U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ROBERT LEIDIGH, **ARB NO. 97-132**

COMPLAINANT, **ALJ NO. 87-STA-12**

v. **DATE: December 24, 1998**

FREIGHTWAY CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Robert Leidigh, *pro se*

ORDER DENYING RECONSIDERATION

This case arises under Section 405, the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. app. §2305 (1988).[1/] Complainant, Robert Leidigh, seeks reconsideration of the Board's Final Decision and Order issued on December 18, 1997. We deny the request.

Leidigh's request for reconsideration appears to relate to other complaints that he filed under the STAA. We will outline the various complaints he filed in order to give context to the denial of reconsideration.

BACKGROUND

Leidigh began working for Freightway as a truck driver in July 1976. He worked at a terminal in Defiance, Ohio, driving trucks leased to Freightway by B & H Trucking. Beginning in 1983, he filed various complaints and grievances about his employment.

[1/] In 1994, the employee protection provision was codified, without substantive change, at 49 U.S.C. §31105. Because this case arose prior to 1994, we will refer to the language of the provision prior to codification.

In October 1985, Leidigh had a disagreement with Freightway's president, Jay Kaplan, concerning a physical examination. Kaplan allegedly chased Leidigh off company property. Leidigh did not return to work because he feared Kaplan. Leidigh prevailed on a grievance concerning this incident and won back his job.

In April 1986, Leidigh drove a trailer with defective brakes, which caused some tires to blow. He got a temporary repair while on the road, and upon return to the terminal he reported the defective brakes to Freightway's dispatcher and mechanic. A few days later, despite Leidigh's objection, Freightway ordered Leidigh to drive the defective trailer to Toledo. Leidigh wrote a letter to the Occupational Safety and Health Administration (OSHA), to Kaplan, and to his union, complaining that he was being singled out for coercion and threats concerning the defective trailer. Complainant's Exhibit (CX) 17.

That same month, B & H announced it was canceling the lease of its equipment to Freightway. Kaplan wrote a letter in April 1986 notifying the drivers that it was closing the Defiance terminal because of the lease cancellation. The drivers were given a deadline to inform Freightway of their choice among three options: transferring to the Toledo terminal, becoming an owner-operator, or retiring/seeking employment elsewhere.

Leidigh contended that he was afraid of working at the Toledo terminal because of Kaplan's presence there. His requests for help from the union went unheeded. Meanwhile, Freightway extended the deadline for Leidigh to choose an option.

Late in May 1986, Leidigh asked for a voluntary layoff so that he could obtain union representation concerning his choice among the options. The company denied the request because it would adversely affect other, less senior drivers and was not one of the options available to all of the Defiance terminal drivers.

In early June of that year, Freightway sent a letter informing Leidigh that his employment was terminated voluntarily because he had not been available for dispatch and had not contacted the office since May 27. Leidigh's grievance about the voluntary termination was denied. He filed this complaint in 1987, alleging that his discharge violated the STAA because he had made a safety complaint about the trailer brakes.

After ceasing to work for Freightway, Leidigh applied for jobs with other trucking companies. When one of the companies asked Freightway whether it would hire Leidigh again, Freightway answered "no" because it "cannot afford the legal expense to defend the charges filed with OSHA, National Labor Relations Board (NLRB) and other government agencies. All of the past charges filed were determined to be unfounded." CX 21.

Leidigh filed a complaint with the NLRB alleging that Freightway blacklisted him and unlawfully refused to rehire him. He also filed a separate complaint under the STAA concerning the blacklisting, Case No. 88-STA-13.

While the blacklisting case was pending before the NLRB, there was a hearing on this complaint, No. 87-STA-12, at which the parties agreed to defer the STAA proceeding until resolution of the NLRB proceeding.

Leidigh prevailed in an initial decision on the NLRB complaint. The decision ordered Freightway to reinstate Leidigh to the job he would have filled had he been hired on November 18, 1986, and also ordered back pay.

Pursuant to the NLRB order, Freightway rehired Leidigh in May 1990 and initially set his seniority at its original date, July 1976. The parties then settled this STAA complaint, as memorialized in a final decision issued by the Secretary in July 1990.

The union protested the July 1976 seniority date and consequently Freightway changed Leidigh's seniority date to November 1986. Leidigh unsuccessfully grieved the alteration in seniority date.

Later in 1990, Freightway discharged Leidigh for refusing a dispatch because of fatigue. This led to a STAA complaint, which the parties settled. Case No. 91-STA-27, ALJ Dec. and Ord., Nov. 27, 1991.

In the meantime, Freightway and Leidigh disagreed over the amount of back pay Freightway owed to Leidigh pursuant to the NLRB order. The parties settled the back pay issues in February 1992. In exchange for monetary payments, Leidigh agreed to resign from Freightway and not seek reemployment with the company.

Leidigh asked the Secretary to reopen this STAA complaint, which had been settled, because of the loss of ten years' seniority with Freightway. He sought reinstatement to Freightway and restoration of his July 1976 seniority date. The Secretary found that the parties had not agreed to a material part of the settlement, reopened the case, and remanded it to the Administrative Law Judge (ALJ) for a hearing. The hearing took place in May 1996.

In a recommended decision and order, the ALJ found that Freightway, acting lawfully under the collective bargaining agreement, terminated Leidigh's employment in 1986 because he did not make himself available for dispatch for three days. The ALJ recommended dismissing the complaint.

In a Final Decision and Order, the Board accepted the ALJ's recommendation. We found that "Leidigh did not present convincing evidence that discriminatory animus motivated Freightway's otherwise reasonable response to Leidigh's unavailability for work." Accordingly, we dismissed the complaint.

REQUESTS TO REOPEN

Leidigh submitted several requests seeking reopening and reconsidering of the final decision. Several of the requests mention the same ground for seeking reconsideration. We have grouped the arguments into three major issues.

We consider the requests to reopen a final decision with the knowledge that such requests are disfavored. *Jackson v. Protein Express,* ALJ Case No. 95-STA-38, ARB Case No. 98-104 Final Dec. and Ord., May 19, 1998, slip op. at 2. Reconsideration should be granted only to correct manifest errors of law or fact or to present newly discovered evidence. *Id.*; *Macktal v. Brown and Root, Inc*., ALJ Case No. 86-ERA-23, ARB Case Nos. 98-112, 98-112A, Order Granting Reconsideration, Nov. 20, 1998.

1. In the final decision, the Board corrected the misstatements in the Secretary's 1996 remand order

In a January 28, 1998 letter forwarded to the Board, Leidigh contended that there were mistakes in the 1996 Remand Order, and further, that when he notified the Board of the mistakes, "they refused to change the order, resulting in the loss of my case." There was no need to issue a separate order correcting any misstatements in the 1996 Remand Order. The ALJ corrected the mistakes in his recommended decision, and the Board likewise included the correct statement of the facts in the Final Decision. The Board therefore considered Leidigh's complaint in light of the correct facts.

The first alleged mistake is the statement, "Respondent settled Complainant's [STAA] claims arising out of the May 1986 discharge case by agreeing to reinstate him." 1996 Remand Order at 3, attached to Leidigh letter of July 17, 1998, to the Board. In the Final Decision, we stated correctly that Freightway reinstated Leidigh in 1990 pursuant to an *NLRB* order.[2/]

The second alleged misstatement is "that [Leidigh] was reinstated as if first hired in November 1986, *i.e*., that Respondent declined to restore his 1976 seniority." 1996 Remand Order at 3, 4. Again, we correctly stated in the Final Decision that the company initially restored his 1976 seniority date, but changed it to 1986 because the union protested. FD at 4 n.3.

Since we already have corrected the misstatements of fact, and we reached our Final Decision in light of the correct information, we will not reopen the Final Decision for this reason.

2. Leidigh's counsel did not make any error that justifies reopening the case

In a second letter forwarded to the Board, dated June 9, 1998, Leidigh contended that his lawyer "misrepresented" him by failing to apply STAA Section 405(b), the "refusal to drive" provision.[3/] The lawyer did not err because there is no refusal to drive at issue in this case.

[2/] *See* FD at 4: "The NLRB ordered Freightway to offer Leidigh immediate employment in the job he would have filled had he been hired on November 18, 1986, and to pay back pay. Administrative Law Judge's Exhibit 5 at 5. Consequently, Freightway rehired Leidigh in May 1990."

[3/] The STAA's refusal to drive provision stated at 49 U.S.C. app. §2305(b) (1988):

(continued...)

Leidigh contends that the "refusal to drive" provision applies in this case because he sought a leave of absence because of "stress syndrome." He further contends that to drive while under stress syndrome would violate the motor carrier safety rules. He attached a physician's statement, dated January 1991, that diagnosed stress syndrome. On its face, the 1991 physician statement concerning stress syndrome could not pertain to the discharge in this case, which occurred some five years earlier.

There is no other evidence that Leidigh engaged in a refusal to drive in 1986. Under regulations implementing the STAA's employee protection provision, the Occupational Safety and Health Administration (OSHA) conducts the initial investigation into a complaint. 29 C.F.R. §1978.103. In the investigation, OSHA determines whether "there is reasonable cause to believe that the complaint has merit." 49 U.S.C. app. §2305(c)(2)(A). When a party is dissatisfied with the results of the preliminary investigation, he may "request a hearing on the record" before an ALJ. *Id.* Upon the conclusion of the hearing, the ALJ issues a recommended decision. Formerly, the Secretary of Labor, and now this Board, issues a final order on the complaint.

In light of the statutory scheme outlined above, the Board usually does not rely upon the findings of the OSHA Administrator, but instead looks to the record made before the ALJ. In this case, however, the findings in the preliminary investigation are the best indication of the nature of Leidigh's complaint.

The findings issued by the OSHA Regional Administrator indicate that there was no refusal to drive at issue in the 1986 discharge. The Regional Administrator stated Leidigh's allegations in the complaint as follows: that he was constructively discharged when Freightway closed the Defiance terminal; that Freightway discriminatorily denied his request for voluntary layoff; that Freightway contested his application for unemployment compensation in retaliation for protected activities in which he had engaged in 1982 and 1983; and that he was harassed in April 1986 when Freightway threatened to make him pay for two tires that were destroyed because he drove a vehicle

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[3/](...continued)

> No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or to the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

with defective brakes. Secretary's Findings, Feb. 10, 1987, at pp. 2-4. Concerning the brakes issue, the Regional Administrator noted that Leidigh "did not refuse the assignment" and that Freightway did not make him pay for the tires. *Id*. at 4. Thus, no refusal to drive occurred in connection with the events that preceded Leidigh's 1986 discharge.

In his findings in this case, the Regional Administrator mentioned that in 1983, Leidigh had been discharged for refusing to drive and had filed a complaint under the STAA; that no STAA violation was found, and that Leidigh nevertheless was reinstated pursuant to a union negotiation. The 1983 discharge is not at issue in this complaint, filed in 1986. Because there is no "refusal to drive" issue in the complaint, Leidigh's attorney did not err when he did not litigate such a claim. There is no reason to reopen because of counsel's handling of this case.

3. <u>Leidigh did not allege a medical condition in this complaint</u>

In a July 27, 1998 letter to the Board, Leidigh contends that he alleged a medical condition, petitioned Freightway about stress, and requested a leave of absence to correct his medical condition. Although such a request may have occurred at some other time, and Leidigh may well have filed some other complaint concerning denial of a medical leave, he did not do so in this complaint.

With the May 1986 deadline approaching for choosing whether to work for Freightway at the Toledo terminal, Leidigh sought a voluntary layoff, stating: "I have been forced under pressure and without the advice of counsel to make decisions not in my best interest. I request a Co[mpany] Vol[untary] layoff, until such time I can exercise my Co[mpany] seniority." CX 12. At the hearing Leidigh explained that he sought the layoff so that he could get representation from his union. T. 86. This concession that the layoff was for the purpose of getting union help indicates that it was not based upon a medical condition.

In a July 30, 1998 letter to the Board, Leidigh maintains that the issue of his medical condition nevertheless arose at the hearing in this case. He points to the testimony of Richard Pursel, Vice
President of Operations at Freightway, on cross-examination:

> Q: Did you in any time in your course of dealings and knowing Bob consider him at times to be a nervous person?
>
> A: Yes, sir.

T. 307. Contrary to Leidigh's suggestion, Pursel's testimony that he sometimes appeared to be a nervous person does not constitute evidence that he sought, or was denied, a medical leave in the events leading to the filing of this complaint concerning his 1986 discharge.

CONCLUSION

Complainant has not presented evidence of any manifest errors of law or fact, or any newly discovered, material evidence. Consequently, we **DENY** the requests for reconsideration.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Acting Member