U.S. Department of Labor

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Issue Date: 04 June 2014

CASE NO.: 2013-FRS-3

In the Matter of:

DENNIS COATES,
Claimant

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Employer

Appearances:

Robert B. Thompson, Esq., and Robert E. Harrington, III, Esq.,
For the Complainant

Holly M. Robbins, Esq., and Joseph Weiner, Esq.,
For the Respondent

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

ATTORNEY FEE ORDER

I. Procedural History

On December 13, 2013, I issued a Decision and Order in favor of complainant Dennis E. Coates. The award included $185,563.91 in backpay and $4,500.00 in other compensatory damages. His attorneys submitted a fee petition on February 13, 2014 for their representation. Respondent opposed the petition on April 4, 2014, to which complainant's attorneys replied on April 16, 2014.

II. Applicable Law

The traditional American rule that each side pays its own lawyer – win or lose – has been repeatedly upheld by the Supreme Court. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In response, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, in order to promote "effective access to the judicial process" for persons with civil rights grievances who

otherwise may not bring suit. H.R. Rep. No. 94-1558, 1 (1976). Similarly, the Federal Rail Safety Act provides whistleblowers with make-whole relief, where compensatory damages include "litigation costs, expert witness fees, and *reasonable* attorney fees." 49 U.S.C. § 20109(e)(2)(C) (my emphasis). Thus, the primary concern in resolving an attorney fee dispute is that the fee awarded be reasonable.

The Sixth Circuit and Administrative Review Board follow the lodestar approach, first articulated by the Supreme Court in *Hensley*. *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 616 (6th Cir. 2007) ("The starting point for determining a reasonable fee is the lodestar..."); *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-026, slip op. at 1 (March 5, 2014). That approach considers "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. While the party seeking compensation bears the burden of documenting its work, it remains for the adjudicator to determine what fee is reasonable. *See Reed v. Rhodes*, 179 F.3d 453, 472 (6th Cir. 1999) (citing *Webb v. County Bd. Of Educ.*, 471 U.S. 234, 242 (1985)); *Hensley*, 461 U.S. at 433. As a broad guideline, a reasonable fee is "adequately compensatory to attract competent counsel yet [is one] which avoids producing a windfall for lawyers." *Gonter*, 510 F.3d at 616 (quoting *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004).

Complainant's attorneys stress that because of the important policy concerns of federal fee-shifting statutes like the FRSA, "there is no correlation between the compensatory damages [awarded to claimant] and the award of attorneys' fees." Cl. Pet. Atty. Fees and Costs 3. Complainant's attorneys cite *McHenry v. Chadwick*, 896 F.2d 184 (6th Cir. 1990), which upheld an award of attorney fees and costs of $14,460 – an amount five times the amount of damages awarded to the plaintiff. The Sixth Circuit reasoned that "the value of the rights vindicated goes beyond the actual monetary award, and the amount of the actual award is not controlling." *Id.* at 189. This principle was initially endorsed by the Supreme Court in *City of Riverside v. Rivera*, 477 U.S. 561, 562 (1986). Justice Brennan acknowledged that a rule of proportionality would undermine the ability of "individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts, and would be totally inconsistent with Congress' purpose of ensuring sufficiently vigorous enforcement of civil rights." *Id.* The principle of non-proportionality has recently been articulated by the Second Circuit in the context of an FMLA case:

> By enacting a fee-shifting provision for FMLA claims Congress has already made the policy determination that FMLA claims serve an important public purpose disproportionate to their case value... Especially for claims where the financial recovery is likely to be small, calculating attorneys' fees as a proportion of damages runs directly contrary to the purpose of fee-shifting statutes: assuring that civil rights claims of modest cash value can attract competent counsel.

Millea v. Metro North Railroad Co., 658 F.3d 154, 167-169 (2d Cir. 2011). Thus, disproportionality on its own is not dispositive of unreasonableness. As the Sixth Circuit has clarified, the broad inquiry into reasonableness involves whether the fee is adequately compensatory to attract competent counsel yet avoids producing a windfall. Thus, so long as the fee does not produce a windfall, it may be both disproportional and reasonable.

Because a reasonable fee is composed of a reasonable hourly rate and a reasonable number of hours, I discuss both in turn.

A. Reasonableness of Rate

The *Greier* court explained that "[t]o arrive at the reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Greier*, 372 F.3d at 791 (quoted for the same proposition in *Gonter*, 510 F.3d at 618; *B&G Mining, Inc. v. Dir., Office of Workers' Comp. Programs*, 572 F.3d 657, 664 (6th Cir. 2008)); see also *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). The appropriate rate therefore, "is not necessarily the exact value sought by a particular firm, but is rather the market rate in the venue sufficient to encourage competent representation." *Gonter*, 510 F.3d at 618 (citing *Lamar Adver. Co. v. Charter Twp. of Van Buren*, 178 Fed.Appx. 498, 502 (6th Cir. 2006)) (unpublished).

Complainant's counsel seek an hourly rate of $500.00 for the work of Robert B. Thompson and $300.00 for Robert E. Harrington, III for work done at the OALJ level. They seek reduced rates of $300.00 and $150.00, respectively, for work done at the OSHA level.

Mr. Thompson has practiced law for 39 years. Since 1978, 95% of his daily practice has involved representation of railroad employees in on-duty personal injury claims. He is licensed to practice in Michigan, Ohio, and Illinois, and is a member of the Academy of Rail Labor Attorneys – an organization devoted to prosecution of claims by railroad employees. Since the enactment of FRSA in 2007, Thompson has added whistleblower claims to his practice. He has prior experience prosecuting claims against respondent, which substantially benefitted claimant. In particular, because Thompson had previously represented a GTW employee and possessed his personnel file, Thompson was able to expose false testimony by a GTW witness. In addition, Thompson had personal knowledge of the circumstances surrounding the return to work of a GTW employee. His knowledge helped demonstrate an inconsistent application of employee policy to claimant. The parties do not dispute that Thompson is an experienced attorney. As a result, I find Thompson's experience is consistent with the rates set forth in the 95th percentile of the 2010 Economics of Law Practice Report of the State Bar of Michigan ("Practice Report"). *See* Cl. Pet. Atty. Fees and Costs, Ex. 3.

Mr. Harrington has practiced law for 11 years. He has devoted more than 75% of his practice to railroad employment and injury disputes. He is licensed to practice in Illinois and Indiana and is a member of the Academy of Rail Labor Employees. He has taken this case and *Mihm v. Grand Trunk Western*, 2010-FRS-36 (OALJ 2010) to hearing, and he has been recognized in 2012 as a "Rising Star" by *Superlawyers*. As a result, I find Harrington's experience is consistent with the rates set forth in the 75th percentile of the Practice Report.

The Practice Report details attorney hourly billing rates by field of practice. Average rates for the 95th and 75th percentiles for practitioners of administrative law are $420 and $300; average rates for those same percentiles for practitioners of employment litigation (plaintiff) are $400 and $300. Given that FRSA litigation involves both practice areas, I average the rates and

find that $410 is a rate that a lawyer of Mr. Thompson's "comparable skill and experience can reasonably expect to command."[1] *Greier*, 372 F.3d at 791. For the same reason, I find that $300 is a rate that Mr. Harrington can be reasonably expected to command.

B. Reasonableness of Time

Respondent asserts that claimant cannot recover attorneys' fees for work performed during the OSHA investigation because the result of that investigation was a finding that GTW did not violate the FRSA. Resp't Opp. to Cl. Pet. for Fees and Costs 5. The FRSA provides for an award of attorney fees for "any action taken under subsection (d)." 49 U.S.C. § 20109(e)(1). Subsection (d) expressly lists "petition[s] or other request[s] for relief ... initiated by filing a complaint with the Secretary of Labor." § 20109(d)(1). Thus, worked performed during the OSHA investigation is compensable pursuant to § 20109(e)(1). *See Buchala v. PATH*, 12-CV-5371 (March 28, 2014) (holding that worked performed at OSHA level is recoverable under subsection (d) and noting that it is a step required by the FRSA before an employee is allowed to bring a FRSA action). That a complainant prevails at a later stage in the regulatory process does not preclude work performed at initial required stages. *See id.* at 7.

Coates undertook a section 20109(d)(1) action by filing a complaint with OSHA, an agency of the Department of Labor that is charged with accepting and investigating FRSA complaints. Relief for this action is recoverable under FRSA as an action under subsection (d). Accordingly, any hours billed pursuant to Coates' OSHA proceedings are recoverable.

Coates' attorneys petition for 23 hours of work performed at the OSHA level at a reduced rates of $250.00 and $150.00 per hour. Nothing in the record, including the Practice Report, indicates that hourly rates should vary by non-geographical jurisdiction. Given that I find hourly rates of $410.00 and $300.00 as those rates that Messrs. Thompson and Harrington can be reasonably expected to command in Michigan for representation of a plaintiff in administrative employee litigation, I apply those same rates to work performed at the OSHA level.

Coates' attorneys petition for 537.80 total hours (OSHA and OALJ levels).[2] Respondent asserts that the following hours should be disallowed as unreasonable: (1) review of OSHA complaint file and September 2011 investigation transcript; (2) multiple phone conferences with Coates spanning eight months; (3) excessive time spent opposing summary decision; (4) excessive time spent preparing for hearing; (5) excessive time spent reviewing the hearing transcript; (6) excessive time spent on post-hearing brief; (7) excessive time spent on post-hearing reply brief; (8) excessive time spent drafting October 8 FOIA letter; and (9) various vague time entries. Finally, respondent asserts that the petition's indication of half- and full-hour increments warrants a 50% fee reduction. Respondent therefore asserts that the fee award should

[1] Complainant's counsel notes that the ARB has recently upheld $525.00 for FRSA litigation in *Bala v. PATH*. However, the ARB considered comparable hourly rates for Connecticut, not Michigan. While the Practice Report indicates an average rate of $525.00 for lawyers in the 95th percentile practicing in downtown Detroit, it does not detail rates by practice area in downtown Detroit. As a result, it is unclear whether administrative law and employment litigation (plaintiff) should be adjusted upward for downtown Detroit.

[2] In support of its petition, complainant's attorneys note that a federal district court recently granted a petition for 657.40 hours of attorney work to bring a FRSA case to resolution. *Barati v. Metro-North*, Case No. 3:10-CV-1756 (D. Conn. Mar 27, 2013).

be reduced by 239.55 hours, or in the alternative, the 537.80 hours should be subject to a 50% reduction. Resp't Opp. to Cl. Pet. for Fees and Costs 13.

Complainant's attorneys petition for two hours involved in "[r]eview of initial complaint file". Respondent asserts that this entry is vague. "The key requirement for an award of attorney fees is that '[t]he documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the ligation.'" *Imwalle v. Reliance Medical Products*, 515 F.3d 531, 553 (6th Cir. 2008). I find this entry of sufficient detail to determine with a high degree of certainty that two hours were actually and reasonably expended to review the initial case file. Instead, I find that the three hours devoted to "[r]eview of September 2011 investigation transcript", which was a mere 60 pages, an unreasonable amount of time expended. Accordingly, I reduce the hours in half to one and one-half hours.

Respondent asserts that four hours for "multiple phone conferences with Mr. Coates regarding his actions both before and after the alleged incidents along with investigation into his damages" is not recoverable because (1) most of the time period encompassed by this entry predates any complaint or investigation with OSHA, and (2) the entry is vague. Resp't Opp. to Cl. Pet. for Fees and Costs 6. While time conferring with a complainant before filing a complaint can certainly be reasonably expended, it is unclear from the entry which portion of the four hours spent predates and postdates the filing of the complaint. I therefore find this entry of insufficient detail to determine with a high degree of certainty that the four hours spent were actually and reasonably expended. Accordingly, I reduce the hours in half to two hours.

Respondent asserts that time spent opposing summary decision (37.5 hours by Thompson; 44 hours by Harrington) is excessive. Respondent notes that the brief consisted of 33 pages, and various issues had been previously addressed at the charge stage. Respondent additionally asserts that the case law "is standard for an FRSA case, and the issues are not novel." Resp't Opp. to Cl. Pet. for Fees and Costs 7. Complainant's attorneys assert that the motion raised multiple issues; it extensively discussed complainant's discipline history; the motion's outcome was significant and potentially drastic to complainant; the evidence was not the same at the ALJ and OSHA levels – noting that voluminous documents had been produced, depositions were taken, and depositions needed to be reviewed and summarized; and the ALJ hearing is *de novo*. Cl. Pet. for Fees and Costs 4. Given the volume of the evidence and the high stakes of summary decision for complainant, I find the time spent reasonable. The fact that the brief consisted of 33 pages is unpersuasive; often, clear and concise writing is more difficult to produce than a garrulous and rambling brief. That the case law is standard for a FRSA case is also unpersuasive. Respondent had asserted that the mere filing of an earlier whistleblower complaint in bad faith cannot amount to protected activity. Respondent cited no case law for this proposition, other than a single case from the Northern District of Mississippi. As I explained in my Decision and Order dated December 19, 2013, I could find no directly relevant decisions issued by the Administrative Review Board. *Coates v. Grand Trunk Western RR Co.*, No. 2013-FRS-3, slip op. at 12 (Dec. 19. 2013). Thus, the issues raised by this case were not standard for a FRSA case.

Respondent asserts that time spent related to hearing preparation (56 hours by Thompson; 32 hours by Harrington) is excessive. Respondent notes that the two attorneys only prepared two testifying witnesses, that Thompson's entries largely consist of "[t]rial prep/exhibit review" billed in hour-long increments. Respondent further asserts that the entries "[s]ummary memo/notes", "[p]reparation for hearing" are similarly vague. Lastly, respondent asserts that while travel time is compensable, it is improper to bill for both Thompson's and Harrington's travel to and from the hearing. Resp't Opp. to Cl. Pet. for Fees and Costs 8. Claimant's attorneys assert that FRSA litigation is in its infancy compared to other employee protection statutes, and timely preparation is still necessary; and the facts of the case were complicated and involved many issues. Given the complicated factual issues presented by the case, which involved a number of categories of circumstantial evidence for establishing the "contributing factor" prong of complainant's prima facie case, I find the that time spent related to hearing preparation reasonable. Further, I find the entries sufficiently detailed to determine with a high degree of certainty that the hours were actually and reasonably expended. As the Supreme Court noted in *Hensley*, counsel should identify the "general subject matter" of the time expended. *See Hensley*, 461 U.S. at 437. Complainant's attorneys have done so here. With respect to travel time, both attorneys represented complainant at the hearing; billing travel time for both is therefore reasonable. *See Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991) (travel time awarded for two lawyers upheld as reasonable).

Similarly, respondent asserts that time spent reviewing the hearing transcript is excessive: "It does not take two attorneys 18 hours to review the hearing transcript of hearing that took less than 13 hours." Resp't Opp. to Cl. Pet. for Fees and Costs 9. Complainant's attorneys assert that the hearing transcript needed to be read and summarized, which was complicated by the contradictory and inconsistent testimony of Messrs. Tassin and Golombeski. The hearing transcript bears out this assertion; scattered portions revealed (1) shifting explanations for terminating complainant (2) a change in attitude toward complainant; and (3) cat's paw liability. Establishing that complainant's protected activity contributed to adverse action taken against him required a careful reading and familiarity with the lengthy transcript. For these reasons, I find the time spent reviewing the hearing transcript reasonable.

Respondent asserts that time spent on complainant's post-hearing brief is excessive (12 hours by Thompson and 95.5 hours by Harrington). Respondent reasons that the brief required no "extensive new research or even extensive new factual description, as the case had already been briefed on summary judgment." Resp't Opp. to Cl. Pet. for Fees and Costs 9. Respondent further reasons that given the attorneys' skill level, the amount of billed time is unreasonable. Complainant's attorneys assert that the case was not straightforward and simple; that much of the evidence was circumstantial and required counsel to "connect the dots"; that respondent offers no proof of evidence from other cases as to what is a "reasonable" amount of time; that respondent challenged each issue in the case, conceding nothing; and that the evidence available at the summary decision and post-hearing stage were different, especially given the inconsistencies in Tassin's testimony. Cl. Pet. for Fees and Costs 6. Given the complexity of the case and the change in evidence between summary decision and post-hearing, I find the time spent on complainant's post-hearing brief reasonable.

Respondent asserts that one hour of time spent drafting a FOIA request is excessive. Respondent's attorney has submitted an affidavit stating that he has, on many occasions, submitted FOIA requests that generally have taken ten minutes of time and can be performed by administrative staff. Complainant's attorneys did not respond to this assertion in their reply brief. As a result, I find the amount of time spent drafting the FOIA request unreasonable, and reduce the time spent from 1.5 hours to .25 hours.

Respondent asserts that 12 of Thompson's billing entries are vague and excessive. These include:

- Drafting FOIA request;
- Correspondence with Lipschultz re deposition; Formulate interrogatories and requests for production;
- Review correspondence;
- Review disc./Bonner statement; Supplement answers to interrogatories;
- Review correspondence from GTW;
- Review file/trial strategy;
- Review file/GTW motion to reconsider;
- Review file/prepare for Tassin and Golombeski deposition;
- Summary and review/discussions;
- Status evaluation;
- Motion review; and
- Reschedule deposition issues.

In response, claimant's attorneys have attached an email exchanged between them and respondent's counsel, which underlies the entry "[r]eschedule deposition issues". Cl. Rep. Br. in Support of Pet. for Fees and Costs, Ex. 9. The message, written by respondent's counsel, offers a stipulation in exchange for complainant's agreement to not depose a witness. Complainant's attorneys bill one hour for this exchange, and assert that this type of accuracy underlies all of the entries above. Notwithstanding the example provided by complainant's attorneys, I find the twelve entries, except the drafting of the FOIA request, sufficiently detailed to determine with a high degree of certainty that the hours were actually and reasonably expended. They identify the general subject matter of the task, and are not vague as a result.

Finally, respondent asserts that complainant's attorneys' use of half and full-hour billing increments warrants a percentage reduction of 50%. While the majority of the entries bill in half or full hour increments, all of the entries, except those noted contrarily above, are sufficiently detailed to determine the reasonableness of time expended. In addition, the complete list includes several entries that bill in one quarter and one sixth increments.[3] For these reasons, I decline to reduce total fees by a percentage as a result.

In sum, I find the following number of hours worked by Thompson reasonable:

[3] Complainant's attorneys attest that "[i]f a task took little time, Complainant's counsel did not bill it at all." Cl. Rep. Br. in Support of Pet. for Fees and Costs 8.

- 23.00 hours (OSHA level) reduced by 3.50 hours equals 19.50 hours; and
- 233.50 hours (OALJ level) reduced by 1.25 hours of time spent to draft FOIA request and increased by 6.50 hours for work performed to complete the reply in Support of Complainant's Petition for Fees and Costs equals 238.75 hours;

for a total of 258.25 hours. At a rate of $410.00, total fees for Thompson equal $105,882.50. I find the following number of hours worked by Harrington reasonable:

- 1.00 hour (OSHA level); and
- 280.30 (OALJ level),

for a total of 281.30 hours. At a rate of $300.00, total fees for Harrington equal $84,390.00. Because the total fees of $190,272.50 are reasonable, they do not represent a windfall to complainant's attorneys, and they are adequately compensatory to attract competent counsel. *Gonter*, 510 F.3d at 616.

ORDER

IT IS HEREBY ORDERED that Grand Trunk Western Railroad Company pay Attorney Robert B. Thompson $105,821.00 and attorney Robert E. Harrington, III, $84,390.00.

Digitally signed by Richard Morgan
DN: CN=Richard Morgan, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Pittsburgh, S=PA, C=US
Location: Pittsburgh PA

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).
You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points

and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).

SERVICE SHEET

Case Name: **COATES_DENNIS_v_GRAND_TRUNK_WESTERN__**

Case Number: **2013FRS00003**

Document Title: **ATTORNEY FEE ORDER**

I hereby certify that a copy of the above-referenced document was sent to the following this 4th day of June, 2014:

Digitally signed by KAREN M. JOYCE
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