

In the Matter of:

NICHOLAS AYMOND,

ARB CASE NO. 16-029

and

**ALJ CASE NOS. 2014-FRS-020
2014-FRS-021**

TIMOTHY MARTINO,

DATE: August 30, 2017

COMPLAINANTS,

v.

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

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

W. C. Tucker, Jr., Esq.; *Maples, Tucker & Jacobs, LLC*, Birmingham, Alabama

For the Respondent:

Megan A. Kinsey-Smith, Esq.; *Amtrak Law Department*, Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Leonard J. Howie III, *Administrative Appeals Judge*; and Tanya L. Goldman, *Administrative Appeals Judge*

**ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL
DECISION AND ORDER AWARDING ATTORNEY'S FEE**

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Nicholas Aymond and Timothy Martino filed complaints with the United

¹ 49 U.S.C.A. § 20109 (Thomson Reuters 2016), 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 (2016).

States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that their employer, the National Railroad Passenger Corporation (Amtrak) treated them disparately in retaliation for reporting occupational injuries. After a formal hearing, an Administrative Law Judge (ALJ) issued a Decision and Order in which the ALJ found that Amtrak unlawfully discriminated against Aymond and Martino in violation of the FRSA and awarded each \$5,000 in back pay and \$1,000 in compensatory damages.² Amtrak did not appeal the ALJ's decision on the merits to the Administrative Appeals Board (ARB), and therefore it became a final order.³

Subsequently, the ALJ issued a Supplemental Decision and Order Awarding Attorney's Fee (S. D. & O.) awarding Counsel for Aymond and Martino a total of \$50,056.28 in attorney's fees and costs. Aymond and Martino have appealed this award. As the ALJ did not abuse his discretion in awarding Counsel for Aymond and Martino \$50,056.28 in reasonable attorney's fees and costs, the ALJ's S. D. & O. Order Awarding Attorney's Fee is affirmed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions in FRSA cases.⁴ The ARB reviews the reasonableness of an ALJ's attorney's fee award under an abuse of discretion standard⁵ and will set aside an award only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.⁶

DISCUSSION

A. Governing Law

As prevailing FRSA complainants, Aymond and Martino are "entitled to all relief necessary to make the employee whole . . . including litigation costs, expert witness fees, and reasonable attorney fees."⁷ A reasonable attorney's fee is calculated by "multiplying the number

² ALJ Decision and Order (D. & O.), ALJ Nos. 2014-FRS-020, 2014-FRS-021 (Sept. 11, 2015).

³ 29 C.F.R. § 1982.109(e).

⁴ Secretary's Order No. 02-2012 (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.

⁵ *Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-067, ALJ No. 2013-FRS-003, slip op. at 2 (ARB Aug. 12, 2015).

⁶ *Petersen v. Union Pacific R.R. Co.*, ARB Nos. 13-090, 14-025; ALJ No. 2011-FRS-017, slip op. at 3 (ARB Feb. 20, 2015).

⁷ 49 U.S.C.A. § 20109(e)(2)(C); *see also* 29 C.F.R. § 1982.105(a)(1).

of hours reasonably expended in bringing the litigation by a reasonable hourly rate.”⁸ A complainant’s “attorney seeking a fee award must submit evidence documenting the hours worked and supporting the rates claimed, as well as records identifying the date, time, and duration necessary to accomplish each specific activity and all claimed costs.”⁹ “The petitioning attorney also bears the burden of proof that the claimed hours of compensation are adequately demonstrated and reasonably expended.”¹⁰ Time and task entries must be “sufficiently detailed to demonstrate their reasonableness” and the use of block billing (the practice of grouping multiple tasks into a single time entry) is disfavored and “a percentage reduction of the requested fees” may be made “in lieu of attempting to surgically excise those that are not properly billed.”¹¹

B. The ALJ did not abuse his discretion in determining the award of reasonable attorney’s fees and costs

Counsel for Aymond and Martino requested an attorney’s fee of \$126,125, representing 252.25 hours of work performed by counsel at an hourly rate of \$500, plus \$54,018.37 for litigation expenses.¹² The ALJ awarded an attorney’s fee of \$45,912.14, for 39.57 hours of service at an hourly rate of \$400, 129.7 travel hours at an hourly rate of \$200, plus costs of \$4,144.14.¹³

Initially, the ALJ reduced Counsel’s requested hourly rate to \$400.¹⁴ As the ALJ’s reduction of Counsel’s requested hourly rate is not challenged on appeal, it is affirmed.¹⁵

Next, the ALJ found that all of Counsel’s travel time entries on his fee petition, amounting to 129.7 hours, used block billing without itemizing the amount of time Counsel

⁸ *Petersen*, ARB Nos. 13-090, 14-025, slip op. at 3 (quoting *Luder v. Cont’l Airlines, Inc.*, ARB No. 13-026, ALJ No. 2008-AIR-009, slip op. at 3 (ARB Jan. 7, 2015)).

⁹ *Petersen*, ARB Nos. 13-090, slip op. at 3-4 (quoting *Clemmons v. Ameristar Airways, Inc.*, ARB No. 11-061, ALJ No. 2004-AIR-001, slip op. at 4 (ARB Apr. 27, 2012)).

¹⁰ *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161; ALJ No. 2003-STA-055, slip op. at 4 (ARB Jan. 6, 2010).

¹¹ *Clemmons*, ARB No. 11-061, slip op. at 7; *Cefalu*, ARB Nos. 04-103, 04-161; slip op. at 4; *Evans v. Miami Valley Hosp.*, ARB Nos. 08-039, 08-043; ALJ No. 2006-AIR-022, slip op. at 8, 10, 12 (ARB Aug. 31, 2009).

¹² S. D. & O. at 5.

¹³ *Id.* at 22.

¹⁴ *Id.* at 13-14.

¹⁵ *Leiva v. Union Pacific R.R. Co., Inc.*, ARB Nos. 14-016, -017; ALJ No. 2013-FRS-019, slip op. at 8 (ARB May 29, 2015).

expended on actual work tasks and contained vague descriptions, making it “impossible to distinguish his travel time from other compensable activities” and “d[id] not indicate whether Counsel accomplished legal work while traveling.”¹⁶ The ALJ accurately noted that United States District Courts located within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, where this case arises, compensate travel time entries at 50 percent of an attorney’s hourly rate in the absence of documentation of any legal work accomplished during the travel time.¹⁷ Similarly, the ALJ noted that the ARB has endorsed a percentage reduction and applied a 15 percent reduction to fee petitions for vague and block-billed service time entries that make it impossible to discern between compensable and non-compensable services.¹⁸ Consequently, the ALJ reduced Counsel’s hourly rate from \$400 to \$200, or 50 percent, for his 129.7 hours of travel time entries on his fee petition.¹⁹

On appeal, Counsel argues that the ALJ should have reduced Counsel’s hourly rate for his 129.7 hours of travel time entries to \$250, or half of his requested hourly rate of \$500, or to a percentage smaller than 50 percent of his approved \$400 hourly rate. “The ARB has indicated that travel time is generally compensable, but often at a reduced hourly rate.”²⁰ Thus, applying the *Smith* and *Pollock* standard of charging half the hourly rate for travel time, the ALJ did not abuse his discretion in reducing Counsel’s hourly rate from \$400 to \$200 for his 129.7 hours of travel time entries on his fee petition, due to the vague and block billed entries for Counsel’s travel time.²¹

¹⁶ S. D. & O. at 14-16.

¹⁷ *Id.* at 16. *See Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993), *rev’g Watkins v. Fordice*, 807 F. Supp. 406, 414 (S.D. Miss. 1992) (holding that the district court did not abuse its discretion by reducing the hourly rate billed by 50 percent for travel time); *see also In re Babcock & Wilcox Co.*, 526 F.3d 824, 826, 828-829 (5th Cir. 2008); *Liberty Mut. Fire Ins. Co. v. Ford Motor Co.*, Civ. Action No: 15-5987, 2017 WL 67524, slip op. at 3 (E.D. La. Jan. 6, 2017) (unpub.) (attorney travel time is typically compensated at 50 percent of the reasonable hourly rate); *Guidry v. Jen Marine, LLC*, No. Civ.A. 03-0018, Civ.A. 03-1127, 2003 WL 23095590, slip op. at 7 (E.D. La. Dec. 24, 2003) (unpub.) (“Courts in this Circuit typically compensate travel time at 50% of the attorney’s rate in the absence of documentation that any legal work was accomplished during travel time.”).

¹⁸ S. D. & O. at 16-17 (citing *Cefalu*, ARB Nos. 04-103, 04-161, slip op. at 4 (Board may make a “percentage reduction” due to block billing)); *Evans*, ARB Nos. 08-039, 08-043, slip op. at 12 (applying a 15 percent reduction to the hours requested because of block billing).

¹⁹ S. D. & O. at 17.

²⁰ *Smith v. Lake City Enters., Inc.*, ARB No. 11-087, ALJ No. 2006-STA-032, slip op. at 14 (ARB Nov. 20, 2012) (citing *Pollock v. Cont’l Express*, ARB Nos. 07-073, -051; ALJ No. 2006-STA-001, slip op. at 17 (ARB Apr. 7, 2010) (establishing standard of charging half the hourly rate for travel time)).

²¹ *See Clemmons*, ARB No. 11-061, slip op. at 7; *Cefalu*, ARB Nos. 04-103, 04-161; slip op. at 4; *Evans*, ARB Nos. 08-039, 08-043; slip op. at 8, 10, 12.

In addition, the ALJ reduced 63.2 hours of the remaining 122.55 hours of Counsel's time entries for requested legal services by 15 percent to 59.35 hours, also due to block billing and vagueness.²² As the ALJ's reduction of 63.2 of Counsel's remaining requested hours to 53.72 hours is not challenged on appeal, it is affirmed.²³

The ALJ also considered that Counsel for Aymond and Martino only succeeded on one of the four retaliatory adverse actions they alleged to have suffered for reporting their occupational injuries.²⁴ Thus, due to Counsel's limited success, the ALJ reduced the number of hours Counsel requested, citing the Supreme Court's holding in *Hensley v. Eckerhart*, 461 U.S. 424, 436, 440 (1983).²⁵ The ALJ reduced the number of hours Counsel requested by 65 percent because he accorded Complainants 35 percent success, representing 25 percent success in establishing retaliation, plus 5 percent success for Aymond and Martino each in obtaining compensatory damages.²⁶ Consequently, the ALJ reduced the remaining 113.07 hours of compensable services that Counsel requested by 65 percent, to 39.57 hours of services.²⁷

²² S. D. & O. at 17-18; *see Clemmons*, ARB No. 11-061, slip op. at 7; *Cefalu*, ARB Nos. 04-103, 04-161; slip op. at 4; *Evans*, ARB Nos. 08-039, 08-043, slip op. at 8, 10, 12.

²³ *Leiva*, ARB Nos. 14-016, -017, slip op. at 8.

²⁴ Before the ALJ, Aymond and Martino alleged that they suffered four adverse actions:

- 1) Martino was denied a waiver of Amtrak's lien on his insurance claim as a result of his reporting an injury;
- 2) an Amtrak supervisor made intimidating/threatening comments regarding the reporting of their injuries;
- 3) Aymond was placed on a light duty, off-site assignment as a result of his reporting his injury;
- 4) they lost their overtime Atlanta work due to their reporting of injuries.

D. & O. at 4. While the ALJ determined that Aymond and Martino established retaliation due to their reporting of occupational injuries, he found that they only suffered one adverse action as a result, the loss of their overtime Atlanta work. D. & O. at 48-57. In addition, while Aymond requested \$45,000 in compensatory damages and Martino requested \$40,000 in compensatory damages, the ALJ awarded Aymond and Martino only \$1,000 each in compensatory damages. D. & O. at 69.

²⁵ S. D. & O. at 18-19.

²⁶ *Id.* at 18-20.

²⁷ *Id.* at 19-20.

Counsel contends on appeal that his work on establishing all four retaliatory adverse actions that Aymond and Martino alleged to have suffered was inextricably intertwined and, therefore, should not be reduced, pointing out that attorney's fees awarded may be more than the damages awarded to complainants²⁸ and the fact that the ALJ already reduced Counsel's requested hourly rate. But as the Board recently held in *D'Hooge v. BNSF Rys.*:

Hensley states that fees for completely unrelated claims can be subtracted as Congress, in the analogous civil rights area, did not intend to award fees for unrelated and unsuccessful claims. Even for related claims, the measure of success can justify a reduction to be reasonable. Excellent results for interrelated claims may merit full rates and full hours. Limited or partial success may merit deductions, even large deductions to be reasonable.^[29]

Moreover, a trial judge "has a large degree of discretion" in reducing attorney's fees for limited success in related claims.³⁰ Based on the facts in this case, Counsel did not meet his burden that the fees he requested for the related but unsuccessful claims were reasonable³¹ and, therefore, "has not demonstrated that the ALJ abused his discretion in reducing the attorney's fees" by 65 percent for limited or partial success.³²

Finally, the ALJ considered Counsel's request for litigation expenses. At issue on appeal, Counsel requested over \$15,000 in litigation expenses for legal research and writing performed by a hired outside attorney, Richard J. Riley, at an hourly rate of \$155.³³ The ALJ found that Counsel failed to provide Riley's credentials or specify the work Riley performed and the amount of hours of work he performed "that would enable the [ALJ] to determine the reasonableness of his rate and hours billed."³⁴

In addition, Counsel requested over \$18,000 in litigation expenses for travel.³⁵ The ALJ noted, however, that Counsel requested reimbursement for travel expenses that took place on a

²⁸ We note that, in any case, the ALJ's attorney's fees award is still larger than the damages award Complainants received.

²⁹ ARB Nos. 15-042, 15-066; ALJ No. 2014-FRS-002, slip op. at 13 (ARB Apr. 25, 2017).

³⁰ *D'Hooge*, ARB Nos. 15-042, 15-066; slip op. at 13 (citing *Hensley*, 461 U.S. at 436-437).

³¹ *Cefalu*, ARB Nos. 04-103, 04-161; slip op. at 4.

³² *D'Hooge*, ARB Nos. 15-042, 15-066; slip op. at 13 (citing *Hensley*, 461 U.S. at 436-437).

³³ S. D. & O. at 20-21.

³⁴ *Id.* at 21.

³⁵ *Id.* at 20-21.

day that Counsel did not bill any hours for travel on his fee petition. In fact, the ALJ notes that Counsel did not start billing for the matter until a month and a half after that requested travel reimbursement. Moreover, the ALJ found that the travel expense entries provided no description to allow the ALJ to determine whether the “travel costs included hotels, airline tickets, or ground transportation.”³⁶ Thus, the ALJ also determined that no award would be given for legal research from Riley and for travel reimbursement, as Counsel’s requests were “wholly non-descriptive, unsupported, and vague.”³⁷

On appeal, Counsel argues that Riley has worked with Counsel on other FRSA cases and that Counsel is willing to submit additional information to support Riley’s expenses. Similarly, Counsel contends that his travel expenses are documented and correlated with his time entries, and requests that the case be remanded to the ALJ to give Counsel the opportunity to provide any needed additional information to the ALJ.

Based on the facts in this case and the vagueness of Counsel’s requests for litigation expenses for Riley’s services and Counsel’s travel expenses, Counsel did not meet his burden of providing evidentiary support for these litigation expenses and, therefore, has not demonstrated that the ALJ abused his discretion in rejecting Counsel’s requests for these litigation expenses.³⁸

Counsel also contends that the ALJ erred in failing to consider a reply brief he filed with the ALJ after the filing of his fee petition and Amtrak’s response brief, and requests that the case be remanded for the ALJ to consider it. But the ALJ noted that Counsel filed a reply to Amtrak’s opposition to his fee petition and that Amtrak filed a response to Counsel’s reply.³⁹ Yet the ALJ held that Counsel’s reply and Amtrak’s response “will not be further considered . . . since both are essentially duplicative of the initial presentation and arguments, and lend no new persuasion.”⁴⁰ So, contrary to Counsel’s contention, the ALJ did consider Counsel’s reply brief.

Moreover, Counsel has not demonstrated on appeal how his reply brief was not duplicative of his initial fee petition, nor does our review of the reply brief that Counsel re-submitted with his appeal indicate otherwise. Thus, Counsel has not demonstrated that the ALJ abused his discretion in finding Counsel’s reply brief duplicative.

Consequently, as Counsel does not otherwise challenge the ALJ’s award of attorney’s fees and costs, the ALJ’s Supplemental D. & O. Awarding Attorney’s Fee, awarding Counsel

³⁶ *Id.* at 21.

³⁷ *Id.* at 22.

³⁸ *Petersen*, ARB Nos. 13-090, 14-025; slip op. at 3-4; *Clemmons*, ARB No. 11-061, slip op. at 4, 7; *Cefalu*, ARB Nos. 04-103, 04-161; slip op. at 4; *Evans*, ARB Nos. 08-039, 08-043; slip op. at 12.

³⁹ S. D. & O. at 2 n.2.

⁴⁰ *Id.*

\$45,912.14, for 39.57 hours of service at an hourly rate of \$400, 129.7 travel hours at an hourly rate of \$200, and costs of \$4,144.14,⁴¹ is affirmed.

Lastly, Counsel requests that the Board allow him to file a fee petition with the Board for his fees and costs in appealing the ALJ's Supplemental D. & O. Awarding Attorney's Fee. We note that in federal discrimination and retaliation claims, a plaintiff is entitled to a reasonable attorney's fee for services rendered in a successful appeal of the trial court's fee award.⁴² But an appellate court may not award attorney's fees for work done on an unsuccessful appeal of a trial court's award of attorney's fees to an employee who prevailed below on such claims.⁴³ Because the ARB affirms the ALJ's Supplemental D. & O., Counsel for Aymond and Martino is not entitled to attorney's fees for his unsuccessful appeal to the Board.

CONCLUSION

As the ALJ did not abuse his discretion in awarding Counsel for Aymond and Martin

⁴¹ See S. D. & O. at 22.

⁴² See *Quarantino v. Tiffany & Co.*, 166 F.3d 422, 428 (2d Cir. 1999) (holding attorney's fees may be awarded for work performed in plaintiff's successful appeal of district court's award of attorney's fees after successful litigation of Title VII discrimination and retaliation claims in district court); *Bernardi v. Yeutter*, 951 F.2d 971, 976 (9th Cir. 1991) (holding attorney's fees may be awarded for work performed in successfully challenging district court's attorney's fee award in civil rights case when plaintiff appealed amount of attorney's fees district court awarded after successful litigation of civil rights action in district court).

⁴³ *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 909 (9th Cir. 1995) (concluding that court of appeals could not award fees for work done on plaintiff's unsuccessful appeal of a district court's award of attorney's fees after Title VII employment discrimination case settled before the district court).

\$50,056.28 in reasonable attorney's fees and costs, the ALJ's S. D. & O. Order Awarding Attorney's Fee is **AFFIRMED**.

SO ORDERED.

LEONARD J. HOWIE III
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

TANYA L. GOLDMAN
Administrative Appeals Judge