



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: January 12, 2000

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.*

SUPPLEMENTAL DECISION AND ORDER

By Order dated July 16, 1999, this Board ordered Double R Trucking to pay back wages with interest to Harry D. Cotes, an employee fired for engaging in protected activity under the Surface Transportation Assistance Act of 1982, as amended, 49 U.S.C.A. §31105 (1997). In a separate order issued on the same date, we also requested the parties to provide us with the exact amount of back pay, including interest, which Double R owed to Cotes, and an explanation of the methodology used in determining these figures. Double R Trucking failed to respond; however, the Assistant Secretary provided the requested figure as well as a description of the methodology used in the determination.

Back Pay

Double R owes \$12,171.04 in back pay for its discriminatory termination of Cotes. The methodology (but not the figures) used by the Assistant Secretary in calculating back pay is adopted by the Board. The back pay amount was determined as follows:

(1) The number of straight and overtime hours Cotes worked during the 28 weeks from October 1, 1997, through April 15, 1998, was ascertained. (October 1 was used because that was the date of Cotes' last raise, and April 15 was used because that was the date Cotes was terminated.) Cotes worked 1041 hours straight time and 246.5 hours overtime^{1/} during this period.

(2) The total hours were divided by the number of weeks in the period (28 weeks) to determine an average number of hours worked per week. During the October-April period, Cotes worked an average of 37.2 hours straight time and 8.8 hours of overtime per week.

(3) The weekly average of straight and overtime hours were multiplied by Cotes' straight time pay rate of \$11.00/hr. and his overtime pay rate of \$16.50/hr., producing an average weekly wage for Cotes of \$554.40.

(4) To determine the number of weeks in which Cotes lost wages, we calculated the number of weeks in the period from his termination until the date upon which he was no longer available for work, namely, the number of weeks from April 15, 1998, to September 21, 1998, the date upon which he returned to school and removed himself from the labor market. This period contained 22 weeks and 5 days.

(5) The average weekly wage was multiplied by the number of weeks of lost work, producing \$12,590.42 of wages lost to Cotes because of the unlawful discrimination. To this amount was added 3 days of straight time pay (\$264.00) representing the three holidays Cotes would have been paid if he had been working for Double R Trucking during this period. The total wages lost by Cotes were \$12,854.42.

(6) During the April - September 1998 period, Cotes earned \$683.38 at other jobs. These interim earnings were deducted from the total lost wages, producing a back pay figure of \$12,171.04.

^{1/} The Assistant Secretary determined that Cotes worked 1015.5 hours straight time and 228 hours overtime in the relevant period. Asst. Sec. Filing re Back Pay at 4. These figures are incorrect, however, as the Assistant Secretary failed to include two data points in the calculation. Specifically, the Assistant Secretary omitted from his calculation 25.5 hours of straight time shop hours that Cotes worked during the February 1 to February 15, 1998, pay period, and 18.5 hours of shop overtime hours during the October 1 to October 15, 1997, pay period. These incorrect figures adversely affect all of the Assistant Secretary's subsequent calculations and thus the proffered figures could not be adopted by the Board.

Interest

The Assistant Secretary provided figures representing the interest owed by Double R Trucking based speculatively on various back pay payment dates. Asst. Sec. Filing re Back Pay at 7-8. The methodology and figures used by the Assistant Secretary in calculating these interest figures were not included in the Department's submission to this Board although the interest rate used was apparently the same as that set by the IRS for the underpayment of taxes.^{2/} We agree that Double R Trucking owes Cotes interest on his back pay and order that such interest accrue until the date on which the back pay amount is paid. We further order that the rate of interest to be applied be that required by 29 C.F.R. §20.58(a)(1999), that is, the IRS rate for the underpayment of taxes set out in 26 U.S.C.A. §6621 (1999), and that the interest be compounded quarterly. *See Moyer v. Yellow Freight*, Sec. Final Dec. and Ord., Case No. 89-STA-7, August 21, 1995.

Accordingly, Double R Trucking owes Harry D. Cotes back pay of \$12,171.04 plus accrued interest.

ORDERED

1. Double R shall pay Cotes back wages for the earnings he lost during the period April 15, 1998, to September 21, 1998, in the amount of \$12,171.04, and
2. Double R Trucking shall pay Cotes interest on the back pay, calculated at the rate set at 26 U.S.C.A. §6621(a)(2), and compounded quarterly.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

^{2/} The interest figures used by the Assistant Secretary were derived through conversations with various employees of the IRS. Assist. Sec. Filing re Back Pay at 7-8. In arriving at the interest owed, the Assistant Secretary used the proper interest rate (see discussion *supra*), but apparently compounded the interest on a daily basis. The Assistant Secretary has failed to cite any case, and we have found none, in which the Board has ordered interest to be compounded daily.