



In the Matter of:

**ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY AND HEALTH,**

PROSECUTING PARTY,

and

HARRY D. COTES,

COMPLAINANT,

v.

DOUBLE R TRUCKING, INC.,

RESPONDENT.

ARB CASE NO. 99-061

ALJ CASE NO. 98-STA-34

DATE: July 16, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Laura V. Fargas, Esq., Mark J. Lerner, Esq., Daniel J. Mick, Esq., Donald G. Shalhoub, Esq., Joseph M. Woodward, Esq., Henry Solano, Esq., *U. S. Department of Labor, Washington, D. C.*

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 ("STAA"), as amended, 49 U.S.C.A. §31105 (1997). The Assistant Secretary for Occupational Safety and Health alleged that Double R Trucking ("Double R" or "Company") violated STAA §31105(a)(1)(B) by firing Harry D. Cotes ("Cotes" or "Complainant") because of his refusal to drive an overweight truck. Following a hearing on the merits, the Administrative Law Judge ("ALJ") issued a Recommended Decision and Order ("R. D. & O.") finding that Cotes had established a STAA violation and granting relief. With the exception noted below, we find that the ALJ's findings of fact are supported by substantial evidence and are therefore

conclusive. R. D. & O. at 2; 29 C.F.R. §1978.109(c)(3) (1997). Furthermore, we agree with the finding of liability, but disagree, in part, with the remedy the ALJ ordered.

FACTS

Double R, a trucking operation based in Shelton, Washington, owns and leases commercial vehicles to transport wood chips and other products between sites within the state of Washington. Tr. at 7.^{1/} Cotes was employed by Double R as a truck driver from June 1996 to April 15, 1998, and his duties included hauling wood chips to various locations. Tr. 11, 12.

On April 15, 1998, Cotes completed his pre-trip inspection and filled his truck with wood chips for delivery to Port Townsend. R. D. & O. at 2; Tr. 28. The truck Cotes was driving had a maximum weight limit of 94,000 lbs. (the weight of the truck plus the load). R. D. & O. at 2. After loading the chips, Cotes weighed his truck at the scales and determined that he was overweight by 1600 lbs. Tr. at 19; Exh. CX-2. After notifying Double R's president, Roger Arndt, of the situation by radio, Cotes then started to use a loader (a tractor with a bucket) to bring his load into weight compliance by unloading some of the chips. R. D. & O. at 2; Tr. 29-30. Before the unloading began, Arndt arrived on the scene and directed Cotes not to unload and to haul the load as it was, on the grounds that there were no D.O.T. weight scales between Shelton and Port Townsend. *Id.* When Cotes refused to drive the overweight truck, Arndt told him to do his job or “consider himself fired.” *Id.* Cotes again refused to drive the overweight truck, but asked if he could be laid off instead of being fired so he could qualify for unemployment benefits. *Id.* Arndt said: “No, I will fire you first.” Tr. at 32. Having been fired, Cotes got in his car and left. Tr. at 57. On September 21, 1998, Cotes became a full time student at Centralia College. Tr. 10.

DISCUSSION

STAA Violation

The ALJ ruled that Double R violated the antiretaliation provisions of STAA by terminating Cotes for engaging in protected activity, namely, refusing to drive an overweight truck in violation of state law.^{2/} R. D. & O. at 2.

The employee protection provisions of STAA provide in relevant part:

^{1/} Citations to the transcript of the November 16, 1998, hearing are shown as “Tr.” In addition, “CX” and “DX” are citation forms for the exhibits of Complainant and Double R, respectively.

^{2/} Double R did not challenge this ruling on review. The Company was represented before the ALJ by Roger Arndt, appearing *pro se*. At the hearing, the ALJ noted that in pretrial discussions, Arndt indicated that the Company was “in a precarious position and on the brink of bankruptcy proceedings.” Tr. at 5. No brief or other pleading was filed with this Board by Double R.

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because --

* * * *

(B) the employee refuses to operate a vehicle because --

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health

49 U.S.C.A. §31105(a). As Cotes learned from an earlier occasion when he was cited and fined,^{3/} driving his vehicle with a weight in excess of 94,000 lbs. constituted a violation of the state law on maximum gross weights for commercial vehicles. Wash. Rev. Code Ann. §46.44.041 (1995); *see also* Wash. Rev. Code Ann. §46.01.011; Exh. CX-4. Violation of the state commercial motor vehicle laws also constitutes a violation of a Federal regulation. The Federal Highway Administration regulations provide:

Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated.

49 C.F.R. §392.2 (1998). Because Cotes would be driving a commercial vehicle on Washington state roads, Washington's motor vehicle laws are subsumed and incorporated into STAA as a "regulation" of the United States by reason of the FHA regulation quoted above. Cotes' refusal to drive an illegally overweight truck was protected activity and the Company's termination of him for that protected activity constituted a violation of STAA. *Beveridge v. Waste Stream Environmental, Inc.*, Fin. Dec. and Ord., Case No. 97-137, December 23, 1997, slip op. at 3-4; *Bigham v. Guaranteed Overnight Delivery*, Fin. Dec. and Ord., Case No. 96-108, September 5, 1996, slip op. at 2; *Shoup v. Klopfer Concrete Company*, Fin. Dec. and Ord., Case No. 95-STA-33, January 11, 1996, slip op. at 4.

Remedy

Before the Board, the Assistant Secretary takes exception to the ALJ's rulings on remedy. The ALJ's rulings disputed by the Assistant Secretary are:

1. Reinstatement is a moot issue because Cotes is a full-time student; and
2. Compensatory damages are to be paid in the amount of \$7,138.28.

^{3/} Cotes had been fined for carrying excess weight in January 1998, and at that time, he was informed by a Washington State Department of Transportation officer that the weight limit on the truck was 94,000 lbs. (60,000 lbs. truck weight and a maximum of 34,000 lbs. of load). R. D. & O. at 2; Exh. CX- 4.

R. D. & O. at 3. According to the Assistant Secretary, the ALJ erred because reinstatement is mandated by STAA and must be ordered, and the damages amount awarded by the ALJ is incorrect.

Reinstatement - The ALJ correctly declined to order reinstatement. His decision is correct, however, not because the issue is moot, R. D. & O. at 3, but rather because reinstatement has been waived.

In his pre-hearing brief, the Assistant Secretary informed the ALJ that

OSHA does not seek the reinstatement of the Complainant in his employment with the Respondent as the Complainant has now waived such remedy.^{4/}

Prehearing Response of the Assistant Secretary of Labor for Occupational Safety and Health (“Prehearing Br.”), October 31, 1998, at 5. Furthermore, in his post-hearing submission to the ALJ, the Assistant Secretary remained silent regarding reinstatement, conduct consistent with an understanding that the matter was settled. Assistant Secretary's Proposed Findings of Facts, Conclusions of Law and Order (“Proposed Findings”), January 15, 1999.^{5/} Having represented before the ALJ that reinstatement had been waived, the Assistant Secretary will not be heard to repudiate the waiver.

Back Pay - The ALJ ordered damages to be paid to Cotes in the amount of \$7,138.28, which represented the back pay owed him as a result of his discriminatory firing. R. D. & O. at 3. To determine the amount of back pay, the ALJ, using the figures provided by the Assistant Secretary, subtracted Cotes' interim earnings (\$683.38) from the monies he would have earned had he remained in the Company's employ (\$7,821.66) from April 15, 1998 (the date he was fired), until he voluntarily began full-time schooling on September 21, 1998. *Id.* at 2-3; Proposed Findings at 6-8. The ALJ adopted the Assistant Secretary's representation that Cotes was owed back pay in the amount of \$7,138.28. *Id.*

Contrary to his repeated representations to the ALJ, the Assistant Secretary argues to this Board that the back pay figure used by the ALJ is incorrect because (1) it is based on the wrong lost earnings period, and (2) it does not include the award of interest on the back pay. Br. of Asst. Sec. at 16, 22.

^{4/} This earlier representation directly contradicts the Assistant Secretary's repeated representations to the Board on appeal that there was “nothing” before the ALJ to indicate that reinstatement had been waived. Brief of the Assistant Secretary (“Br. of Asst. Sec.”), May 3, 1999, at 14, 21.

^{5/} The Assistant Secretary provided copies of the Prehearing Brief and the Proposed Findings to both Arndt and Cotes so they were aware of the representations being made regarding reinstatement and the remedy in general. See the cover letters for the Prehearing Brief and the Proposed Findings, dated October 31, 1998, and January 15, 1999, respectively.

(1) The Assistant Secretary contends that the lost earnings amount of \$7,821.66 was calculated based on the wrong time period, that is, it represents earnings lost during the period April 15, 1998, to August 21, 1998, rather than to September 21, 1998, the date Cotes began school. Br. of Asst. Sec. at 16. Therefore, argues the Assistant Secretary, Cotes should receive credit for an additional month of lost earnings, and the back pay amount should be increased accordingly.^{6/}

We agree that the appropriate time period for calculating Cotes' lost earnings is April 15 to September 21, 1998, the point at which Cotes, given his full time student status, was no longer available for work. See *Pope v. Transportation Services, Inc.*, Case No. 88-STA-8, Sec. Fin. Dec. and Ord., September 13, 1988, slip op. at 2 (back pay tolled at time complainant, a truck driver, lost his driver's license); *Francis v. Bogan*, Case No. 86-ERA-8, Sec. Fin. Dec. and Ord., April 1, 1988, slip op. at 5-6. We also agree that the lost earnings figure of \$7,821.66, initially calculated by the OSHA official investigating Cotes' complaint, covers only the period to August 21, 1998, and consequently, it is insufficient because it does not incorporate the additional month of lost earnings. See Secretary's Findings and Order, August 17, 1998, at 8. We therefore order Double R to pay Cotes back wages for the period from April 15 to September 21, 1998.

(2) We also agree with the Assistant Secretary that the ALJ erred by not ordering that interest be paid on the back pay amount. The purpose of the remedy in a discrimination case is to make the complainant whole, and in order to do so, payment of interest on the back pay amount is mandatory. *Hufstetler v. Roadway Express, Inc.*, Case No. 85-STA-8, Sec. Ord., August 21, 1986, *affirmed sub nom Roadway Express v. Brock*, 830 F.2d 179 (11th Cir. 1987). Secretarial decisions awarding interest on back pay under STAA provide that interest be calculated in accordance with the rate used for computing the interest to be charged for underpayment of Federal taxes. 26 U.S.C.A. §6621(a)(2) (1999); *Park v. McLean Transportation Services, Inc.*, Case No. 91-STA-47, Sec. Ord., June 15, 1992; *Phillips v. MJB Contractors*, Case No. 92-STA-22, Sec. Ord., October 6, 1992. We therefore order Double R to pay interest on the back pay amount.

Concurrent with this decision, the Board has also issued an order requiring the parties to submit figures representing the specific amounts of back pay and interest which Double R is to pay to Cotes. The Board will issue a supplemental order addressing these matters following receipt of the parties' submissions.

CONCLUSION

For the foregoing reasons, the ALJ's finding of a violation of STAA by Double R is affirmed, as is the award of back pay to Cotes. In addition, the ALJ's order is amended to include the payment of interest on the back pay amount.^{7/}

^{6/} The Assistant Secretary also contends that the accrual of back pay should not stop until Cotes has been given a bona fide reinstatement offer. Br. of Asst. Sec. at 16-22. As noted above, Cotes waived his right to reinstatement, so this contention is moot.

^{7/} In the "Conclusions" section of his brief to the Board and without discussion or citation to (continued...)

ORDERED

1. Double R shall pay Cotes back wages for the earnings he lost during the period April 15, 1998, to September 21, 1998, less interim earnings, and
2. Double R Trucking shall pay Cotes interest on the back wages.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

^{2/}(...continued)

authority, the Assistant Secretary requests an order requiring Double R to expunge Cotes' personnel records of all references to the firing and to order the Company to make no oral or written references to the firing in the future. Br. of Asst. Sec. at 23. The ALJ declined to order such remedy based on the "totality of the record." R. D. & O. at 3. We affirm.