



**In the Matter of:**

**JAMES M. MINNE,**

**ARB CASE NOS. 09-066  
09-082**

**and**

**ALJ CASE NO. 2004-STA-026**

**ROBERT W. PRIVOTT,**

**DATE: December 19, 2011**

**COMPLAINANTS,**

**v.**

**STAR AIR, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainants:***

Bruce B. Elfvin, Esq., *Elfvin & Besser*, Cleveland, Ohio

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge.**

**FINAL DECISION AND ORDER**

These cases arise under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA)<sup>1</sup> and its implementing regulations at 29 C.F.R. Part 1978.

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<sup>1</sup> These cases initially arose under a previous version of the STAA, 49 U.S.C.A. § 31105 (Thomson/West 2007), which Congress amended in 2007 as part of the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Because the amendments lowered the evidentiary burden of proof requirement for the complainant

Complainants James M. Minne and Robert W. Privott filed separate complaints alleging that Star Air, Inc. retaliated against them in violation of the STAA, which were consolidated upon hearing before a Department of Labor Administrative Law Judge (ALJ). On August 27, 2008, the presiding ALJ issued a Recommended Decision and Order on Remand (R. D. & O.), concluding that Star violated the STAA. The ALJ issued subsequent orders on February 11 and April 14, 2009, awarding the Complainants compensatory damages, attorneys fees, and costs. We affirm the ALJ's rulings.

## BACKGROUND

Star is a company that operates commercial motor vehicles in the course of its business selling ammunition at gun shows. Robert Custer is Star's President and Owner. Minne and Privott worked for Star on weekends as Commission Sales Representatives. They drove to gun shows using Star's vehicles, unloaded and sold ammunition, reloaded whatever did not sell, and then drove back to Star. Their pay consisted solely of a commission on the ammunition they sold.<sup>2</sup>

On January 10, 2003, when Privott was on his way to a gun show in Richmond, Virginia, the West Virginia Department of Transportation issued him a warning citation. The citation listed four violations: (1) hauling a load in excess of 10,000 pounds without a Class A Commercial Driver's License (CDL); (2) operating an overweight trailer; (3) driving a commercial vehicle without displaying the name of the company, its home base, or its Department of Transportation (DOT) number; and (4) driving without a log book.<sup>3</sup>

Privott told Custer about the violations listed on the citation. According to Privott, he told Custer that "the issues need to be taken care of before I can take this out again," and Custer replied "that if [Privott] wasn't willing to drive the trucks, there was certainly someone out there that would be."<sup>4</sup> Privott testified that Custer told him that "this didn't happen very often, and it would be a big mess to weave through it and figure out what the law really wanted us to do and it was just cheaper to keep going along as we have been going along."<sup>5</sup> Custer testified that he did not remember being told about all the violations listed on the citation, but could "recollect" only that the trailer was overweight.<sup>6</sup>

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and raised the burden of proof for the respondent's affirmative defense, the amendments do not affect the outcome of these cases.

<sup>2</sup> Stipulations 2-3, 4-7.

<sup>3</sup> Complainants' Exhibit (CX) 58.

<sup>4</sup> Tr. at 132-33.

<sup>5</sup> Tr. at 135.

<sup>6</sup> Tr. at 214.

Minne was driving to a show in Belleville, Illinois on January 10, 2003, when Privott called him and told him about the West Virginia citation.<sup>7</sup> Minne called Custer and told him that he intended to return to Star rather than risk a similar citation.<sup>8</sup> According to Minne, Custer asked him not to return, and “offered . . . [to] pay [Minne] more if [he would] keep on going.”<sup>9</sup> Minne testified that Custer also said that “it was less expensive for [Custer] to pay the occasional ticket than it would be to make the vehicles compliant, and that [Custer] would pay any ticket expenses . . . should they ever arise.”<sup>10</sup> Custer also stated that “we could either drive the vehicles as they were or somebody else would.”<sup>11</sup> Custer testified that he did not encourage Minne to keep driving, but instead gave him the option of returning to Star.<sup>12</sup>

During the week after he received the citation, Privott spoke with Carmen Neidert, Custer’s Secretary, about Star’s attempts to address the violations.<sup>13</sup> Privott and Neidert also discussed steps that would be necessary to bring Star into compliance with hazardous materials regulations.<sup>14</sup> According to Privott, he told Neidert that Star had not sufficiently addressed the violations to allow him to complete his next assignment, a show in Indianapolis, Indiana scheduled for January 17, 2003, and Neidert agreed.<sup>15</sup> Privott did not drive to Indianapolis. Cheryle Sigler, another Secretary at Star, testified that, on or about January 18, 2003, Star placed a hold on the Complainants’ company credit cards.<sup>16</sup>

Minne called Custer and Neidert on or about January 14, 2003, to discuss Star’s efforts to abate the violations that were cited on January 10. According to Minne, Custer said that his “intent was not to do any hazmat placarding or anything like that. It was more expensive [and]. .

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<sup>7</sup> Tr. at 62-63.

<sup>8</sup> Tr. at 63-64.

<sup>9</sup> Tr. at 64.

<sup>10</sup> Tr. at 66.

<sup>11</sup> Tr. at 89.

<sup>12</sup> Tr. at 233-236.

<sup>13</sup> Tr. at 157.

<sup>14</sup> Tr. at 142, 155.

<sup>15</sup> Tr. at 138-39.

<sup>16</sup> Tr. at 337.

. . . He didn't believe that they [the vehicles] needed to be placarded."<sup>17</sup> Custer testified that Star's trucks were not placarded because he did not believe that it was required by law.<sup>18</sup>

On January 31, 2003, Minne called Star "to get an update on the condition of the vehicles," because he "needed to know when to come back."<sup>19</sup> Minne called Star again sometime in mid-February 2003. According to Minne, Neidert told him that, since January 31, Star had undertaken no further compliance efforts.<sup>20</sup> Minne also spoke to Custer who, according to Minne, made it "apparent" that he "had no interest in making the vehicles compliant."<sup>21</sup> Custer testified that he did not recall this latter conversation.<sup>22</sup>

During the next few weeks, a few days before each show, Star assigned other drivers to cover shows originally assigned to Minne or Privott.<sup>23</sup> According to Sigler, Minne's and Privott's names were removed from the payroll in mid-to-late February 2003.<sup>24</sup>

Minne and Privott each filed a complaint with OSHA. R. D. & O. at 1. OSHA dismissed each complaint on the ground that "the investigation did not reveal any evidence that you were told verbally or in writing that your employment with the respondent was terminated." OSHA Determination (regarding Minne), December 10, 2003, at 1; OSHA Determination (regarding Privott), December 10, 2003, at 1. Minne and Privott jointly requested a hearing. After the hearing, the ALJ dismissed their claims because "the evidence does not show that Complainants were fired, disciplined, or suffered any other adverse employment action."<sup>25</sup> Minne and Privott appealed the ALJ's ruling to the Board.

On October 31, 2007, the Board remanded the case to the ALJ. We held that the ALJ applied the wrong legal standard to determine whether the Complainants had engaged in

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<sup>17</sup> Tr. at 71.

<sup>18</sup> Tr. at 254-55.

<sup>19</sup> Tr. at 72.

<sup>20</sup> Tr. at 73-76.

<sup>21</sup> Tr. at 75.

<sup>22</sup> Tr. at 240.

<sup>23</sup> Tr. at 245, 310-11, 326-27, 431-32.

<sup>24</sup> Tr. at 327.

<sup>25</sup> *Minne v. Star Air, Inc.*, ALJ No. 2004-STA-026, slip op. at 5 (Oct. 14, 2004).

protected activity.<sup>26</sup> We also concluded that the ALJ did not rely on the plain language of the STAA, which prohibits discipline, discharge, or discrimination, when he concluded that Star did not subject Minne and Privott to adverse employment actions.<sup>27</sup>

On remand, the ALJ instructed the parties to submit briefs addressing the remanded issues. The Complainants submitted a brief on July 21, 2008. Star did not submit a brief to the ALJ.<sup>28</sup> The ALJ held that Star violated the STAA by replacing and discharging Minne and Privott after they engaged in protected activity.<sup>29</sup> The ALJ ordered Star to reinstate the Complainants “and take what affirmative action is necessary to abate all violations of the Department of Transportation regulations.”<sup>30</sup> The ALJ left open the issue of calculating the amount of back pay owed, giving the parties 30 days to resolve this issue.

After the parties failed to resolve the back pay issue, the ALJ reopened the record and allowed the parties to submit evidence regarding the calculation of the back pay awards. The Complainants submitted a brief and evidence to the ALJ on November 28, 2008. Star did not submit any evidence to the ALJ.<sup>31</sup> He awarded Minne and Privott back pay and interest totaling \$181,468.28 and \$341,894.64, respectively, based on their 2002 earnings at Star.<sup>32</sup> Minne and Privott also submitted to the ALJ an Application for Fees and Costs. Star did not object to the request. The ALJ examined the request and awarded the Complainants \$79,004.75 “as full satisfaction of attorney’s fees and reimbursable costs and expenses.”<sup>33</sup>

These matters are before the Board under the now obsolete automatic review provision that was in effect when the ALJ issued his R. D. & O.<sup>34</sup> We issued a briefing order on September 5, 2008, inviting the parties to submit briefs in support of or in opposition to the ALJ’s decision. Neither party submitted a brief.

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<sup>26</sup> *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 9 (Oct. 31, 2007) (Order of Remand).

<sup>27</sup> *Id.* at 12.

<sup>28</sup> R. D. & O. at 1.

<sup>29</sup> *Id.* at 4-7.

<sup>30</sup> ALJ’s February 11, 2009 Recommended Decision and Order on Damages at 7.

<sup>31</sup> *Id.* at 1.

<sup>32</sup> *Id.* at 7.

<sup>33</sup> ALJ’s April 14, 2009 Recommended Attorney Fee Order at 2.

<sup>34</sup> See 29 C.F.R. § 1978.109(a) (2009) (“The [ALJ’s] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee.”).

## 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.<sup>35</sup> The ARB “shall issue a final decision and order based on the record and the decision and order of the administrative law judge.”<sup>36</sup> We are bound by the ALJ’s factual findings if those findings are supported by substantial evidence on the record considered as a whole.<sup>37</sup> The ARB reviews the ALJ’s conclusions of law de novo.<sup>38</sup>

## 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 activities. To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and such employment action was taken because of the employee’s protected activity.<sup>39</sup> The employee activities the STAA protects include: making a complaint “related to a violation of a commercial motor vehicle safety or security regulation, standard, or order,”<sup>40</sup> “refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security,”<sup>41</sup> or “refus[ing] to operate a vehicle because . . . the

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<sup>35</sup> 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).

<sup>36</sup> *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

<sup>37</sup> 29 C.F.R. § 1978.109(c)(3).

<sup>38</sup> *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

<sup>39</sup> See *Formella v. Schmidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-035, slip op. at 4 (ARB Mar. 19, 2009) (citing *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014 (ARB Sept. 30, 2004)). Congress changed the parties’ respective burdens of proof when it amended the STAA in 2007 (see footnote 1, supra). However, those changes are inconsequential to the disposition of this appeal because the claims and their disposition before the ALJ occurred prior to the 2007 amendments and were decided under a more difficult standard of proof for complainants.

<sup>40</sup> 49 U.S.C.A. § 31105(a)(1)(A).

<sup>41</sup> 49 U.S.C.A. § 31105(a)(1)(B)(i).

employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition."<sup>42</sup>

### ***Protected Activity***

The ALJ's findings of fact are not contested on appeal and they are supported by substantial evidence. The ALJ provided ample support for his conclusion that Minne and Privott refused to continue driving Star's vehicles because doing so would have constituted violations of several motor carrier safety regulations. They both contacted Custer on January 10, 2003, to tell him that they did not want to continue driving unsafe vehicles, and Custer admitted that Privott told him that the trailer he was driving on January 10, 2003, was overweight.<sup>43</sup>

Star operated vehicles in excess of 10,001 pounds. 49 C.F.R. § 390.21 requires companies operating vehicles above that limit to display signage indicating the name of the company and the DOT number assigned to the company. Privott and Mike Neidert, another Star driver, testified that none of the commercial motor vehicles they drove for Star contained such markings.<sup>44</sup> Custer testified that Star's trucks did not display signage because he did not believe that such markings were required by law.<sup>45</sup>

49 C.F.R. § 395.8 requires drivers to maintain their duty status in a log book or automatic on-board recording device. The record supports the ALJ's finding that "the failure to provide log books was ongoing and had only been remedied with respect to two Class A drivers, despite the fact that Privott specifically received a citation for failing to have a logbook."<sup>46</sup> Minnie testified that he was neither assigned a log book nor required to keep a driving log.<sup>47</sup> And Custer testified that he only gave log books to two drivers who had Class A CDLs, and he did so only after the trucks they drove were re-classified for a higher weight rating.<sup>48</sup>

The record also supports the ALJ's conclusion that Star failed to comply with regulatory requirements for transporting hazardous materials. Star regularly carried ammunition subject to

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<sup>42</sup> 49 U.S.C.A. § 31105(a)(1)(B)(ii).

<sup>43</sup> Tr. at 214.

<sup>44</sup> Tr. at 109, 380.

<sup>45</sup> Tr. at 254-55.

<sup>46</sup> R. D. & O. at 3-4.

<sup>47</sup> *Id.* at 3, citing Tr. at 52.

<sup>48</sup> Tr. at 247.

the shipping and labeling requirements of 49 C.F.R. Part 172.<sup>49</sup> The ALJ found that Star “failed to comply with shipping paper requirements” and “routinely obscured” labels on boxes containing hazardous ammunition.<sup>50</sup> None of Star’s vehicles displayed hazardous materials placards, and only one of its drivers, Neidert, received hazardous materials training and was supplied with contact information to use in the event of an emergency.<sup>51</sup>

In sum, the record supports the ALJ’s conclusion that driving any of the vehicles in Star’s fleet would have resulted in the Complainants’ commission of an actual violation of a safety regulation. The Complainants’ refusals to drive therefore qualify as protected activity under the STAA.

### ***Adverse Action***

The STAA prohibits “discharge . . . discipline or discriminat[ion] . . . regarding pay, terms, or privileges of employment” because of protected activity.<sup>52</sup> Star found replacement drivers for Minne and Privott, but failed to offer them equivalent work that did not require participation in safety violations. As we noted in our remand, “Custer did not indicate that he actually had offered Minne or Privott a position as a commissioned sales person [which required no driving]. Rather, he indicated only that he ‘would have been happy’ if either had asked him for such a position.”<sup>53</sup>

Star chose to react to Minne’s and Privott’s refusal to work by considering them to have resigned, rather than by addressing the issues they had raised during their employment. An employer who decides to interpret an employee’s protected activity as a resignation has in fact decided to discharge that employee.<sup>54</sup> Under the STAA, a discharge by an employer constitutes an adverse action. Thus ample evidence supports the ALJ’s conclusion that Star’s decision to discharge Minne and Privott constituted an adverse action. This finding is not contested on appeal.

### ***Causation***

To prove causation, Minne and Privott must show that they suffered adverse action because of protected activity. The record supports the ALJ’s finding that they refused to drive

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<sup>49</sup> *Id.*

<sup>50</sup> R. D. & O. at 4-5; *see, e.g.*, CX 4.

<sup>51</sup> R. D. & O. at 5, citing Tr. at 56, 106-7, 197.

<sup>52</sup> 49 U.S.C.A. § 31105(a)(1).

<sup>53</sup> *See* Order of Remand, slip op. at 12, n 15.

<sup>54</sup> *Id.* at 13-15.



for Star because the company wanted them to drive unsafe vehicles.<sup>55</sup> Because they refused to drive, Star replaced them with other drivers and discharged them from employment.<sup>56</sup> We therefore agree with the ALJ's conclusion that Minne and Privott were replaced and discharged because of their protected activity, and those actions by Star constituted retaliatory discrimination under the STAA.

In the weeks after Privott received the citation, both Complainants spoke to Custer and Neidert about addressing Star's safety violations. Instead of providing the Complainants with assurances that Star had properly addressed their concerns, Star cancelled their credit cards, replaced them with other drivers, and removed them from the payroll. The ALJ found that Star committed these acts to avoid its obligations under the laws governing motor vehicle safety:

It is apparent that, based on Complainants' protected activity, Respondent made the decision to replace Complainants. In so doing, Respondent was able to avoid taking responsibility for the maintenance of the trucks by substituting other drivers for Complainants. The replacement of Complainants is consistent with the statements made by Custer that he would find someone to drive the trucks if Complainants refused.<sup>[57]</sup>

An "employer is not allowed to impose unreasonable conditions on an employee and then [terminate the employee's employment] when the employee fails to comply with them."<sup>58</sup> The record supports the ALJ's conclusion that Star has "not introduced any evidence of a legitimate reason for the adverse action [it] took against Complainants."<sup>59</sup> The record supports the ALJ's findings that Star discriminated against and discharged Minne and Privott because of their protected activities, and therefore did so in violation of the STAA. Again, these findings are not contested on appeal.

### ***Reinstatement***

As a preliminary matter, we note that Star did not contest the ALJ's remedy award, nor does Star contest that award before us.

The STAA provides that, if the Secretary decides on the basis of a complaint that an employer violated the STAA, the Secretary shall order the employer to (1) take affirmative

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<sup>55</sup> R. D. & O. at 7.

<sup>56</sup> *Id.* at 12, n 15.

<sup>57</sup> *Id.* at 6.

<sup>58</sup> *Patterson v. Portch*, 853 F.2d 1399, 1407 (7th Cir. 1988).

<sup>59</sup> R. D. & O. at 8.

action to abate the violation; (2) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (3) pay compensatory damages, including back pay.<sup>60</sup> The ALJ ordered Star to reinstate the Complainants “and take what affirmative action is necessary to abate all violations of the Department of Transportation regulations.”<sup>61</sup> We affirm that order.

### ***Back Pay***

The ALJ directed the parties to submit evidence regarding the calculation of the back pay awards. Minne and Privott submitted evidence to the ALJ in support of their request for back pay, and Star did not oppose their request. We have reviewed the record, and we affirm the ALJ’s ruling awarding Minne and Privott back pay and interest totaling \$181,468.28 and \$341,894.64, respectively, based on their 2002 earnings at Star.<sup>62</sup>

### ***Attorneys Fees and Costs***

When a STAA complainant has prevailed on the merits, he or she may be reimbursed for litigation costs, including attorney’s fees. The STAA provides that “the Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney’s fees) reasonably incurred by the complainant in bringing the complaint . . . .”<sup>63</sup> Minne and Privott submitted to the ALJ an Application for Fees and Costs. Star did not object to the request. The ALJ examined the request and awarded the Complainants \$79,004.75 “as full satisfaction of attorney’s fees and reimbursable costs and expenses.”<sup>64</sup> We affirm this award. Minne and Privott’s attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney’s fee petition for costs and services before the ARB, with simultaneous service on opposing counsel. Thereafter, Star shall have 30 days from its receipt of the fee petition to file a response.

### ***Liability of Robert Custer***

Finally, Minne and Privott submitted a document captioned “Complainant’s Motion To Show Cause Why Respondent’s Sole Owner, Robert Custer, Should Not Be Personally Liable For The Relief Ordered In This Matter” (Motion to Show Cause), requesting that we issue an order directing Star “to show cause why its corporate veil should not be pierced for purposes of

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<sup>60</sup> 49 U.S.C.A. § 31105(b)(3)(A).

<sup>61</sup> ALJ’s February 11, 2009 Recommended Decision and Order on Damages at 7.

<sup>62</sup> Recommended Decision and Order on Damages at 7.

<sup>63</sup> 49 U.S.C.A. § 31105(a)(3)(B).

<sup>64</sup> ALJ’s April 14, 2009 Recommended Attorney Fee Order at 2.

recovering backpay, legal fees, and costs from its sole owner, Robert Custer.”<sup>65</sup> The Complainants submitted this document after the ALJ closed the record and issued his rulings on damages, fees, and costs.

Our decision constitutes an order affirming the ALJ’s provision of remedies to Minne and Privott. When a party fails to comply with a Board order, the STAA requires the Secretary of Labor to seek enforcement of the order. Under 49 U.S.C.A. § 31105(e), “If a person fails to comply with an order issued under subsection (b) of this section, the Secretary shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.” The Secretary has not delegated to the Board her authority to enforce such orders. Enforcement authority for STAA whistleblower orders rests with the Secretary or Assistant Secretary for Occupational Safety and Health for enforcement of the Board’s final decision, who will then decide whether to pursue the remedy sought against Custer personally.<sup>66</sup>

### CONCLUSION

Substantial evidence in the record as a whole supports the ALJ’s findings of fact, and he correctly applied the pertinent law. We **AFFIRM** the ALJ’s conclusion that Star discriminated against and discharged Minne and Privott for engaging in protected activity, and that Star therefore violated the STAA. We also **AFFIRM** the ALJ’s award of damages, attorney’s fees and costs. Finally, we **DENY** the Complainant’s Motion to Show Cause.

**SO ORDERED.**

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

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

**LUIS A. CORCHADO**  
Administrative Appeals Judge

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<sup>65</sup> Motion To Show Cause at 6.

<sup>66</sup> See, e.g., *Pollock v. Cont’l Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 16, n105 (ARB Apr. 7, 2010).