



Issue Date: 29 September 2004

Case No.: 2004-STA-00043

In the Matter of:

CHRISTOPHER WAECHTER,
Complainant

v.

J.W. ROACH & SONS LOGGING AND HAULING
JAMES D. ROACH
and
AMY PAYTON
Respondents

RECOMMENDED DECISION AND ORDER-DAMAGES

This matter arises upon a complaint filed by Mr. Christopher Waechter pursuant to § 31105 of the Surface Transportation Assistance Act of 1982, (hereinafter, "STAA" or the "Act") 49 U.S.C. 31101, *et seq.*, and the regulations promulgated thereunder at 29 C.F.R. Part 1978, and the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18. This matter was investigated by the Occupational Safety Health Administration, which issued its findings on April 8, 2004. On May 4, 2004, the Complainant filed objections and requested a formal hearing before the Office of Administrative Law Judges.

On August 27, 2004, a decision and order was issued granting the Complainant's motion for partial summary decision and ordering the Complainant's immediate reinstatement to employment. Additionally, Respondents J.W. Roach & Sons Logging and Hauling and James D. Roach and Amy Payton were ordered to pay to Complainant damages in the form of back wages for the period from February 13, 2004 to the present and continuing until the Complainant is reinstated, plus interest at the rate specified in 28 U.S.C. § 1961, commencing on February 13, 2004, the date of Complainant's discharge. Because evidence had not yet been presented regarding the amount of damages, Complainant was directed to submit evidence and argument as to the amount of back wages and any additional damages claimed, and Counsel's fee petition as to attorney fees and costs. It was also determined that the Respondents, by ignoring all orders issued in this case, had waived their right to present evidence opposing the complaint in this case, and would not be permitted to present evidence in opposition to the Complainant's evidence of damages or to Counsel's petition for attorney fees and costs.

On September 20, 2004, Counsel for the Complainant has submitted a brief concerning damages, the affidavit of the Complainant, and a petition for attorney's fees and costs.

Complainant is entitled to wage loss damages.

Under 49 U.S.C. § 31105(b)(2)(A) a successful complainant is entitled to compensatory damages and other relief. As evidenced by the Affidavit of Christopher Waechter, Complainant, his rate of pay with J. W. Roach & Sons Logging & Hauling was supposed to be 25 per cent of the revenue received by the employer for hauling services provided by Complainant. Complainant's affidavit indicates that Overnite Express paid J. W. Roach & Sons Logging and Hauling 88.3 cents per mile for Complainant's services. Thus, Respondents should have paid Complainant 29.43 cents per mile.

Complainant's affidavit establishes that he drove approximately 8,184 miles in the employ of J. W. Roach & Sons Logging & Hauling during his employment with that motor carrier. This results in an average weekly wage of \$602.14 (2,046 miles x .2943 per mile). Complainant began working for J. W. Roach & Sons Logging & Hauling on January 13, 2004. Thus, his projected wages through September 20, 2004, are \$22,277.19 (35.85 weeks x \$602.14 per week). It is noted that the Complainant acknowledges that his figures may not be precise, but, correctly argues that Respondents have refused to participate in this proceeding making it impossible to engage in discovery which would provide a more accurate estimate of miles driven by Complainant. Moreover, it is settled that "uncertainties in determining what an employee would have earned but for the discriminations should be resolved against the discriminating employer. *Pettway v. American Cast Iron Pipe Co., Inc.*, 494 F.2d 211, 260-61. See also, *Clay v. Castle Coal & Oil Co., Inc.*, 1990-STA-37 (Sec'y June 3, 1994).

The Complainant further acknowledges that, although he did not receive a paycheck during his employment with J. W. Roach & Sons Logging & Hauling, Inc., he received \$852.00 in trip advances, and also received \$7,534.25 in interim wages after his discharge. The Complainant concedes that these amounts, totaling \$8,386.25 should be deducted from his projected earnings. This leaves Complainant with a net wage loss through September 20, 2004 of \$13,890.94 (\$22,277.19 - \$8,386.25 = \$13,890.94).

Complainant is entitled to damages for emotional distress.

The Complainant also argues that he is entitled to compensatory damages due to emotional distress over the manner in which he was fired, and the Respondent's actions in having him arrested. Compensatory damages in cases under the STAA are not limited to back pay. *Michaud v. BSP Transport, Inc.*, 1995-STA-29 (ARB Oct. 9, 1997). The Secretary may award damages for emotional distress. *Dutkiewicz v. Clean Harbor Environmental Services*, 1995-STA-34 (ARB Aug. 8, 1997). *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, 1995-STA-37 (Sept. 5, 1996).

The Complainant argues that he was fired away from his home, that Amy Payton told Complainant to "park the truck, get out and walk home." After Complainant delivered the truck and keys to a neutral location, Respondents had Complainant charged with theft of the truck and his C.B. Radio. However, the charges against Complainant were ultimately dismissed. Under the facts presented, I find that the charges were clearly brought in retaliation for Complainant's protected activity. Therefore, I find that an award of damages for emotional distress is

appropriate. Complainant suggests an award of \$20,000 for his emotional distress, which I find is reasonable compensation under the circumstances.

Attorney's Fees and Costs

Counsel for the Complainant has filed a petition for attorneys fees and costs in the amount of \$6,869.25, based upon an hourly rate of \$250.00 per hour. I have reviewed the fee petition and find that the services rendered are reasonable in prosecution of this matter.

ORDER

It is, accordingly, Ordered that:

1. Respondents J.W. Roach & Sons Logging and Hauling and James D. Roach and Amy Payton shall pay to Complainant, Christopher Waechter, damages in the form of back wages for the period from February 13, 2004 to September 20, 2004 in the amount of \$13,890;
2. Respondents J.W. Roach & Sons Logging and Hauling and James D. Roach and Amy Payton shall pay to Complainant damages for lost wages from September 20, 2004, and continuing until he is fully reinstated to employment, at the rate \$602.14 per week;
3. Respondents J.W. Roach & Sons Logging and Hauling and James D. Roach and Amy Payton shall pay to Complainant compensatory damages in the amount of \$20,000, in addition to his back wages;
4. Respondents J.W. Roach & Sons Logging and Hauling and James D. Roach and Amy Payton shall pay to Counsel for Complainant, Paul O. Taylor, the sum of \$6,869.25 for attorney's fees and costs;
5. All amounts payable under this order shall be paid plus interest at the rate specified in 28 U.S.C. § 1961, commencing on February 13, 2004, the date of Complainant's discharge; and
6. This Recommended Decision and Order – Damages will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. *See* 29 C.F.R. §§ 1978.109(a) (2002).

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RICHARD E. HUDDLESTON
Administrative Law Judge