



In the Matter of:

PETER P. CEFALU,

**ARB CASE NOS. 04-103
04-161**

COMPLAINANT,

ALJ CASE NO. 2003-STA-055

v.

DATE: January 6, 2010

ROADWAY EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Paul O. Taylor, Esq., *Truckers Justice Center*, Burnsville, Minnesota;
Amanda Cefalu, Esq., *McGrann, Shea, Anderson, Carnival, Straughn & Lamb*,
Minneapolis, Minnesota**

For the Respondent:

Lisa A. McGarrity, Esq., *Franczek Sullivan, P.C.*, Chicago, Illinois

FURTHER DECISION AND ORDER ON ATTORNEYS' FEES

Peter P. Cefalu prevailed in his whistleblower complaint against Roadway Express, Inc., arising under the employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2008).¹ In this Further Decision and Order, we address his attorneys' entitlement to fees under 49 U.S.C.A. § 31105(a)(3)(B) for work performed before the United States Court of Appeals for the Seventh Circuit.

¹ Congress amended the STAA after Cefalu filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). These amendments have no effect on the issues before us.

BACKGROUND

The history of this case is now quite lengthy. In 2002, Roadway fired Cefalu after he testified for another employee in the employee's grievance hearing. Cefalu filed a complaint with the Department of Labor (DOL) alleging that Roadway retaliated against him in violation of the STAA's whistleblower protection provision.

On May 20, 2004, a DOL Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) concluding that Roadway violated the STAA. The ALJ excluded evidence relating to Roadway's proffered reason for firing Cefalu, that he had lied about his driving record in his employment application, as a sanction for refusing to comply with the ALJ's discovery order requiring disclosure of the source of that information. The ALJ also ruled that Cefalu was entitled to damages and reinstatement to his previous job as a truck driver. *Cefalu v. Roadway Express, Inc.*, ALJ No. 2003-STA-055 (May 20, 2004).

Roadway appealed to the Administrative Review Board (ARB), which adopted the ALJ's recommendations, including his award of attorneys' fees. *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161, ALJ No. 2003-STA-055 (ARB Jan. 31, 2006). Roadway then appealed the ARB's decision to the United States Court of Appeals for the Seventh Circuit.

On July 25, 2007, the Seventh Circuit affirmed the Board's determination that Roadway had violated the STAA, and that evidence that he lied about his driving record in his employment application had been properly excluded on the merits. *Roadway Express, Inc. v. United States Dep't of Labor*, 495 F.3d 477, 483 (7th Cir. 2007). However, the court held that the ALJ should have considered whether, in view of Cefalu's arguably unsafe driving record, reinstatement was an appropriate remedy. *Id.* at 486. The ARB then remanded the case to the ALJ. *Cefalu v. Roadway Express, Inc.*, ARB No. 08-001, ALJ No. 2003-STA-055 (ARB Jan. 30, 2008).

On remand, the ALJ ordered the parties to file briefs addressing the appropriateness of Cefalu's reinstatement and to submit additional documentary evidence. Subsequently, the ALJ issued a Recommended Decision and Order (R. D. & O.) on July 1, 2008, concluding that reinstatement was a proper remedy and affirming his previous order reinstating Cefalu in his former position. *Cefalu v. Roadway Express, Inc.*, ALJ No. 2003-STA-055 (July 1, 2008).

On automatic review to the ARB, we affirmed the ALJ's decision. *Cefalu v. Roadway Express, Inc.*, ARB No. 08-110, ALJ No. 2003-STA-055 (ARB Dec. 10, 2008). Roadway then appealed again to the Seventh Circuit, *Roadway Express, Inc. v. United States Dep't of Labor*, No. 09-1315, where the issue of reinstatement is still pending.

As we noted, the ARB adopted the ALJ's initial award of fees in our decision of January 31, 2006. *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161, ALJ No. 2003-STA-055 (ARB Jan. 31, 2006). We approved the recommended award of

\$28,662.50 in fees and \$1,096.76 in expenses to Attorney Paul O. Taylor, and \$2,031.25 in fees to Attorney Amanda Cefalu. Slip op. at 9.

By order dated May 26, 2006, the ARB granted Attorney Taylor additional fees for work performed from June 16, 2004, through February 7, 2006, in defending Roadway's unsuccessful appeal before the ARB. The award was for \$3,892.40, which included \$42.40 in clerical costs. *Cefalu v. Roadway Express, Inc.*, ARB No. 04-003, -161, ALJ No. 2003-STA-055 (ARB May 23, 2006).

On April 3, 2008, the ARB issued an order that granted Attorney Taylor \$1,718.75 for work done from April 20 to May 26, 2006, in defending against Roadway's motion to stay reinstatement. *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161, ALJ No. 2003-STA-055, slip op. at 3 (ARB Apr. 3, 2008).² However, the April 3, 2008 Order disallowed Attorney Amanda Cefalu's fee request. Slip op. at 3.

By a Supplemental Verified Petition dated August 29, 2007, Attorney Taylor requested additional interim fees and expenses of \$31,267.80 for his representation of Cefalu in Roadway's appeal to the Seventh Circuit during 2006. By a similar Supplemental Verified Petition dated August 27, 2007, Attorney Cefalu requested additional interim fees and expenses of \$10,080.19 for her representation of Cefalu in Roadway's appeal. Those petitions are pending before us and we now consider them.³

DISCUSSION

The legal standards concerning fees

The STAA authorizes the Secretary of Labor (or her designees such as the ALJ or ARB) to award attorneys' fees on behalf of the prevailing party.⁴ The ARB may do so,

² The ARB later withdrew other portions of the April 3, 2008 award as duplicative of the May 26, 2006 Order on Attorney's fees. *Cefalu v. Roadway Express, Inc.*, ARB No. 04-003, -161, ALJ No. 2003-STA-055 (ARB Nov. 13, 2008).

³ By a Supplemental Verified Petition dated January 5, 2009, Attorney Taylor has requested additional interim fees of \$4,208.75 for his representation of Cefalu before the Board between July 2, 2008, and January 1, 2009, on the issue of reinstatement. By a similar Supplemental Verified Petition dated December 30, 2008, Attorney Cefalu requested additional interim fees of \$633.75. Because entitlement to these fees depends on the outcome of the reinstatement issue in the Seventh Circuit, the ARB declines to address them at this time.

⁴ The STAA provides: "If the Secretary issues an order [finding a STAA violation] and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in

even though the work was performed before a United States Court of Appeals. *See Dalton v. Copart, Inc.*, ARB Nos. 04-027, 138, ALJ No. 1999-STA-046 (ARB Feb. 8, 2006).

The ARB has endorsed the lodestar method to calculate attorneys' fees. This method requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. *See, e.g., Evans v. Miami Valley Hosp.*, ARB Nos 08-039, 08-043, ALJ No. 2006-AIR-22, slip op. at 3 (ARB Aug. 31, 2009); *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003). An attorney seeking a fee award must submit evidence documenting the hours worked and the rates claimed, as well as records identifying the date, time, and duration necessary to accomplish each specific activity and all claimed costs. *Evans*, slip op. at 3; *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 2 (ARB Mar. 7, 2006).

The petitioning attorney must demonstrate that his or her requested hourly rate is in line with fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Evans*, slip op. at 3; *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-005, slip op. at 15 (ARB Dec. 30, 2002) (citations omitted). The petitioning attorney also bears the burden of proof that the claimed hours of compensation are adequately demonstrated and reasonably expended. *Jackson v. Butler & Co.* ARB Nos. 03-116, -144, ALJ No. 2003-STA-026, slip op. at 10 (ARB Aug. 31, 2004). Hours are not reasonable if they are (1) excessive in relationship to the task performed, (2) redundant or duplicative because multiple attorneys performed the same task, or (3) unnecessary or inappropriate because the task is not properly billed to clients. *Evans*, slip op. at 3, citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

The ARB requires that time and task entries be sufficiently detailed to demonstrate their reasonableness. *Evans*, slip op. at 8. We disfavor the use of block billing (the practice of grouping multiple tasks into a single time entry), and may make a percentage reduction of the requested fees in lieu of attempting to surgically excise those that are not properly billed. *Id.* Finally, even though the Taylor and Cefalu fee petitions were unopposed, we have an obligation to ensure that they follow applicable standards. *Moder v. Village of Jackson*, ARB Nos. 01-095, 02-039, ALJ No. 2000-WPC-005, slip op. at 1 (ARB Oct. 28, 2003).

With these guideposts in sight, we turn to the fee petitions of Attorney Taylor and Attorney Cefalu.

bringing the complaint. The Secretary shall determine the costs that reasonably were incurred.” 49 U.S.C.A. § 31105(a)(3)(B).

Attorney Taylor's fees

Attorney Taylor's petition requests compensation for 102.70 hours in services at an hourly rate of \$275 for a total of \$28,242.50; 13.5 hours of travel at an hourly rate of \$137.50 for a total of \$1,856.25; and out of pocket expenses of \$1,169.05. For reasons we now explain, we reduce the award of fees by one-third to \$20,075.87 and expenses to \$269.05.

We find and hold that certain adjustments from the lodestar are appropriate. The issues before the Seventh Circuit were not novel. They were substantially the same as those briefed and argued below before the ALJ and the ARB. On appeal to the Seventh Circuit, the Solicitor of Labor defended the ARB decision in Cefalu's favor. Cefalu was an interested party, and Attorney Taylor's appearance and work on Cefalu's behalf was possibly helpful, but not required. Through Attorney Taylor, Cefalu sought and obtained intervenor status, and briefed and argued the case along with attorneys from the Solicitor's Office.

The appeal to the Circuit was only partially successful. The Circuit affirmed the Board's determination that Roadway had violated the STAA, and that evidence that he lied about his driving record in his employment application had been properly excluded on the merits. But the court ruled that the ALJ should have considered Cefalu's supposedly unsafe driving record in determining whether reinstatement was an appropriate remedy.

Attorney Taylor's hourly rate was unopposed. We find from the affidavits he submitted and his substantial experience before the Board that a rate of \$275 is reasonable. However, we do not find his requested hours reasonably expended, primarily because it is not clear what value Attorney Cefalu added to the case. We find unexplained telephone calls and correspondence with her (e.g., 4/17/06; 4/19/06; 5/16/06; 5/26/06; 6/02/06; 6/7/06; 7/19/06; 8/23/06; 8/25/06; 8/29/06; 10/18/06; 10/19/06; 11/30/06; 7/25/07). Those entries are batched with time for more properly billed services.

Both Attorney Taylor and Attorney Cefalu represent that they worked on the intervenor's 26-page brief to the Seventh Circuit. We cannot determine from their time entries the extent to which their work was duplicative or distinct. We can, however, determine that a total of over 150 hours for the two lawyers' work while the case was pending in the Circuit for briefing, oral argument, and travel is excessive by the standards of private practice. Accordingly we make an across-the-board downward adjustment of Attorney Taylor's submission of one-third. His compensable fee for services will be \$20,075.87.

We turn to his expenses. Attorney Taylor has not persuaded us that his payment of two lawyers at \$400.00 each was reasonably expended in his preparation for oral argument, or that his payment of \$100 to another individual to proofread the intervenor's

brief was compensable. Accordingly, we award only expenses of \$269.05 for outside preparation and service of the brief.

Attorney Cefalu's fees

Attorney Cefalu's fee petition seeks compensation for 53.75 hours at a rate of \$175 per hour, for a total of \$9,406.25. The affidavits of record adequately support her hourly rate. We review her time, which is more problematic.

Attorney Cefalu conferred on many occasions with Attorney Taylor (e.g., 4/19/06; 5/16/06; 5/26/06; 6/07/06; 6/09/06; 6/12/06; 6/29/06; 7/05/06; 7/06/06; 7/19/06; 8/23/06; 8/25/06; 8/29/06; 10/19/06; 12/05/06; 12/06/06). For each of these conferences that is not batched with other entries, she charged 15 minutes, and it is not clear whether they advanced the case or merely served to keep her informed. She also charged for the review of documents Attorney Taylor also reviewed (e.g., 4/20/06; 7/03/06; 8/30/06; 9/18/06; 7/25/07), for a failed motion to strike Roadway's brief (7/03/06 through 7/19/06), and for opposing a Roadway motion to stay (5/30/06 through 6/06/06), which appears to duplicate time for which Attorney Taylor was already compensated in a prior award.

Attorney Cefalu also seeks compensation for assisting Attorney Taylor with writing the intervenor's brief. She requests payment for observing oral argument preparation, travel to Chicago, and attendance at the oral argument itself, from November 30, 2006, through December 6, 2006, a total of over 15 hours. The record establishes that Attorney Cefalu is the daughter of Peter Cefalu, the complainant herein. It may be commendable for her to follow his case, but we cannot conclude that her attendance at oral argument was necessary.

Based upon the considerations we have indicated, we make a blanket reduction of Attorney Cefalu's fees of two-thirds and award \$3,132.28. As for expenses, we award \$30 for a courier fee and \$214.99 for Attorney Taylor's hotel bill, which she evidently advanced, in connection with the oral argument. We deny the balance of her request for expenses as not reasonably expended.

In sum, we award to Attorney Taylor and against Roadway \$20,075.87 in fees and \$269.05 in expenses. We award to Attorney Cefalu and against Roadway \$3,132.28 in fees and \$244.99 in expenses. Because of the delay in the award and payment, we award

pre-judgment interest from the date of the petitions and post-judgment interest from the date of this decision, both at the statutory rate found at 26 U.S.C. § 6621(a)(2).

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge