U.S. Department of Labor

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

In the Matter of:

ASSISTANT SECRETARY OF LABOR,

PROSECUTING PARTY,

and

ALBERT PORTER,

COMPLAINANT,

v.

GREYHOUND BUS LINES,

RESPONDENT.

ARB CASE NO. 98-116

ALJ CASE NO. 96-STA-23

DATE: June 12, 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

The Administrative Law Judge submitted a recommended order in this case arising under the Surface Transportation Assistance Act of 1982, as amended, (STAA), 49 U.S.C.A. §31105 (West 1996), recommending that the Board defer to the outcome of an arbitration proceeding and that the complaint be dismissed. Complainant was discharged by Greyhound on December 27, 1996, for repeated failure to be available for work and filed this complaint as well as a grievance under the collective bargaining agreement. A hearing on the grievance was held before an arbitrator on April 25, 1997, who upheld the discharge and denied the grievance. None of the parties filed exceptions to the ALJ's recommended order.

The standards in STAA cases for deferral to the outcome of other proceedings are that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the STAA. 29 C.F.R. §1978.112(c) (1996). The arbitrator found that Complainant was an "extra board" driver for Greyhound from March 1996 to December 27, 1996.[1/] Extra board drivers are on call as needed by Greyhound when a regularly scheduled driver is absent. The arbitrator found that Complainant was unavailable for work when called on six occasions before the

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[1/] The ALJ erroneously refers to Complainant's date of termination as December 27, 1995.

final incident which led to his discharge. Arbitrator's Decision and Award (Award) at 5-6, Attachment 2 to Greyhound's Motion to Defer to Arbitral Decision. He was warned each time that further incidents of being unavailable for work, called a "miss-out," could result in discharge, and he was suspended for three days after a miss-out in May, 1996. When Complainant missed out on August 13, he was warned that the next incident would result in discharge. Award at 6.

For each of the three days prior to his dismissal, Complainant avoided work by dropping down to the bottom of the extra board. Award at 8. When he was called at 2:00 AM on December 27, he said he was not available because he was sleepy. *Id.* at 6. Complainant met with his supervisor later that morning and explained that he had been fatigued when called at 2:00 AM because he had been out with family and friends the night before. *Id.* Complainant was discharged for being unavailable for work. The arbitrator held that Complainant had no reasonable basis to claim he was fatigued on the morning of December 27, because he had not worked for three days by dropping down to the bottom of the extra board and had ample time to be rested and available for work. *Id.* at 10.

The arbitrator rejected the union's argument that Greyhound violated the STAA by discharging Complainant when he refused to work because he was fatigued. He held that obtaining adequate rest was within Complainant's control because he had not worked for three days, and that the STAA does not protect an employee from discipline in those circumstances. *Id.* at 10-11.

The ALJ found that the arbitration decision dealt adequately with the factual issues in the case and reached an outcome that was not repugnant to the purposes of the STAA. ALJ Recommended Order at 2. Complainant had ample opportunity to obtain sufficient rest in the three days prior to his miss-out on December 27 and had been warned that another miss-out would result in his discharge. We agree with the ALJ that the arbitrator dealt adequately with the factual issues in the case. There is no indication that the arbitration proceeding was unfair to Complainant or suffered from any procedural defect, and we find that the outcome is not repugnant to the purposes and policy of the STAA.

The Federal Motor Carrier Safety regulations prohibit operation of a vehicle when "the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle." 49 C.F.R. §392.3 (1996) (the "fatigue rule"). The arbitrator held that the STAA does not protect an employee who deliberately made himself unavailable for work by not taking advantage of his time off to become rested and available when called. Award at 10-11. The test for violation of the fatigue rule is whether "a reasonable person in the same circumstance . . . would . . .conclude that his ability or alertness would be impaired such that a violation of the fatigue rule would have occurred." *Cortes v. Lucky Stores, Inc.*, Case No. 96-STA-30, ARB Dec. Feb. 27, 1998, slip op. at 5. Simply claiming that he was "sleepy" when called by Greyhound, Award at 6, is not enough to show that Complainant reasonably believed he was too fatigued to take the assignment. It is also not sufficient to show that an actual violation of the fatigue rule would have occurred if Complainant had accepted the assignment. 49 U.S.C.A. §31105(a)(1)(B)(i). *See Brandt v. United Parcel Service*, Case No. 95-STA-26, Sec'y. Dec. Oct. 26, 1995, slip op. at 6 (employee not protected for refusing an assignment in anticipation of fatigue due to change in sleep patterns contrasted with employee

required to remain on call by employer causing fatigue.) We agree with the ALJ that the STAA does not protect an employee who, through no fault of the employer, has made himself unavailable for work. Accordingly, we adopt the ALJ's recommendation that we defer to the outcome of the arbitration proceeding and the complaint in this case is denied.

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member