



**In the Matter of:**

**BILL FLEEMAN,**

**ARB CASE NOS. 09-059  
09-096**

**COMPLAINANT,**

**ALJ CASE NO. 2008-STA-015**

**v.**

**DATE: May 28, 2010**

**NEBRASKA PORK PARTNERS,**

**and**

**NEBRASKA PORK MARKETING, L.L.C.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD,**

**Appearances:**

*For the Complainant:*

**Daniel T. Hoarty, Esq., *Byam & Hoarty*, Omaha, Nebraska**

*For the Respondents:*

**Jennifer R. Petersen, Esq., *Gross & Welch*, Omaha, Nebraska**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

Bill Fleeman filed a complaint under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997),<sup>1</sup> and its implementing regulations at 29 C.F.R. Part 1978 (2009). He alleged that his employer, Nebraska Pork Partners & Nebraska Pork Marketing, L.L.C. (NPM), fired him because he complained about exceeding the hours-of-service limit for truck drivers.

After a hearing, a Department of Labor Administrative Law Judge (ALJ) concluded that NPM had violated the STAA and awarded Fleeman reinstatement and back- and front-pay pursuant to a Recommended Decision and Order (R. D. & O.), ALJ No. 2008-STA-015 (Feb. 9, 2009). The ALJ subsequently awarded attorney's fees pursuant to a Recommended Supplemental Decision and Order issued on May 19, 2009. Both the R. D. & O. and the supplemental decision awarding attorney's fees are now before the Administrative Review Board (ARB), docketed as ARB Case Nos. 09-059 and 09-096, respectively, pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).

## BACKGROUND

The ALJ summarized the facts in this case in exhaustive detail. R. D. & O. at 4-25. We reiterate briefly.

Fleeman was an owner-operator, contract driver for NPM, delivering trailer loads of hogs to processing plants in Nebraska and Iowa among other states. Complainant's Exhibit (CX) 12. At a November 2006 drivers meeting to discuss a new contract, Fleeman complained to E. John Meays, fleet coordinator, and Nathan K. Horton, logistics supervisor, that the company's scheduling of certain loads prevented drivers from taking legal rest breaks and caused them to exceed the Department of Transportation's (DOT) hours-of-service regulations. Hearing transcript (TR) at 47-49, 56-58.

Fleeman signed a new contract with NPM on December 1, 2006. Late that month, Fleeman twice refused to take loads because of ice storms. TR at 59-62. On January 2, 2007, Fleeman refused to drive because he had run out of hours to be on duty. TR at 63-64; CX 3.

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<sup>1</sup> Congress amended the STAA in 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(b) (Thomson/West 2007). See *Implementing Recommendations of the 9/11 Commission Act of 2007*, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 49 U.S.C.A. § 31105(b)(1) (Thomson/West Supp. 2009). The amendments provide that a complainant must establish by a preponderance of the evidence that his protected activity was a contributing factor in the employer's adverse personnel action. *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004) (explaining the scope of coverage, procedures, and burdens of proof under AIR 21). As Fleeman filed his complaint prior to the effective date of the amendments, we will apply the burden of proof applicable when he filed his complaint. See discussion, *infra* at 5-6.

On January 5, 2007, Fleeman received a certified letter terminating his contract effective February 4th. CX 1, TR at 65-66. NPM's letter cited section 1.1 of Fleeman's contract providing that either party could terminate the agreement at any time with or without cause. *Id.* Subsequently, Meays and Horton both testified that Fleeman was fired for being belligerent, failing to communicate, getting other drivers worked up, bringing down morale, and turning drivers against NPM. TR at 116, 152.

On May 30, 2007, Fleeman filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that NPM had fired him because he engaged in whistle-blowing activities protected under the STAA. OSHA dismissed Fleeman's claim, and he requested a hearing, which was held on July 22, 2008. The ALJ found in Fleeman's favor. We affirm.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a). In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted). The ARB reviews the ALJ's conclusions of law de novo. *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

### **DISCUSSION**

The STAA provides that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" or who "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. See 49 U.S.C.A. § 31105(a)(1).

To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and that the employer took such

action because he engaged in protected activity. *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, -159, ALJ No. 2005-STA-063, slip op. at 11 (ARB June 30, 2008). The ARB has interpreted “because” to mean that a STAA complainant must show that the protected activity was a “motivating factor” in the employer’s decision to take adverse action. *Id.*

If the employer presents evidence of a non-discriminatory reason for the adverse action, the employee can prevail by proving that the proffered reasons are a pretext for discrimination. *Shields v. James E. Owen Trucking, Inc.* ARB No. 08-021, ALJ No. 2007-STA-022, slip op. at 5 (ARB Nov. 30, 2009). Once the employee proves that the employer violated the STAA, the employer may escape liability only by establishing by a preponderance of the evidence that it would have taken the adverse action absent the employee’s protected activity.<sup>2</sup> *Pollock v. Cont’l Express*, ARB Nos. 07-073, -051, ALJ No. 2006-STA-001, slip op. at 7 (ARB Apr. 7, 2010).

The ALJ concluded that Fleeman’s refusal to drive on December 21-22, 2006, due to icy weather conditions and on January 2, 2007, because he was out of service hours was protected activity under the STAA because had he driven those loads he would have violated federal regulations.<sup>3</sup> R. D. & O. at 31-32; *see* 49 U.S.C.A. § 31105(a)(1)(B)(i). Based on their testimony, the ALJ found that Meays and Horton were aware of Fleeman’s complaints in late December and January. R. D. & O. at 33-34. Finally, the ALJ found that the January 4, 2007 letter to Fleeman terminating his contract was an adverse action. *Id.* at 32.

The ALJ’s decision thoroughly and fairly recites the relevant facts underlying these elements that Fleeman must prove as part of his complaint. Substantial evidence on the record as a whole supports the ALJ’s factual findings, which are therefore conclusive. Accordingly, we reject NPM’s arguments<sup>4</sup> and affirm the ALJ’s conclusions that

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<sup>2</sup> Based on his adverse determinations regarding the credibility of Meays and Horton, the ALJ concluded that NPM would not have fired Fleeman absent his protected activity. R. D. & O. at 39. We agree. *See Ass’t Sec’y & Mailloux v. R. & B Transp., L.L.C.*, ARB No. 07-084, ALJ No. 2006-STA-012, slip op. at 9 (ARB June 16, 2009) (affirming ALJ’s findings that the employer’s reasons for firing Mailloux were pretext and he therefore established a causal connection between his protected activity and his discharge).

<sup>3</sup> If conditions become sufficiently dangerous due to snow, ice, and sleet, the operation of a commercial motor vehicle shall be discontinued. 49 C.F.R. § 392.14 (2009). Also, a driver of a commercial motor vehicle may not drive more than 11 cumulative hours following 10 consecutive hours off duty or remain on duty more than 14 hours after starting his shift. 49 C.F.R. § 395.3. The ALJ also found that Fleeman’s ongoing oral complaints from January through November of 2006 that NPM’s driver scheduling caused the drivers to violate the hours-of-service regulation was protected activity under 49 U.S.C.A. § 31105(a)(1)(A).

<sup>4</sup> NPM argued on appeal that Fleeman did not engage in protected activity when he complained that scheduling trips to Awahee, Illinois caused him to exceed the allowable hours of service or when he refused to drive in December and January because these

Fleeman established by a preponderance of the evidence that he engaged in protected activity and that NPM was aware of his protected activity and terminated his employment.

### *Causation*

As we have stated, to prevail on his complaint, which was filed prior to the effective date of the 2007 amendments to the STAA, Fleeman must establish by a preponderance of the evidence that NPM fired him because of his protected activity. The ALJ, however, applied the STAA amendments and concluded that Fleeman's protected activity was a contributing factor in his discharge, rather than the reason for it. R. D. & O. at 39. This was error.

While NPM does not contest the ALJ's application of the incorrect standard, legal error such as the ALJ's normally requires remand to apply the correct standard. *Miller v. Basic Drilling Co.*, ARB No. 05-111, ALJ No. 2005-STA-020, slip op. at 4 (ARB Aug. 30, 2007). Rather than remand this case to the ALJ, however, we will examine the record and apply the appropriate legal standard of proof to the ALJ's credibility determinations and factual findings regarding causation. *Anderson v. Jaro Trans. Servs.*, ARB No. 05-011, ALJ Nos. 2004-STA-002, -003, slip op. at 5 (ARB Nov. 30, 2005).

In considering whether Fleeman's protected activities contributed to his firing, the ALJ noted Fleeman's satisfactory job performance, NPM's lack of criticism of his attitude or morale effect on other drivers until after he was fired, and NPM's signing of a new, annual contract with Fleeman on December 1, 2006. R. D. & O. at 35. The ALJ found Meays' proffered reasons for firing Fleeman to be problematic and essentially unbelievable. *Id.* at 35-37. The ALJ also found "readily apparent" discrepancies in Horton's stated reasons for firing Fleeman. *Id.* at 37-39. Based on his credibility findings, the temporal proximity of Fleeman's firing in January, and his protected activity in December, plus his finding that NPM's purported reasons for firing Fleeman were pretext, the ALJ concluded that Fleeman had proven by a preponderance of the more probative evidence that NPM engaged in "an act of illegal discrimination under the STAA" in terminating his employment. *Id.* at 40.

Substantial evidence fully supports the ALJ's factual findings and credibility determinations regarding Meays and Horton. For example, Meays cited Fleeman's lack of communication in failing to report that he was out of hours on December 30, 2006, but admitted that he was not aware of this lapse until after the termination letter had been drafted on January 2, 2007. TR at 121-24.

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complaints were oral and too generalized. Respondents' Brief at 10-15. Oral complaints are protected under the STAA, and Fleeman testified credibly about the icy weather conditions in February. TR at 58-62.

As an example of turning other drivers against the company, Meays referred to Fleeman's telephone calls to fellow drivers in bad weather, but these calls concerned ice storms in late December, when Horton admitted he had to reschedule many trips due to the weather. TR at 126-28, 139. Meays denied that Fleeman ever complained about NPM's scheduling of his trips but then admitted that he knew that Fleeman had concerns about the scheduling. TR at 109-10. Meays stated that he fired Fleeman for refusing to take certain routes, but Fleeman accepted those routes after signing his new contract on December 1, 2006. TR at 164-65. Meays testified that he did not speak to Fleeman after the firing, but Horton and Fleeman stated that Meays had taken part in a conference call about the firing. TR at 66-68, 130, 152.

Similarly, Horton testified that Fleeman was "terrible" about calling in when scheduling delays occurred, yet admitted that he had never disciplined Fleeman over such failures or even addressed morale or attitude issues with Fleeman. TR at 161-62, 169-70. Horton also stated that Fleeman's refusal to take loads to Awahee, Iowa, during 2006 was one of the reasons for firing him, but agreed that Fleeman was accepting those loads later in 2006. TR at 158-59, 165-66.

Finally, Horton stated that the triggering event for Fleeman's discharge was his discovery on January 2, 2007, that Fleeman failed to inform NPM on December 30, 2006, that he was out of service hours. TR at 167-69. Horton admitted, however, that on January 2, the same day he and Meays drafted the termination letter, Fleeman called in and refused a load that evening because he was out of hours. TR at 155-58.

Our review of the record convinces us not only that Fleeman's protected activity on December 21-22, 2006, and January 2, 2007, was a motivating factor in his discharge but also that he has proven by a preponderance of the evidence that NPM's reasons for firing him were pretext. Therefore, we conclude that NPM violated the STAA when it fired Fleeman because of his protected activity. *See Carpentier v. Golden Valley Transfer, Inc.*, ARB No. 08-116, ALJ No. 2008-STA-045, slip op. at 5 n.24 (ARB Feb. 26, 2010) (stating that the case outcome would have been no different had the correct standard been applied).

### *Remedies*

The ALJ found that Fleeman was entitled to a total of \$127,010.84 in back pay from his last day of employment on February 4, 2007, through February 9, 2009, when he began working for Camaco. R. D. & O. at 41-42. *See* CX 8, 10-11. Inasmuch as a successful complainant under the STAA is entitled to an award of back pay, *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-005, slip op. at 12-13 (ARB Dec. 30, 2002), and since the amount of the award is not challenged, we affirm the ALJ's award of back pay. *Palmer v. Triple R Trucking*, ARB No. 06-072, ALJ No. 2003-STA-028, slip op. at 5 (ARB Aug. 30, 2006).

As a successful complainant, Fleeman is also entitled to be restored to the same or a similar position that he would have occupied but for the discrimination, with the same

pay and terms and conditions of employment. 49 U.S.C.A § 31105(b)(3)(A)(ii). *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4 (ARB Mar. 31, 2005); see *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 1990-ERA-030, slip op. at 15 (ARB Feb. 9, 2001) (a “substantially equivalent position” provides the same promotional opportunities, compensation, job duties, working conditions, and status). Nevertheless, circumstances may make reinstatement impractical or impossible. *Assistant Sec’y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 7-8 (ARB June 30, 2005).

Fleeman testified that he wanted reinstatement with NPM, but that because he had been forced to sell his truck after NPM fired him, he would be unable to perform his previous duties as an owner-operator with NPM unless and until he had secured a new truck. TR at 77. Reinstatement, he added, would make it possible for him to purchase another truck. *Id.*

The ALJ found that Fleeman was entitled to front pay at the rate of \$1,140.59 a week until he obtained another truck and could thus accept reinstatement with NPM. Accordingly, the ALJ ordered NPM to pay front pay at the aforementioned rate until Fleeman obtained another truck and to reinstate Fleeman upon notification that he had obtained a truck and could resume his employment under his previous contract, at which point Fleeman’s entitlement to front pay would cease.<sup>5</sup> R. D. & O. at 43.

On appeal Fleeman asks the ARB to remand this case for the ALJ to determine an appropriate amount of front pay, presumably because of Fleeman’s asserted inability to afford the purchase of a truck that would, in turn, entitle him to the reinstatement ordered by the ALJ.<sup>6</sup> Complainant’s Brief at 14. Fleeman’s argument rests on the ALJ’s language that where reinstatement is found to be impossible, an award of front pay in lieu thereof is appropriate as an equitable substitute. R. D. & O. at 43.

It is true that the functional equivalent of reinstatement is front pay, which affords the complainant the same benefit (or as close an approximation as possible) as he or she would have received with reinstatement. Front pay is designed to place the complainant “in the identical financial position that he would have occupied had he been reinstated.” *Bryant*, ARB No. 04-014, slip op. at 8-9. (citations omitted).

Nevertheless, we decline at this time to order this matter remanded for a reassessment of the ALJ’s order of front pay and reinstatement. Notwithstanding

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<sup>5</sup> NPM does not address the issue of reinstatement and has thus waived the issue. See *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 7 (ARB Mar. 30, 2007).

<sup>6</sup> Fleeman noted on appeal that he had to file for bankruptcy in November 2008; since February 2009 he had applied for loans to purchase a truck and had tried to lease one but had been unsuccessful. Complainant’s Brief at 13 and attached affidavit.

Fleeman's difficulties to date in obtaining a new truck, the ALJ's order has been operative for only 15 months, too short a period in our estimation for concluding that the relief ordered by the ALJ is an impossibility.<sup>7</sup> *Compare Palmer*, ARB No. 06-072, slip op. at 7 (declining to decide the duration of a front pay award dependent on complainant's purchase of a truck) *with Bryant*, ARB No. 04-014, slip op. at 9 (remanding for a determination of the total amount of front pay).

While it is inherent in the ALJ's order that Fleeman exercise good faith in obtaining a truck, thereby enabling him to be reinstated, at the same time under the order as issued, NPM is legally obligated to reinstate Fleeman and thus erase the effects of its illegal action under the STAA. It is thus anticipated that NPM will, in the exercise of its own self-interest, make a good-faith effort to assist Fleeman in obtaining a truck and thereby re-establishing his qualifications for contracting with NPM as an owner-operator.

#### *Attorney's fees*

Pursuant to ARB Case No. 09-096, we have reviewed the ALJ's recommended decision awarding attorney's fees.<sup>8</sup> The ALJ approved a rate of \$200.00 an hour for Attorney Thomas F. Hoarty and \$150.00 an hour for Attorney Daniel T. Hoarty as reasonable and unopposed by NPM. The ALJ reduced the number of hours for which Fleeman's attorneys are entitled to recover fees by 32.45 hours, based on his findings that the attorneys failed to specify the purpose of several telephone calls, charged for unrelated matters, and spent an unnecessary amount of time in preparing for the one-day hearing and drafting the closing argument brief. The ALJ also reduced the request for litigation expenses from \$929.88 to \$249.25, the cost of the transcript.<sup>9</sup>

We find the ALJ's award of attorney's fees and costs based on the reduction of hours and the disallowance of certain expenditures to be supported by substantial evidence of record and in accordance with the ALJ's discretionary authority and law. Accordingly, we affirm the ALJ's award of attorney's fees and costs. *Dale*, ARB No. 04-003, slip op. at 8.

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<sup>7</sup> While Fleeman is entitled to front pay, such awards cannot be unduly speculative or open-ended. The longer a proposed front-pay period, the more speculative the damages become. *Bryant*, ARB No. 04-014, slip op. at 10 (citation omitted). Here, the ALJ ordered front pay from February 17, 2009, until NPM reinstates Fleeman.

<sup>8</sup> *Fleeman v. Nebraska Pork Partners*, ALJ No. 2008-STA-015 (May 19, 2009).

<sup>9</sup> The ALJ noted that on-line legal research, photocopies, and postage were part of overhead costs and were therefore not reimbursable.



### *Motion for new trial*

On appeal, NPM filed a motion for a new trial (hearing) on the grounds that the ALJ improperly examined Meays and Horton on July 22, 2008 “in an aggressive and intimidating manner,” which deprived NPM of due process of law and irreparably tainted the hearing. Respondents’ Motion for New Trial, Respondents’ Brief at 2.

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges do not provide for motions for a new hearing, but do refer to the Federal Rules of Civil Procedure (F.R.C.P.). 29 C.F.R. § 18.1(a). Rule 59(a)(2) provides three grounds for granting a new trial: (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence. F.R.C.P. 59(a)(2).

Relief is also available under Rule 60(b) because of (i) mistake, inadvertence, surprise or excusable neglect, (ii) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59, (iii) an adverse party’s fraud, misrepresentation, or misconduct, (iv) or other reasons not relevant here. F.R.C.P. 60(b).

NPM alleges that the ALJ intimidated its witnesses, especially Meays, but has provided no new evidence or any showing of mistake or neglect or manifest error in law or in fact. Our review of the transcript of the hearing reveals that the ALJ’s questioning of Meays or Horton was neither hostile nor intimidating. Indeed, the ALJ attempted throughout the hearing to elicit further information and clarify all four witnesses’ answers, but the tenor of his questions appears neutral and even-handed. *See* TR at 30-31, 38, 43-50, 53, 55, 57-62, 66-67, 69, 71, 73-84, 86-89, 91-92, 94, 98-102 (witnesses John Bohac and Fleeman); TR at 104, 111, 115, 118-28, 131-34, 155, 158, 162-71 (witnesses Meays and Horton). Accordingly, we deny NPM’s motion for a new trial. *See Santiglia v. Sun Microsystems, Inc.*, ARB No. 03-076, ALJ No. 2003-LCA-002, slip op. at 4 (ARB July 29, 2005).

### **CONCLUSION**

Notwithstanding the ALJ’s erroneous application of the standard for proof of causation under the recent STAA amendments, as herein discussed application of the appropriate standard leads to the same conclusion. Accordingly, the Board finds that ALJ’s Recommended Decision and Order on appeal is supported by substantial evidence of record and in accordance with applicable law. Fleeman proved that NPM fired him because of his protected activity in violation of the STAA’s whistleblower protection provisions. In addition, we find that the ALJ’s remedies regarding reinstatement and back and front pay are in accordance with law, as is the ALJ’s award of attorney’s fees. Therefore, we **AFFIRM** the ALJ’s recommended decision and award.

Fleeman's attorney has 30 days from the date this Decision and Order is issued in which to submit a request to the Board for additional attorney's fees and litigation expenses related to this appeal. He is to serve any such petition on NPM, which will have 30 days in which to file objections to the petition.

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**