



In the Matter of:

BRIAN PETERSEN,

**ARB CASE NOS. 13-090
14-025**

COMPLAINANT,

v.

ALJ CASE NO. 2011-FRS-017

UNION PACIFIC RAILROAD CO.,

DATE: February 20, 2015

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Christopher W. Bowman, Esq., *Yaeger & Jungbauer Barristers, PLC*, St. Paul, Minnesota

For the Respondent:

Steven W. Olsen, Esq., *Simmons Olsen Law Firm, P.C.*, Scottsbluff, Nebraska

BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

ORDER AWARDING ATTORNEYS' FEES

This Order addresses: (1) Respondent Union Pacific's appeal (ARB Case No. 14-025) of the ALJ's Supplemental Order Awarding Attorneys' Fees and (2) Complainant Petersen's request for the award of attorneys' fees for legal representation before the Administrative Review Board in ARB Case No. 13-090.

I. ARB Case No. 14-025

In a Final Decision and Order issued in this matter on November 20, 2014, the Administrative Review Board (ARB) affirmed the Administrative Law Judge (ALJ) Decision and Order in which the ALJ found Union Pacific to have discharged Petersen in violation of the

whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).¹ The ARB affirmed the ALJ's order reinstating Petersen and awarding back pay with interest, compensatory and punitive damages, and attorneys' fees, which were to be determined. In addition, the ARB ordered that Petersen was entitled to an award of reasonable attorneys' fees and costs incurred before the ARB, and afforded Petersen the opportunity to submit a petition requesting the ARB to award attorneys' fees.

1. The ALJ's Supplemental Order Awarding Attorneys' Fees

On September 10, 2013, Petersen filed with the ALJ a petition for fees and costs incurred before the ALJ and OSHA, and Union Pacific filed an opposition. Petersen requested a total of \$112,121.85 in fees and costs for work performed before OSHA and the OALJ. In her Supplemental Order Awarding Attorneys' Fees (Supplemental Order), issued January 14, 2014, the ALJ discussed Union Pacific's objections to Petersen's fee petition and awarded a total of \$91,486.85 in attorneys' fees and costs for work performed before the ALJ and OSHA.² After thorough analysis, the ALJ reduced the rates from those requested for attorney hours as follows: she reduced the rate for Mr. Jungbauer's hourly fee from the requested \$450 to \$350; and she reduced the rate of Mr. Brunner's hourly fee from \$275 to \$225. After discussing Union Pacific's objections based on unnecessary time spent due to Jungbauer's illness and due to two attorneys representing Petersen at the hearing, the ALJ allowed all of the hours requested.³

Union Pacific appealed the ALJ's Supplement Order in ARB Case No. 14-025. On March 12, 2014, Union Pacific filed with the ARB a brief in Support of its Petition for Review of the ALJ's order and Petersen filed an opposition brief (in support of the Supplemental Order). Union Pacific argues before the Board that the ALJ erred in three ways. First, it argues that the ALJ's award of \$225 per hour to Brunner was not supported by substantial evidence because the survey Petersen submitted failed to list fees for attorneys with four or five years of experience in the Micropolitan/Rural Market at issue. Union Pacific argues that because there is no evidence of what the rate should be, that his rate should be lowered to that of Union Pacific's counsel, \$190 per hour.

Union Pacific also argues that there were multiple redundancies in hours billed and tasks completed because Jungbauer became ill and needed medical attention on May 23, 2012, the second day of the hearing. They argue that 22.5 hours, including travel time and hours, spent in preparation were clearly redundant, and Union Pacific was not responsible for this redundancy.

Finally, Union Pacific argues that some of the hours Brunner billed were duplicative. It asserts that because Brunner could not take over for Jungbauer during the first hearing when he

¹ 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2014) and as implemented by federal regulations at 29 C.F.R. Part 1982 (2014) and 29 C.F.R. Part 18, Subpart A (2013).

² Supplemental Order at 11.

³ *Id.* at 9-10.

was sick, it was implicit that Brunner was not able or prepared to continue the hearing on his own. Union Pacific takes issue with Brunner billing for all of the hours he spent attending the hearing on May 22, and 23, and August 14, and 15, 2012. It argues that Brunner's hours should be reduced for inefficiency or duplication of services in this case because more than one attorney was used.

Petersen's counsel argues that the Board should reject Union's Pacific's argument to overturn the ALJ's decision. Petersen's counsel argues that Brunner's hourly rate was reasonable as supported by another ALJ decision that found a reasonable hourly rate for Brunner as \$225. Petersen's counsel asserts that the time spent on the case due to Jungbauer's illness was reasonable because all of the time spent was necessary and, as the ALJ noted, there is no evidence that Jungbauer's health concern was exaggerated or the result of bad faith. Finally, Petersen's counsel asserts that both Jungbauer and Brunner were meaningful participants in the hearings, as the ALJ found, so Union Pacific's objection that the presence of two attorneys was duplicative must fail.

LEGAL STANDARD

The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under the FRSA.⁴ The ARB reviews an ALJ's fee award under an abuse-of-discretion standard and sets aside an award only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.⁵

DISCUSSION

As a successful FRSA complainant, Petersen is "entitled to all relief necessary to make the employee whole [including] . . . any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees."⁶ Reasonable attorneys' fees are calculated by "multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate."⁷ A complainant's "attorney seeking a fee award must submit evidence documenting the hours worked and supporting the

⁴ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1982.110.

⁵ *Luder v. Cont'l Airlines, Inc.*, ARB No. 13-026, ALJ No. 2008-AIR-009, slip op. at 2 (ARB Jan. 7, 2015); *Smith v. Lake City Enters., Inc.*, ARB Nos. 12-112, -113, ALJ No. 2006-STA-032, slip op. at 3 (ARB Sept. 12, 2013).

⁶ 49 U.S.C.A. § 20109(e); see also 29 C.F.R. §1982.105(a)(1).

⁷ *Luder*, ARB No. 13-026, slip op. at 3.

rates claimed, as well as records identifying the date, time, and duration necessary to accomplish each specific activity and all claimed costs.”⁸

The ALJ awarded fees and costs to Petersen in the amount of \$91,486.85 for work performed before the ALJ and OSHA. The ALJ granted the award based on a lower hourly rate than Petersen requested, finding that \$350 (rather than \$450) was a reasonable rate per hour for Jungbauer and \$225 (rather than \$275) was a reasonable rate per hour for Brunner. The ALJ analyzed and rejected Union Pacific’s objections based on “redundant” time spent because of Jungbauer’s illness at the first hearing and because there were two attorneys at the hearings.

On appeal, Union Pacific has, as previously discussed, raised three objections to the ALJ award: (1) that the ALJ’s award of \$225 per hour for Brunner’s time is not supported by substantial evidence and should be reduced to \$190 per hour (the rate charged by Union Pacific’s counsel), (2) there were multiple redundancies in hours billed because of Jungbauer’s illness on May 23, 2012, and (3) that some of the hours were duplicative because both Brunner and Jungbauer attended the hearing. After careful consideration of Union Pacific’s arguments, we are nevertheless persuaded by Petersen’s arguments that the ALJ’s determination of the appropriate hourly rate for Brunner was reasonable, that the amount of time spent on the case due to Jungbauer’s illness was both reasonable and necessary, and finally that the participation of both attorneys in the hearings before the ALJ was not duplicative.

Accordingly, we find the ALJ’s award of legal fees and costs neither arbitrary, capricious, nor an abuse of discretion, and otherwise in accordance with law. We therefore **APPROVE** the recommended award of \$91,486.85 in fees and costs for work performed before the ALJ and OSHA.

2. Attorneys’ Fees for Work Performed before the Administrative Review Board in ARB Case No. 13-090

On December 12, 2014, Christopher W. Bowman, Esq., Petersen’s attorney, filed with the ARB a petition for special damages including reasonable attorneys’ fees and litigation costs incurred before the ARB in this matter in the total amount of \$9,799.24. Attorney Bowman certified that a copy of the fee petition was simultaneously served upon Union Pacific’s attorneys at the Simmons Olsen Law Firm. Union Pacific did not file an objection in opposition to the fee petition. We find itemization of fees and costs reasonable, and approve Petersen’s request for the award of attorneys’ fees and costs in the amount of \$9,799.24 for legal services and costs provided by his legal representative before the ARB.

⁸ *Id.* (quoting *Clemmons v. Ameristar Airways, Inc.*, ARB No. 11-061, ALJ No. 2004-AIR-001, slip op. at 4 (ARB Apr. 27, 2012)).

CONCLUSION

The ALJ's Supplemental Order Awarding Attorneys' Fees in the amount of \$91,486.85, issued January 14, 2014, challenged by Union Pacific on appeal in ARB Case No. 14-025, is **AFFIRMED**. Complainant Petersen's request for the award of attorneys' fees in the amount of \$9,799.24 for legal representation before the ARB in Case No. 13-090 is **GRANTED**.

Accordingly, Union Pacific is **ORDERED** to pay Petersen a total of \$101,286.09 for legal fees and court costs incurred.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge