



In the Matter of:

MICHAEL BEN GRAVES,

ARB CASE NO. 12-066

COMPLAINANT,

ALJ CASE NO. 2011-NTS-004

v.

DATE: August 30, 2013

MV TRANSPORTATION, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael Ben Graves, *pro se*, Los Angeles, California

For the Respondent:

Mark A. Lies II, Esq.; Todd C. Hunt, Esq., *Seyfarth, Shaw LLP*, Chicago, Illinois

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the National Transit Systems Security Act (NTSSA), 6 U.S.C.A. § 1142 (Thomson/West Supp. 2013), and its implementing regulations, 29 C.F.R. Part 1982 (2012). On January 14, 2011, Michael Ben Graves, a bus driver, filed a complaint with the Occupational Safety and Health Administration alleging that his employer, MV Transportation, Inc. (MVT), discriminated against him for complaining about unsafe workplace practices in violation of NTSSA. OSHA dismissed the complaint on June 23, 2011. Graves objected and requested a hearing with the Office of Administrative Law Judges. After an evidentiary hearing, an Administrative Law Judge (ALJ) entered a Decision and Order (D. & O.) on April 18, 2012, determining that MVT's actions

against Graves violated the NTSSA, and granted relief. Graves petitions for review, challenging the ALJ's denial of punitive damages. We affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB) the authority to issue final agency decisions under the NTSSA and its implementing regulations at 29 C.F.R. Part 1982. Secretary's Order No. 2-2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69378, 69379 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a). The ARB reviews the ALJ's factual findings for substantial evidence and conclusions of law de novo. 29 C.F.R. § 1982.110(b); *Blackie v. Smith Transp., Inc.*, ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 7 (ARB Nov. 29, 2012).

DISCUSSION

Graves petitions for review of the ALJ's denial of an award for punitive damages.¹ Punitive damages in whistleblower cases may be appropriate where there is a finding that an employer acted with "callous disregard of [an employee's protected] rights." *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, 13-033; ALJ No. 2012-FRS-012, slip op. at 2 (ARB Apr. 22, 2013) (quoting *Youngerman v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 18 (ARB Feb. 27, 2013)). The ALJ determined that, given the circumstances presented in the record, Graves failed to show that the company's actions against him warranted an award of punitive damages. D. & O. at 23. Substantial evidence supports that determination.

For example, the record reflects that during the evening of January 6, 2011, when Graves refused yard supervisor Jesus Zamora's orders to back his bus into a parking spot without a spotter, Graves left the bus in the yard without parking it. Hearing Transcript (Tr.) at 21; see also Zamora Pre-filed testimony at 3 ("I then told Mr. Graves to leave his bus at the probing station instead of backing it into the parking space."). While Zamora wrote up and submitted an incident report, the report was never acted on. D. & O. at 7. Moreover, the next day, on January 7, MVT issued a memorandum to Graves instructing him to leave his bus in the yard without parking it until the grievance proceedings were resolved. See D. & O. at 7, citing Tr. at 21; Zamora Pre-filed testimony at 2-3; see also Respondent's Exhibit (Resp. Ex.) M, O.

The union grievance process was settled on February 3, 2011. Resp. Ex. R. As a part of the settlement, MVT agreed to remove the four safety points that had been assessed against Graves in December 2010, and erased the record of the prior accident from his file. *Id.* at 1. The company also agreed to provide spotters for "all required backers in the MV yard." *Id.* A day or two later, around February 4 or 5, 2011, Zamora and Dispatcher Yesena Garcia again instructed Graves to back his bus into a parking spot without a spotter. Tr. at 25-26. Graves refused, and left his bus in the yard. *Id.* On February 9, 2011, MVT sent out a company-wide memorandum

¹ MVT did not petition the ARB for review of the ALJ's Decision and Order.

instructing drivers on the night shift to leave their buses in the yard without parking them. R. Ex. S at 1. The company did not discipline Graves for leaving the bus in the yard prior to issuance of the February 9 memo. Given the specific circumstances in this case, the company's actions do not rise to the level of establishing grounds for awarding punitive damages to Graves. *See, e.g., Bailey*, ARB Nos. 13-030, 13-033, slip op. at 3 (ARB Apr. 22, 2013) (affirming ALJ's finding that harm to complainant was not so severe, or "Respondent's actions so reprehensible or culpable as to warrant punitive damages."); *Youngerman*, ARB No. 11-056, slip op. at 19 (affirming punitive damages award of \$100,000 based on ALJ's finding that "Respondent acted with callous disregard for Complainant's rights when it continuously instructed him to drive a vehicle in violation of the regulations' based on 'misinformation that it was in fact not a violation to drive the truck in its condition.'"). The ALJ determined that "[r]eviewing the facts, the harassment by Jesus Zamora did not amount to reckless or callous disregard for the Complainant's rights, or intentional violations of federal law." D. & O. at 23. We find no reason for disturbing the ALJ's ruling.

CONCLUSION

The ALJ's decision is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge