



In the Matter of:

LARRY E. EASH,

COMPLAINANT,

v.

ROADWAY EXPRESS, INC.,

RESPONDENT.

**ARB CASE NOS. 02-008
02-064**

ALJ CASE NO. 2000-STA-7

DATE: March 9, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Truckers Justice Center, Eagan, Minnesota

For the Respondent:

John T. Landwehr, Esq., Katherine T. Talbot, Eastman & Smith, Ltd, Toledo, Ohio

ORDER AWARDING ATTORNEY'S FEES

On June 27, 2003, the Administrative Review Board (ARB or Board) issued a Final Decision and Order in this case arising under the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997). The ARB affirmed the order of the Administrative Law Judge (ALJ) granting partial summary disposition on the grounds that the Complainant, Larry Eash, had failed to demonstrate that there were issues of material fact with regard to three of the six warning letters, which Eash alleged the Respondent, Roadway Express, had issued to him in violation of the STAA's whistleblower protection provisions.

The Board also affirmed the ALJ's November 2, 2001 Recommended Decision and Order (R. D. & O.). In this R. D. & O., the ALJ concluded that Eash failed to establish that Roadway issued two warning letters in retaliation for his protected activity

in filing a prior complaint. However, the ALJ also found that Eash had engaged in protected activity on January 14, 1999, when he refused to drive because of unsafe weather conditions. The ALJ ordered Roadway to expunge a warning letter based on this refusal to drive from Eash's record and to pay partial attorney's fees based upon the attorney's degree of success in presenting Eash's case. The Board held that substantial evidence and the relevant law supported the R. D. & O. The Board permitted Eash to submit an itemized petition for additional attorney's fees and other litigation expenses in connection with the litigation before the Board and Roadway to file any objections to the petition. We now consider Eash's petition and Roadway's objections to it.

The Complainant's attorney, Paul O. Taylor, has petitioned for attorney's fees seeking \$2,868.75 in fees and \$24.57 in expenses. Complainant's Supplemental Petition for Fees and Costs at 3. Roadway's attorney filed a timely response, opposing the petition on the ground that Taylor's request for fees for work performed before the ARB should be calculated on the same basis as the ALJ calculated the fees, i.e., by awarding 1/2 of the fees for the work associated with the appeal of the issues not resolved by the June 17, 2001 summary judgment and 1/3 for work associated with the appeal of the issues resolved in the ALJ's November 2, 2001 R. D. & O.

Under the STAA, if the ALJ or the ARB finds that a person violated the employee protection provisions, 49 U.S.C.A. § 31105(a), they can assess, at the complainant's request, the costs of bringing the case, including attorney's fees reasonably incurred by the complainant in bringing the complaint, against the person against whom an order is issued for violation of the STAA. 49 U.S.C.A. § 31105(b)(3)(B).

We calculate attorney's fees according to the lodestar method, under which the number of hours reasonably expended in bringing the litigation is multiplied by a reasonable hourly rate. *Jenkins v. EPA*, No. 92-CAA-6, slip op. at 2 (Sec'y Dec. 7, 1994), citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. A "complainant's attorney fee petition must include 'adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent with practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Gutierrez v. Regents, Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 13 (ARB Nov. 13, 2002); *Fabricius v. Town of Braintree/Park Dep't*, ARB No. 97-144, ALJ No. 1997-CAA-14, slip op. at 9 (ARB Feb. 9, 1999). If the documentation of hours is inadequate, the award may be reduced accordingly. *Hensley v. Eckerhart*, 461 U.S. at 433.

Taylor stated that he worked 12.75 hours on Eash's appeal, including legal research, drafting and editing the brief, and preparing a letter to us in transmitting the brief. Upon our examination of his affidavit, we find those hours to have been reasonably expended.

Similarly, Taylor has requested that he be compensated at the rate of \$225 an hour and has submitted the required documentation in support of his request. We have previously approved that hourly rate for him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-103, ALJ 1999-STA-5 (Dec. 30, 2002). Roadway did not object to the application of that hourly rate to this case, and therefore we approve it.

Roadway did object to Taylor's fee request on the basis that he had obtained only partial success in representing Eash on appeal and contended that his fee therefore should reflect that partial success. Roadway stated that half of Taylor's fee should be reduced by 50% and half should be reduced by 2/3, using the same calculation that the ALJ used in his R. D. & O. Roadway therefore calculated that total awardable fees should not exceed \$1,195.41. Respondent's Objections to Complainant's Supplement Petition for Attorney Fees and Costs at 2-3.

We disagree. In the present case, Taylor successfully defended on appeal the portion of the ALJ's R. D. & O. that found that Roadway violated the STAA. In determining attorney's fees for work done in relation to an appeal to this Board, we are not bound by the ALJ's determination on how to award attorney's fees for work done in presenting Eash's case to the ALJ. Eash's counsel is entitled to attorney's fees for all the work he performed on appeal, because he succeeded in defending on appeal the ruling by the ALJ that was favorable to his client. We therefore award attorney's fees in the entire amount sought of \$2,868.75.

Taylor requested costs of \$24.57 for photocopying and postage. As Roadway noted, we affirmed in our June 27, 2003 decision that part of the ALJ's decision that found that photocopying, and postage costs constituted clerical duties, which were not recoverable in a petition for fees and costs. We have reviewed the costs presented in Taylor's petition and conclude that the costs are for services that form part of the overhead of the attorney's office. These overhead costs are already covered by the approval of Taylor's request for attorney's fees. We therefore disallow Taylor's petition as it pertains to costs.

ORDER

Roadway is ordered to pay the sum of **\$2,868.75** to attorney Paul Taylor for fees in connection with the appeal of this case to the ARB.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge