In the Matter of:

ROBERT SHARPE,

COMPLAINANT,

v.

SUPREME AUTO TRANSPORT,

RESPONDENT.

ARB CASE NO. 2017-0077

ALJ CASE NO. 2016-STA-00073

DATE: December 23, 2019

Appearances:

For the Complainant:
Jack W. Schulz, Esq. and Elizabeth A. Gotham, Esq.; *Schulz Gotham PLC*; Detroit, Michigan

For the Respondent:
Carolyn B. Witherspoon, Esq. and J. E. Jess Sweere, Esq.; *Cross, Gunter, Witherspoon & Galchus, P.C.*; Little Rock, Arkansas

Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. Robert Sharpe, the Complainant, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on March 3, 2015, against Supreme Auto Transport, the Respondent. Complainant alleged that Respondent, his employer, had violated the

employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, when it terminated his employment. 49 U.S.C. § 31105 (2007), as implemented at 29 C.F.R. Part 1978 (2019). Complainant argued that he was fired because he engaged in activity protected by the STAA. The STAA prohibits employers from discriminating against employees when they report violations of commercial motor vehicle safety rules or when they refuse to operate a vehicle when such operation would violate those rules. 49 U.S.C. § 31105(a).

After hearing, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) denying the complaint because the ALJ found that the decision-makers did not know that Complainant had engaged in protected activity and concluded that Complainant was fired because he told Respondent that he wanted to terminate his lease. The ALJ also concluded in the alternative that Respondent had proven by clear and convincing evidence that it would have repossessed Complainant's truck and ended Complainant's employment absent any protected activity. We summarily affirm the ALJ's decision.

BACKGROUND

Complainant worked for Respondent as a truck driver from March 15, 2014, until March 10, 2015, under both a master lease agreement and an authorized carrier lease he signed on March 14, 2014. D. & O. at 1-2, 4. The lease agreements allowed either party to terminate the lease and automatic termination (and repossession of the truck) upon default by Complainant. *Id.*

On January 5 and 21, 2015, Complainant made external complaints to the Department of Transportation (DOT) about overweight loads. On numerous occasions during his employment, Complainant voiced oral objections about receiving overweight loads internally to Respondent's terminal manager and at least two dispatchers, and refused to drive overweight. *Id.* at 5, 6, 15, 16. He also emailed a complaint about overweight loads to Debbie Lange, corporate dispatcher, on February 22, 2015, in which he refused to drive overweight. *Id.* at 6-7, 15, 16 (citing CX 13/RX L). In this email, Complainant told Lange that he had "been leaving 3 units a week on average because of being overweight on [his] gross," "[t]he only way you make money with Supreme is [that] you have run overweight all the time," and "I'm not driving [] more than the legal weight allowed." CX 13.

On March 3, 2015, Complainant filed a complaint with OSHA alleging that Respondent was harassing him for refusing to take overweight loads and that Respondent terminated his employment as of February 10, 2015, as it had stopped paying him or assigning him work.

On March 9, 2015, Complainant emailed Respondent's employees, Hilda Hinton and Debbie Lange, an ambiguous email with the subject "Termination

Lease" with an attached letter stating that he was planning to terminate the carrier lease with Respondent "ASAP" and asking what his obligations would be to Supreme when he did so. *Id.* at 4, 17 (citing JX C). He stated that "[t]he current prices set [for] running legal weight do not cover operating expenses," and asked if he could place the equipment under his own motor carrier authority and insurance "until the equipment lease is complete?" JX C. He asked how the negative balance he owed could be settled and indicated that he was "interested in working solutions!" *Id.*

Later that day, Doug Fellows, Chief Executive Officer, and Jack Nugent, Chief Operating Officer, decided to and did repossess Complainant's truck, effectively terminating his employment. *Id.* at 4, 5, 10, 17. Complainant owed Respondent $10,880.49 at the time Respondent made the decision to repossess the truck, and the truck was worth $250,000. *Id.* at 19. Nugent was a personal guarantor of the $250,000 truck loan and feared for the truck. *Id*. at 18.

Three days after the termination, on March 12, 2015, OSHA sent Respondent notice that Complainant had filed a complaint alleging that Respondent violated the STAA. *Id.* at 18.

On August 4, 2016, OSHA sent Complainant a letter indicating that it had completed its investigation of Complainant's timely complaint and determined that it did not have reasonable cause to believe that a violation of the STAA had occurred. It determined that Complainant quit his employment on March 9, 2015, and dismissed the complaint. Complainant filed objections to OSHA's findings and requested a hearing before an ALJ, who held a hearing on May 16-17, 2017.

In his Decision and Order Denying Claim and Dismissing Complaint, the ALJ concluded that Complainant engaged in protected activity when he made external complaints to OSHA and DOT, internal complaints to his dispatchers and terminal manager, and when he refused to drive overweight loads. D. & O. at 14-16. The ALJ further concluded that when Respondent repossessed Complainant's truck, it was a constructive discharge and thus, an adverse action. *Id.* at 17.

Having considered the evidence of contribution as a whole and collectively weighing all of the evidence of record, the ALJ found that none of Complainant's protected activity contributed to his termination. *Id.* at 18-19. The ALJ found Fellows and Nugent's testimony that they "had not been informed of the complaint [about overweight loads to Lange on February 22, 2015] at the time of the decision," to be credible. *Id.* at 18. The ALJ further found that Complainant never testified that he informed either of the decision-makers about overweight loads and none of the record evidence showed any such communication. *Id.* The ALJ concluded that Respondent fired Complainant because he emailed Respondent that he wanted to

terminate his lease and because Complainant was behind on his lease payments, both of which caused Respondent to fear for the property (truck). *Id.*

In the alternative, the ALJ concluded that even if Complainant had proved his case, Respondent showed by clear and convincing evidence that it would have taken the same action absent any protected activity (an affirmative defense) relying in part on his finding that both Nugent and Fellows were credible on this issue. *Id.* at 19.

The ALJ denied the complaint, and Complainant filed a timely petition for review. Both parties filed briefs on appeal.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) authority to hear appeals from ALJ decisions and issue final agency decisions in cases arising under the STAA. Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019). The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence. 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted). We uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable." *Jacobs*, ARB No. 2017-0080, slip op. at 2 (quotations omitted).

DISCUSSION

On appeal, Complainant objects to the ALJ findings and conclusions that the decision-makers had no knowledge of protected activity, there was no contributing factor causation, and Respondent would have taken the same action absent protected activity. STAA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121 (2000).

To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in unfavorable personnel action taken against him. 49 U.S.C. § 42121(b)(2)(B)(iii). In light of our disposition of this matter, we limit our discussion to the issues of whether the ALJ correctly decided that protected activity did not contribute to the termination decision in this matter (which encompasses the issue of decision-maker knowledge) and that Respondent proved by clear and convincing evidence that it would have taken the same action absent any protected activity.

In short, the ALJ concluded that while Complainant had engaged in protected activities on several occasions and was fired, there was no contributing factor causation because the decision-makers (Fellows and Nugent) did not know that Complainant had ever objected to overweight loads. Substantial evidence supports the ALJ's findings of fact and his conclusions are in accordance with law. Nugent's and Fellows' witness testimony, which the ALJ found to be credible, support the ALJ's findings and conclusions. Further, Complainant's testimony and evidence fail to establish that he complained to the decision-makers about his protected activity. D. & O. at 18, n. 134-35. While the ALJ could have inferred knowledge based upon Complainant's protected email to Respondent's corporate dispatcher, Lange, on February 22, 2015, and other circumstantial evidence such as the close contact Lange had with the decision-makers and her responsibilities in the corporate structure, his credibility determinations and other findings in favor of Respondent preclude such a result. We conclude that the ALJ's findings on this issue are supported by substantial evidence in the record and we affirm.

Substantial evidence and prevailing law also support the ALJ's alternative finding and conclusion that Respondent proved by clear and convincing evidence that it would have repossessed Complainant's truck and effectively terminated his employing even if Complainant had never engaged in any protected activity. The ALJ concluded that Respondent had proven the affirmative defense that it would have repossessed the truck after it received Complainant's email about terminating his lease "ASAP," absent any protected activity, considering both the amount Complainant owed Respondent ($10,880.49) and the value of the truck ($250,000) which was personally guaranteed by Nugent, as well as Nugent and Fellows' credible testimony that they would have done so.

For these reasons, we affirm. We must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice had the matter been before us de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

CONCLUSION

As substantial evidence supports the ALJ's factual determination that Respondent did not take any adverse action against Complainant because he engaged in protected activity, we **AFFIRM** the ALJ's conclusion of law that Respondent did not violate the STAA. We also **AFFIRM** the ALJ's alternate conclusion regarding the affirmative defense. Accordingly, the complaint in this matter is **DENIED.**

SO ORDERED.