROAD PASSENGER
CORPORATION (Amtrak),**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

James C. Zalewski, Esq.; DeMars, Gordon, Olson, Zalewski, Wynner & Tollefsen; Lincoln, Nebraska

For the Respondent:

Chad P. Richter, Esq.; Jackson Lewis CP; Omaha, Nebraska

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Administrative Appeals Judge; and Luis Corchado, Administrative Appeals Judge. Judge Corchado, concurring.

ORDER AWARDING ATTORNEY'S FEES AND COSTS

This case arises under the employee whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Lawrence J. Rudolph claimed that his employer, National Railroad Passenger Corporation (Amtrak), violated the FRSA. A Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Amtrak

¹ 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2015), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 (2015) and 29 C.F.R. Part 18 Subpart A (2015).

had violated the FRSA on one of his whistleblower retaliation claims and awarded Rudolph \$5,000.00 in punitive damages.² Rudolph appealed to the Administrative Review Board (ARB), which affirmed the ALJ's decision in part, reversed in part, and remanded the case for further proceedings.³ Subsequently, the ALJ issued an attorney's fee award of \$1,000.00, plus \$1,209.12 in litigation expenses.⁴ Rudolph appealed to the ARB. We affirmed the litigation expenses, reversed the fee award, and remanded this case because of the ALJ's legal errors.⁵

On remand, the ALJ concluded that Amtrak had violated the FRSA beyond his initial findings and ordered relief.⁶ In a supplemental decision, he approved an attorney's fee of \$55,185.00, plus the previously affirmed \$1,209.15 in expenses for "the only partially successful representation" of Rudolph.⁷ Amtrak appealed this award to the ARB.

DISCUSSION

The ARB reviews an ALJ's attorney's fee award under an abuse of discretion standard.⁸ Having prevailed on the merits of his whistleblower complaint, Rudolph is entitled to a monetary award that includes his "litigation costs, expert witness fees, and reasonable attorney fees."⁹

² *Rudolph v. Nat'l R.R. Passenger Corp.*, ALJ No. 2009-FRS-015 (Mar. 14, 2011) (Decision and Order—Partial Approval of Complaint & Punitive Damages).

³ *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 27-28 (ARB Mar. 29, 2013).

⁴ *Rudolph v. Nat'l R.R. Passenger Corp.*, ALJ No. 2009-FRS-015 (May 10, 2011) (Supplemental Decision and Order—Partial Award of Attorney Fee & Litigation Costs).

⁵ *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB No. 11-055, ALJ No. 2009-FRS-015, slip op. at 2 (ARB Apr. 25, 2013).

⁶ The ARB affirmed this decision. *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB Nos. 14-053, -056; ALJ No. 2009-FRS-015 (ARB Apr. 5, 2016).

⁷ *Rudolph v. Nat'l R.R. Passenger Corp.*, ALJ No. 2009-FRS-015 (July 9, 2014).

⁸ For the ARB's authority, see Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

⁹ 49 U.S.C.A § 20109(e)(2)(C).

On appeal, Amtrak urges us to vacate the award and remand this case because the ALJ used the wrong reduction percentage in determining the reduced fee and improperly found a \$225.00 hourly rate for Rudolph's attorney reasonable. Amtrak Brief at 4-6.

In his April 24, 2014 decision on the merits of Rudolph's complaint,¹⁰ the ALJ concluded that Rudolph had prevailed in his FRSA complaint, but noted that he was "only partially successful." In considering the current fee petition from Rudolph's attorney, the ALJ noted this partial success and determined that he would consider the petition in two parts: first, he would determine whether an adjustment of the overall fee was warranted, given the partial success, and second, whether the hourly rate represented the prevailing market rate and whether the time charges were reasonable. The ALJ applied the four-step analysis in *Hensley v. Eckerhart*¹¹ and determined that Rudolph was the prevailing party because he established that his protected activities were contributing factors in the adverse actions he suffered, including medical disqualification and Amtrak's refusal to rehire him.¹²

The ALJ then applied the lodestar figure—the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate—and found that his initial rejection of 23 hours of claimed time to respond to Amtrak's summary judgment motion and submit a closing brief was appropriate. The ALJ found the remaining number of hours—285.2—to be reasonable for the initial adjudication of Rudolph's complaint in addition to the claimed number of hours for the attorney's work on remand, which resulted in a lodestar figure of \$66,090.00.¹³

Turning to Rudolph's "partial success," the ALJ found that the value of Rudolph's potential recovery was \$1.49 million, consisting of \$1.3 million (reinstatement), \$160,000.00 (back pay), \$25,000.00 (compensatory damages), and \$5,000.00 (punitive damages). The ALJ noted that if Rudolph had been fully successful, his actual potential recovery would have been \$1.785 million, consisting of \$1.3 million in front pay, \$160,000.00 in back pay, and \$325,000 in compensatory and punitive damages. The ALJ concluded that a comparison of the two amounts, which represented a successful recovery rate of 83.5 percent, warranted a reduction of the lodestar fee to \$55,185.00, "especially considering that the value of the reinstatement award is conditional." The ALJ then reduced the requested fee by 16.5 percent and awarded a total fee of \$55,185.00.¹⁴

¹⁰ *Rudolph*, ALJ No. 2009-FRS-015 (Apr. 24, 2014).

¹¹ 461 U.S. 424, 426 (1983).

¹² *Rudolph*, ALJ No. 2009-FRS-015 (July 9, 2014).

¹³ *Id.* at 4-7.

¹⁴ *Id.* at 7-8.

DISCUSSION

Having prevailed on the merits of his whistleblower complaint, Rudolph is entitled to a monetary award that includes his “litigation costs, expert witness fees, and reasonable attorney fees.”¹⁵ We review an ALJ’s attorney’s fees award under an abuse of discretion standard¹⁶ 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.¹⁷

First, Amtrak argues that the 16.5 percent fee reduction that the ALJ used should have been significantly higher because the value of Rudolph’s reinstatement, which the ALJ determined was \$1.3 million through his 2024 retirement, was conditioned on whether Rudolph would be found mentally fit for duty. Amtrak claims that the reinstatement value was actually zero, since Rudolph was reinstated in 2010.¹⁸

First, nothing in the record before the ALJ suggests that Rudolph was reinstated in 2010 and thus had no claim to back or front pay. In 2011, the ALJ initially determined that, although Rudolph was entitled to \$5,000.00 in punitive damages, reinstatement and the award of back pay were inappropriate.¹⁹ On appeal, the ARB reversed this decision and remanded.²⁰ Thus, Rudolph was not entitled to reinstatement until the ALJ ruled in his favor.²¹

Second, the ALJ properly compared the actual potential value of Rudolph’s full recovery with the actual result, noting that reinstatement was dependent on Rudolph’s mental ability to perform the duties of a conductor.²² Further, while Rudolph may not have received the full amount of the \$1.3 million in front pay for reinstatement, he is now entitled to reinstatement dependent on his mental status and his compensatory and

¹⁵ 49 U.S.C.A § 20109(e)(2)(C).

¹⁶ For the ARB’s authority, see Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

¹⁷ *Smith v. Lake City Enters., Inc.*, ARB Nos. 12-112, -113; ALJ No. 2006-STA-032, slip op. at 3 (ARB Sept. 12, 2013).

¹⁸ Amtrak Brief at 4-6.

¹⁹ *Rudolph*, ALJ No. 2009-FRS-015 (Mar. 14, 2011).

²⁰ *Rudolph*, ARB No. 11-037 (Mar. 29, 2013).

²¹ *Rudolph*, ARB Nos. 14-053, -056 (Apr. 5, 2016).

²² Rudolph’s attorney notes that since Rudolph “has been reinstated, he has now received basically an award of full back pay and benefits.” Rudolph Brief at 3.

punitive damages were increased by 500 percent. Thus, he has now achieved “essentially full relief.”²³


Amtrak also argues that the ALJ should have reduced the \$225.00 hourly fee Rudolph’s attorney charged because he had previously determined that \$200.00 an hour was reasonable. This argument is unavailing. Rudolph’s attorney proffered ample evidence that \$225.00 an hour is at the lower end of the prevailing rate in the local community.²⁴ Further, as Rudolph’s attorney points out, he voluntarily reduced his customary fee in his first fee petition in 2009 given the ALJ’s partial approval of Rudolph’s complaint.

CONCLUSION

Accordingly, the Board **AFFIRMS** the ALJ’s award of attorney’s fees and costs for services performed before the ALJ. Rudolph’s attorney shall have thirty (30) days from receipt of this Order in which to file a fully supported statement with the ARB for costs and fees incurred opposing the ALJ’s initial decision and his remand decision, and contesting Amtrak’s current appeal of the ALJ’s award of fees and costs, with simultaneous service on opposing counsel. Thereafter, Amtrak shall have thirty (30) days from its receipt of the statement to file a response.

SO ORDERED.


PAUL M. IGASAKI
 Chief Administrative Appeals Judge


E. COOPER BROWN
 Administrative Appeals Judge

²³ *Furland v. Am. Airlines, Inc.*, ARB Nos. 09-102, 10-130; ALJ No. 2008-AIR-011, slip op. at 11 (ARB July 27, 2011). *See also Hensley*, 461 U.S. at 435 (attorney’s fees should not be reduced simply because plaintiff failed to prevail on every contention raised, where plaintiff obtains an otherwise excellent result).

²⁴ *See Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 3 (ARB Apr. 3, 2008) (party requesting fees must demonstrate the reasonableness of the hourly fee by producing evidence that the requested rate is in line with fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation).

Judge Corchado, concurring:

I agree to affirm the ALJ's ultimate ruling on the fee award because I find Amtrak's appellate arguments are unpersuasive. I only point out that the basis for the ALJ's reduction of Rudolph's fee request is not entirely convincing to me. Rudolph succeeded in proving his overall claim: he lost his position as a result of unlawful whistleblower retaliation. Nevertheless, because Rudolph did not appeal the ALJ's order, we cannot consider increasing the ALJ's award.



LUIS A. CORCHADO
Administrative Appeals Judge