**In the Matter of:**

**SELWYN T. LANE,** **ARB CASE NO. 03-006**

**COMPLAINANT,** **ALJ CASE NO. 02-STA-38**

**v.** **DATE: February 27, 2004**

**ROADWAY EXPRESS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Paul O. Taylor, Esq.,** ***Truckers Justice Center, Eagan, Minnesota***

***For the Respondent:***
**Sally J. Scott, Esq.,** ***Franczek Sullivan PC, Chicago, Illinois***

## DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997). On January 20, 2000, the Respondent, Roadway Express, issued a warning letter to the Complainant, Selwyn T. Lane, for delay of freight occurring on January 9 and 10, 2000. Lane filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA), alleging "that he received discipline and lost wages as a result of his refusal to drive in the hazardous conditions on January 9, 2000."[1] On or about May 23, 2000, Roadway withdrew the letter from Lane's disciplinary file.

On June 7, 2002, OSHA determined that, because Roadway withdrew the warning letter, Lane's complaint should be dismissed. On June 21, 2000, Lane requested a hearing before an Administrative Law Judge (ALJ). In response, Roadway filed a motion

[1] Discriminatory Case Activity Work Sheet, Allegation Summary, May 12, 2000.

to dismiss Lane's objection to the Secretary's findings and order, and a motion to stay discovery.

On October 4, 2002, the ALJ issued a Recommended Decision and Order (R. D. & O.) granting Roadway's Motion to Dismiss and denying Lane's request for attorney's fees. Lane appealed the ALJ's ruling to this Board.

## STATEMENT OF ISSUES

1. Whether Lane's claims are moot and his complaint therefore should be dismissed.

2. Whether Lane's claim for waiting time pay is pre-empted by the Labor Management Relations Act.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor's jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) has been delegated to the Administrative Review Board ("ARB" or "Board"). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c)(2002).

When reviewing STAA cases the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). 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." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

## DISCUSSION

### I. Mootness

Under Article III of the Constitution, the jurisdiction of federal courts extends only to actual cases and controversies. A federal court may not adjudicate disputes that

are moot. *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir.1997) (en banc) (quotation omitted). Although administrative proceedings are not bound by the constitutional requirement of a "case or controversy," the Board has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot. *See, e.g., United States Dep't of the Navy*, ARB No. 96-185 (ARB May 15, 1997); *see also Assistant Sec'y and Curless v. Thomas Sysco Food Servs.*, No. 91-STA-12, slip op. at 4-7, Sec'y, Sept. 3, 1991, *vacated on other grounds sub nom., Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60 (6th Cir. 1993).

Mootness results "when events occur during the pendency of a litigation which render the court unable to grant the requested relief." *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986), citing *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911). Allegations become moot when a party "has already been made whole for damage it claims to have suffered." *Madyun v. Thompson*, 657 F.2d 868, 872 (7th Cir. 1981). The burden of demonstrating mootness rests on the party claiming mootness. *Ammex, Inc. v. Cox*, 351 F.3d 697, 705, (6th Cir. 2003), citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

Roadway's allegation that Lane's complaint is moot comes to us in the context of Roadway's Motion to Dismiss. The rules governing hearings in whistleblower cases contain no specific provisions for dismissal of complaints for failure to state a claim upon which relief may be granted. *See* 29 C.F.R. Parts 18 and 24 (2003). We therefore apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims.[2] 29 C.F.R. § 18.1 (a). Under Fed. R. Civ. P. 12(b)(6), all reasonable inferences are made in favor of the non-moving party. *Tyndall v. United States Envtl. Prot. Agency*, 93-CAA-6, 95-CAA-5 (ARB June 14, 1996). Dismissal should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Studer v. Flowers Baking Co. of Tenn., Inc.*, 93-CAA-11 (Sec'y June 19, 1995), citing *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980).

In granting Roadway's Motion to Dismiss, the ALJ held that there was no remaining adverse action in the case before him, and therefore no live controversy:

> The warning letter was placed in Mr. Lane's personnel file on January 20, 2000. Roadway Express removed the letter from Mr. Lane's file on or about May 23, 2000. Although Mr. Lane referenced the exception to the mootness doctrine

[2] Had Roadway submitted evidence outside the pleadings in support of its Motion to Dismiss, the Board would have viewed the motion as a motion for summary decision under 29 C.F.R. §18.40. *See Erickson v. United States Envt'l Prot. Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2 (ARB July 31, 2001); *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-075, ALJ No. 96-CAA-8, slip op. at 3-4 (ARB Mar. 13, 2001).

> in his memorandum in opposition to motion to dismiss, he did not go so far as to allege any facts that would warrant application of the exception to his case. The record contains no evidence or allegations to indicate that Mr. Lane will again be subjected to the consequences of the warning letter. Therefore, I find that the issue before the undersigned is moot.

R. D. & O. at 2.

Lane's complaint specifically alleges "that he received discipline *and* lost wages as a result of his refusal to drive in the hazardous conditions on January 9, 2000"[3] (emphasis added). Additionally, Lane's response to Roadway's Motion to Dismiss explains that the "lost wages" in his complaint encompassed "waiting time pay" he should have received in addition to his regular "per mile" pay.[4] Making all reasonable inferences in favor of Lane, we infer that the waiting time pay was encompassed in his complaint concerning "lost wages."

The ALJ thus overlooked the fact that Lane's complaint contained claims as to two separate adverse actions (discipline and lost wages). Roadway has not shown that the "lost wages" claim is moot. Therefore, we deny Roadway's motion to dismiss Lane's complaint for mootness.

**II. Pre-emption**

Roadway also contends that consideration of Lane's claim, as it relates to waiting time pay, is pre-empted by the Labor Management Relations Act, 29 U.S.C.A. § 141 *et seq.* (West 1998):

> Whether Lane is entitled to waiting time pay for the time he spent alongside the road on January 10, 2000 is determined by the parties' collective bargaining agreement. Lane readily admits this as he cites the Master Freight Agreement as the basis for his claim for waiting time pay … . As such, his claim is preempted by federal labor law … . Section 301 of the Labor Management Relations Act provides that the federal courts have jurisdiction over

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[3] Discriminatory Case Activity Work Sheet, Allegation Summary, May 12, 2000.

[4] Lane Affidavit, ¶ 7 ("Roadway Express, Inc. has not made me whole for the illegal discipline. Under Article 51 of the National Master Freight Agreement, I was entitled to 8 hours pay for delay due to bad weather, in addition to my regular per mile pay for completing the trip to Wausau, WI. Roadway Express, Inc. paid me my regular per mile pay for the run from Oak Creek, WI to Wausau, WI on January 9-10, 2000. Roadway Express, Inc. did not pay me the 8 hours of pay that I am entitled to for waiting in Westfield, WI.")

> "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185. It also requires that federal law govern all actions concerning the enforcement of collective bargaining agreements … . Thus, if a resolution of a claim depends upon the meaning of, or requires the interpretation of, a collective bargaining agreement, the claim is preempted by Section 301.

Respondent's Brief at 6. The Labor Management Relations Act, which governs contractual labor disputes, does not preclude the Secretary of Labor from determining whether discrimination occurred, and ordering appropriate relief, under the STAA.

Accordingly, we deny the Motion to Dismiss and **REMAND** the case for further proceedings.[5]

**SO ORDERED.**

**JUDITH S. BOGGS**
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**
**Administrative Appeals Judge**

[5] Lane argues that he is entitled to attorney's fees for pursuing his claims. However, Lane is only entitled to attorney's fees if an order has been issued under 49 U.S.C.A. § 31105(3)(B), following a decision that the STAA has been violated. Since no such decision and order have been issued, Lane is not entitled to attorney's fees at this time.